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CODE OF CRIMINAL PROCEDURE, 1973

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PREFACE TO THE FIFTH EDITION.

In preparing a new edition of this work, I have tried to reduce its bulk by avoiding as far as possible repetitions of the same discussion and concentrating it in one place, to which reference is made under appropriate heads. The advantage of repetitions under appropriate heads was intended to limit the discussion as applied to a particular section in hand. To a practitioner, this is an advantage, but it had to be sacrificed because, if the same scheme had been continued, the two volumes would have further grown in size against which I have received complaints. In the second place, when this work was originally planned, it was intended to be an exhaustive review of the law on the subject. As such, all the reported and unreported cases were pressed into service for this purpose. But on reconsideration, I have preserved the original scheme, and yet eliminated cases which merely paraphrase the text of the sections, and were found in fact to be new cases without deciding a new point. It has led the reading of such cases in detail, but will, I hope, assist the reader in sorting out only such of them as possess any ratiocinative value. The multiplication of reports within the last few years, and the competition between them in reporting the largest number of cases has enormously increased the bulk of the case-law without correspondingly shedding more light on the subject. If I had followed the wake of the reports and cited all the cases irrespective of their value, I would have made the work more ponderous, and possibly more confusing to the practitioner, and indeed, too bewildering to the student of law.

All cases reported in the authorised and unauthorised reports may, broadly speaking, be divided into four groups: (*i*) Those in which the Court has to state the points calling for decision for which it has necessarily to paraphrase a section or those points thereof requiring notice with reference to the facts of the case before it; (*ii*) Those in which the Court has to concede or repel an argument addressed to it with reference to some point arising out of a section; (*iii*) Those disposed of in the ordinary course of routine work, in which casual references to the law and cases are not intended to be *ex cathedra*—such cases swell the reports with unreportable cases and furnish examples of the same Courts having given contradictory decisions; (*iv*) Those in which the Court has to apply its mind to the elucidation of a section and at times to deduce corollaries therefrom, it may be, in the light of other provisions of the law. The first three form the bulk of the cases published in the reports. Those of the fourth class being few and far between; though it is these that really interest the commentator. But in the Courts, unfortunately, there is a growing tendency to overwhelm them with indiscriminate citation of authorities, a tendency which might be curbed if the Courts were to pay greater regard to the principles rather than to the authorities which at times are bafflingly conflicting.

If this work has made any contribution to the clarification of the Indian Law on the subject, it has been because in groping my way through the jungle of cases, I have never lost sight of my objective, and I am happy to find that my work has,

in some degree, helped to fix the principle which I have striven to state, and which my commentary is intended to elucidate. My work was never intended to be a mere collection of cases, though their citation has grown with each edition. They have now been recast from first to last, and I believe that in this respect this edition of my work may more be regarded as a new work rather than a new edition.

There remain another class of cases indiscriminately reported, and many of these placed cheek by jowl, in which the same court, and the same learned judges, have permitted themselves to give contradictory decisions. These judgements were never given *ex cathedra* and should never have been reported.

I have rewritten many parts of the work and brought the reference down to the latest date of publication. I hope the economy of space effected will make the work more handy, but none the less equally serviceable, both alike to the student and the practitioner, while my critical review of the cases might be of some help to those who have to interpret and administer the law.

As the superior courts naturally prefer to follow decisions of their own court on a given point, I have added such references in the foot-notes.

In order to avoid a lengthy addenda, special arrangements had to be made for printing off the work within the shorest time possible, and I am obliged to Mr. S. N. Kherdekar, who took upon himself the duty of proceeding to Madras to read through the proofs without reference to me.

Nagpur
15th March, 1936

H. S. GOUR

THE INDIAN PENAL CODE, 1860.

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A. C.	...	Appeal Cases (L. R. from 1891—)
A. & E.	...	Adolphus and Ellis' Reports (1834—1840). New Series (1841—1852)
A. I. R.	...	All India Reporter (1922—). Citation : Ali Meah, (1926) C. 1012
A. L. J. R.	...	Allahabad Law Journal Reports (1904—).
A. W. N.	...	Allahabad Weekly Notes (1881—1908).
Agra	...	Agra High Court Reports (1866—1868).
Alison	...	Alison's Criminal Law of Scotland.
App.	...	Appendix
Austin	...	Austin's Jurisprudence
Bacon	...	Bacon's Abridgment of the Law
B. & A.	...	Barnwell and Alderson (K. B. Reports, 1817—1822)
B. & C.	...	Barnwell and Creswell (King's Bench, 1822—1830)
Beav.	...	Beavan's Reports (Rolls, 1836—1866).
Bell	...	Bell's Crown Cases Reserved (1858—1860)
B. H. C. R.	...	Bombay High Court Reports (1862—1875)
B. L. R.	...	Bengal Law Reports (1868—1875)
Bing.	...	Bingham's Cases (Common Pleas, 1834—1840)
Bishop	...	Bishop's Criminal Law
Black	...	Blackstone's Commentaries (Ed. 1773)
Bligh	...	Bligh's House of Lords Reports (1819—1821)
Bligh N. S.	...	Bligh's House of Lords Reports (1827—1837)
Bom. L. R.	...	Bombay Law Reporter (1899—)
Boul.	...	Boulnois' Reports (Calcutta, 1862—1875)
B. & S.	...	Best and Smith (Q. B., 1861—1869)
B. U. C.	...	Bombay Unreported Cases (1862—1898)
Bur. L. J.	...	Burmah Law Journal (1923—)
Bur. L. R.	...	Burmah Law Reports (1895—).
Burr.	...	Burrow's Reports (K. B. 1757—1771)
Cald.	...	Caldecott's Settlement Cases (K.B., 1776—1785)
C. C. R.	...	Crown Cases Reserved
C. L. J.	...	Calcutta Law Journal (1905—)
C. L. R.	...	Calcutta Law Reports (1878—1883).
C. P. L. R.	...	Central Provinces Law Reports (1887—1904)
C. W. N.	...	Calcutta Weekly Notes (1896—)
Camp.	...	Campbell's Reports (N. P. 1808—1816)
C. B.	...	Common Bench Reports (C. P. 1845—1856)
C. P.	...	Common Pleas (Law Reports, 1866—1874)
C. P. D.	...	Common Pleas Division (L. R., 1875—1890)
C. & K.	...	Carrington and Kirwan (N. P., 1843—1850)
C. & M.	...	Crompton and Meeson (Exch., 1832—1834)
C. & P.	...	Carrington and Payn (N. P., 1823—1841)
Ch. D.	...	Chancery Division (L. R., 1875—1890)
Cl. & F.	...	Clark and Finnelly (N. P., 1831—1846).
Coke	...	Coke's Reports (1752—1816)
Cox	...	Cox's Criminal Cases (1843—)
Cr. Car.	...	Croke's Reports of the Reign of Charles I (1625—1641)
Cr. L. J.	...	Criminal Law Journal (1904)
Cr. P. C.	...	Criminal Procedure Code (1898)
D. & B.	...	Dearsley and Bell's Crown Cases (1856—1858)
Dears.	...	Dearsley's Crown Cases (1852—1856)
Den. C .C.	...	Denison's Crown Cases (1844)
Doug.	...	Douglas's Reports (K. B., 1778—1784)
Dow.	...	Dow's House of Lords Reports (1812—1818)
Dow. & C.	...	Dow and Charles' House of Lords Reports (1827—1831)
Dowl. & Ry. D. & Ry. D. & R.	...	Dowing and Ryland's King's Bench (1822—1827)
D. & R.	...	Magistrate's Cases (1822—1827)

East	...	East's Pleas of the Crown
East R.	...	East's Reports of the King's Bench (1801—1812)
E. B. & E.		Ellis Blackburn and Ellis (Q. B., 1858)
E. & B.	...	Ellis and Blackburn (Q. B. 1852—1858)
E. & E. }	...	
Ell. & E. }	...	Ellis and Ellis (Q. B., 1858—1861).
E. & I. App.	...	English and Irish Appeal Cases (1861—)
Esp.	...	Espinasse's Reports (N. S. 1793—1807)
Exch.	...	Exchequer
Ex. D.	...	Exchequer Division
Forst.	...	Forster (Dublin C. C., 1767)
F. B.		Full Bench
F. & F.	...	Foster and Finlayson (Nisi Prius, 1856—1867)
Foster	...	Foster's Crown Law (1743 –1761)
Hagg.	...	Haggard's Reports. (Admiralty Cases 1822—1837 Consistorial Reports 1789—1802 Ecclesiastical Reports, (1827—1833)
Hale	...	Hale's Pleas of the Crown
Hare	...	Hare's Reports (1841—1853)
Hawk.	...	Hawkin's Pleas of the Crown
Hay.	...	Hay's Reports (Calcutta 1862—1863)
H. & C.	...	Hurlstone and Coltman (Exchequer, 1862—1865)
H. L.	...	House of Lords
H. L. C.	...	House of Lords Cases (1847—1866)
Hob.	...	Hobbart's Reports (1608—1625)
Hyde	...	Hyde's Reports (Calcutta, 1863—1864)
I. A.	...	Law Reports, Indian Appeals (1876—)
I. C.	...	Indian Cases (1909)
I. J.	...	India Jurist (Old Series, Calcutta, 1862 ; New Series, Calcutta, 1866, 1867)
I. L. R., All.	...	Indian Law Reports, Allahabad High Court (1876—)
I. L. R., Bom.		Indian Law Reports, Bombay High Court (1876—)
I. L. R., Cal.	...	Indian Law Reports, Calcutta High Court (1876—)
I. L. R., Lah.	...	Indian Law Reports, Lahore (1920—)
I. L. R., Mad.	...	Indian Law Reports, Madras High Court (1876—)
I. L. R., Pat.	...	Indian Law Reports, Patna (1922—)
I. L. R., Ran.	...	Indian Law Reports, Rangoon (1924—)
J. P.	...	Justice of the Peace, (Reports 1836—)
Keb.	...	Keble's Reports, King's Bench (1661—1679)
Kel.	...	Kelyng's Reports, King s Bench (1673—1706)
L. B. R.	...	Lower Burmah Rulings ((1901—)
L. & C.	...	Leigh and Cave's Crown Cases (1861—1865)
L. L. J.	...	Lahore Law Journal (1920—)
L. J. Ch.	...	Law Journ. Reports Chancery (1822—)
L. J. C. P.	...	Law Journ. Crown Pleas
L. J. Ex.	...	Law Journ. Exchequer
L. J. M. C.	...	Law Journ. Magistrates's Class
L. J. M.	...	Law Journ. Matrimonial Cases
L. J. P. M. & A.	...	Law Journ. Probate, Matrimonial and Admiralty
L. J. Q. B.	...	Law Journ, Queen's Bench
Ld. Raym.	...	Lord Raymond's Reports (K. B. & C. P. 1694—1734)
Leach	...	Leach's Crown Cases (1730—1788)
L. R. A.	...	Law Reporter, Allahabad (1920—)
L. R. A. C.	...	Law Reports, Appeal Cases.
L. R. C. C.	...	Law Reports Crown Cases (1866—)
L. R. C. P.	...	Law Reports, Common Pleas (1866—1875)
L. R. C. P. D.	...	Law Reports, Common Pleas Division (1876—)
L. R. E. & I.	...	Law Reports, English and Irish Appeal Cases
L. R. Q. B.	...	Law Reports, Queen's Bench (1891—)
L. T.	...	Law Times (1845—1858)
L. T. (N. S.)	...	Law Times New Series (1859—)
Ld. Ray	...	Lord Raymond's Reports (Common Law, 1694—1734)
Lewin	...	Lewin's Crown Cases (1822—1833)
Loff.	...	Lofft's Reports, King's Bench (K. B., 1772—1774)
Mad.	...	Madras
M. H. C. R.	...	Madras High Court Reports (1862—1875)
M. L. J. R.	...	Madras Law Journal Reports (1891—)
M. & R.		
Man. & R.	...	Manning and Ryland's Beports (K. B., 1827—1830

Marsh.	...	Marshall's Reports (Common Pleas, 1813—1816)
Mood. C. C.	...	Moody's Crown Cases Reserved (1824—1844)
M. I. A.	...	Moore's Indian Appeals (1836—1873)
M. & R.	...	Moody and Robinson (Nishi Prius, 1830—1843)
M. & S.	...	Maule and Selwyn (King's Bench, 1813—1819)
M. & W.	...	Meeson and Welby (Exchequer, 1836—1847)
Mod.	...	Modern Reports (King's Bench, 1669—1732)
N. L. R.	...	Nagpur Law Reports (1905)
N. & M. Nev. & M.	...	Neville and Manning (K. B., 1832—1836). Magistrates' Cases (K. B., 1832—1838)
Nol.	...	Nonal's Magistrates' Cases (K. B., 1791—1793)
Oudh L. J.	...	Oudh Law Journal (1915—)
Oudh W. N.	...	Oudh Weekly Notes (1924—)
Palm	...	Palmer's Reports (King's Bench, 1619—1629)
Parl. Rep.	...	Parliamentary Reports
Pat. L. J.	...	Patna Law Journal
Pat. L. R.	...	Patna Law Reporter (1924—)
Pat. L. T.	...	Patna Law Times (1920—)
P. C.	...	Privy Council
P. J. L. B.	...	Printed Judgments, Lower Burmah (1893—1900)
P. L. R.	...	The Punjab Law Reporter
Price	...	Prince's Reports Exchequer
P. R.	...	Punjab Record (1862—)
P. W. R.	...	Punjab Weekly Reporter, (1906—)
P. & D.	...	Perry and Division (Q. B., 1838—1841)
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THE
INDIAN PENAL CODE, 1860.

(ACT XLV OF 1860).

(*Passed on the 6th October*, 1860, *as Amended upto January* 1936).

CHAPTER I.

INTRODUCTION.

Preamble.

WHEREAS it is expedient to provide a general Penal Code for British India ; It is enacted as follows :—

Title and extent of operation of the Code.

1. This act shall be called the Indian Penal Code, and shall take effect * * * throughout the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Victoria, Chapter 106, entitled " An Act for the better government of India " * * *.

Punishment of offences committed within the said territories.

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories * * * *.

Punishment of offences committed beyond, but which by law may be tried within the territories.

3. Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories.

Extension of Code to extra-territorial offences.

4. The provisions of this Code apply also to any offence committed by—

(1) any Native Indian subject of Her Majesty in any place without and beyond British India ;

(2) any other British subject within the territories of any Native Prince or Chief in India ;

(3) any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India.

Explanation.—In this section the word " offence " includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

Illustrations.

(*a*) A, a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

(*b*) B, a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(*c*) C, a foreigner, who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.

(*d*) D, a British subject living in Indore, instigates E to commit a murder in Bombay. D is guilty of abetting murder.

Certain laws not to be affected by this Act.

5. Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV, Chapter 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of Her Majesty * * * *, or of any special or local law.

CHAPTER II.

General Explanations.

Definitions in the Code to be understood subject to exceptions.

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision or illustration.

Illustrations.

(*a*) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) A, a Police-officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

Sense of expression once explained.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

Number.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

"Man"; "Woman."

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

"Person."

11. The word "person" includes any Company or Association, or body of persons, whether incorporated or not.

"Public."

12. The word "public" includes any class of the public or any community.

"Queen."

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

"Servant of the Queen."

14. The words "servant of the Queen" denote all officers or servants continued, appointed or employed in India by or under the authority of the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the Better Government of India," or by or under the authority of the Government of India or any Government.

"British India."

15. The words "British India" denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the Better Government of India" * * * *.

16. The words "Government of India" denote the Governor-General of India in Council, or during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively.

"Government of India."

17. The word "Government" denotes the person or persons authorised by law to administer executive Government in any part of British India.

"Government."

18. The word "Presidency" denotes the territories subject to the Government of a Presidency.

"Presidency."

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person

"Judge."

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(*a*) A Collector exercising jurisdiction in a suit under Act X of 1859 is a Judge.

(*b*) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(*c*) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.

(*d*) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

"Court of Justice."

Illustration.

A panchayat acting under Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely :—

"Public servant."

First.—Every Covenanted servant of the Queen ;

Second.—Every Commissioned Officer in the Military, Naval or Air Forces of the Queen while serving under the Government of India or any Government ;

Third.—Every Judge ;

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth.—Every juryman, assessor or member of a panchayat assisting a Court of Justice or public servant ;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth.—Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electrol roll or to conduct an election or part of an election.

Illustration.

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

"Moveable property."

22. The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

"Wrongful Gain."

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss."

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

"Gaining wrongfully": "Losing wrongfully."

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

"Dishonestly."

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

"Fraudulently."

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

"Reason to believe."

26. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise.

Property in possession of wife, clerk or servant.

27. When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

"Counterfeit."

28. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

"Document."

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-Attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

"Valuable security."

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

"A will."

31. The words "a will" denote any testamentary document.

Words referring to acts include illegal omissions.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

'Act': 'Omission'

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

Acts done by several persons in furtherance of common intention.

34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Effect caused partly by act and partly by omission.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

Co-operation by doing one of several acts constituting an offence.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations.

(*a*) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(*b*) A and B are joint jailors, and, as such, have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(*c*) A, a jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but, as A did not co-operate with B, A is guilty only of an attempt to commit murder.

Persons concerned in criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

39. A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

"Voluntarily."

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act: yet, if he knew that he was likely to cause death, he has caused death voluntarily.

40. Except in the chapter and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

"Offence."

In Chapter IV, Chapter V-A and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

41. A "special law" is a law applicable to a particular subject.

"Special law."

42. A "local law" is a law applicable only to a particular part of British India.

"Local law."

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

"Illegal": "Legally bound to do."

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

"Injury."

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

"Life."

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

"Death."

47. The word "animal" denotes any living creature, other than a human being.

"Animal."

48. The word "vessel" denotes anything made for the conveyance by water of human being or of property.

"Vessel."

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

"Year": "Month."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

"Section."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

"Oath."

52. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

"Good faith."

CHAPTER III.

OF PUNISHMENTS.

"Punishments."

53. The punishments to which offenders are liable under the provisions of this Code are,—

First,—Death ;

Secondly,—Transportation ;

Thirdly,—Penal servitude ;

Fourthly,—Imprisonment, which is of two descriptions, namely :—

(1) Rigorous, that is, with hard labour ;

(2) Simple.

Fifthly,—Forfeiture of property ;

Sixthly,—Fine.

Commutation of sentence of death.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Commutation of sentence of transportation for life.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Sentence of Europeans and Americans to penal servitude.

56. Whenever any person being an European or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude instead of transportation according to the provisions of Act XXIV of 1855:

Proviso as to sentence for term exceeding ten years, but not for life.

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

Offenders sentenced to transportation how dealt with until transported.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Transportation instead of imprisonment.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

61. [*Repealed.*]

62. [*Repealed.*]

Amount of fine.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Sentence of imprisonment for non-payment of fine.

64. In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Description of imprisonment for non-payment of fine.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

Imprisonment for non-payment of fine, when offence punishable with fine only.

67. If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

Imprisonment to terminate on payment of fine.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Termination of imprisonment on payment of proportional part of fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are

completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

Fine leviable within six years, or during imprisonment.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Death not to discharge property from liability.

Limit of punishment of offence made up of several offences.

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Illustrations.

(*a*) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(*b*) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

Solitary confinement.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

a time not exceeding one month if the term of imprisonment shall not exceed six months :

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year :

a time not exceeding three months if the term of imprisonment shall exceed one year.

Limit of solitary confinement.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

75. Whoever, having been convicted,—

Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.

(*a*) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, or

(*b*) by a Court of Tribunal in the territories of any Native Prince or State in India acting under the general or special authority of the Governor-General in Council or of any Local Government, of an offence which would, if committed in British India, have been punishable under those Chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years.

CHAPTER IV.

General Exceptions.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations.

(*a*) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(*b*) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

Act of Judge when acting judicially.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Act done pursuant to the judgment or order of Court.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done while such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Act done by a person justified, or by mistake of fact believing himself justified by law.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act, seizes Z, in order to bring Z before the proper a thorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

Accident in doing a lawful act.

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration.

A is at work with hatchet ; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

Act likely to cause harm, but done without criminal intent, and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations.

(*a*) A, the captain of a steam-vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

(*b*) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

Act of a child under seven years of age.

82. Nothing is an offence which is done by a child under seven years of age.

Act of a child above seven and under twelve of immature understanding.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Act of a person of unsound mind.

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Act of a person incapable of judgment by reason of intoxication caused against his will.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Act not intended and not known to be likely to cause death or grievous hurt done by consent.

87. Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Act not intended to cause death done by consent in good faith for person's benefit.

88. Nothing, which is not intended to cause death, is an offence by reason of any harm, which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

Act done in good faith for benefit of child or insane person, by or by consent of guardian.

89. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause, to that person:

Provisos. Provided—

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity.

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration.

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

Consent known to be given under fear or misconception.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or,

Consent of insane person.

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Exclusion of acts which are offences independently of harm caused.

91. The exceptions in sections 87 and 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Act done in good faith for benefit of a person without consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit :

Provisos Provided—

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death ;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt or the curing of any grievous disease or infirmity ;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt ;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations.

(*a*) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(*d*) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

Communication made in good faith.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Act to which a person is compelled by threats.

94. Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence : Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

Act causing slight harm.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Of the Right of Private Defence.

Things done in private defence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

Right of private defence of the body and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body, and the body of any other person, against any offence affecting the human body;

Secondly.—The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

Right of private defence against the act of a person of unsound mind, etc.

98. When an act, which would otherwise be a certain offence is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations.

(*a*) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(*b*) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

Acts against which there is no right of private defence.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

When the right of private defence of the body extends to causing death.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault ;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault ;

Thirdly.—An assault with the intention of committing rape ;

Fourthly.—An assault with the intention of gratifying unnatural lust ;

Fifthly.—An assault with the intention of kidnapping or abducting ;

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

When such right extends to causing any harm other than death.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

Commencement and continuance of the right of private defence of the body.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed ; and it continues as long as such apprehension of danger to the body continues.

When the right of private defence of property extends to causing death.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :—

First.—Robbery

Secondly.—House-breaking by night ;

Thirdly.—Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property ;

Fourthly.—Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

When such right extends to causing any harm other than death.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Commencement and continuance of the right of private defence of property.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

106. If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Right of private defence against deadly assault when there is risk of harm to innocent person.

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

CHAPTER V.

OF ABETMENT.

Abetment of a thing.

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing ; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

108. A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(*a*) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(*b*) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations.

(*a*) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(*b*) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby, causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(*c*) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(*d*) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Illustration.

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section, and is liable to the punishment for murder.

108-A. A person abets an offence within the meaning of this Code who, in British India, abets the commission of any Act without and beyond British India which would constitute an offence if committed in British India.

Abetment in British India of offences outside it.

Illustration.

A, in British India, instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.

***Procedure :*—Special complaint.**

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(*b*) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(*c*) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

***Procedure:*—Court by which offence abetted is triable—Cognizable, if offence abetted cognizable—According as warrant or summons may issue for offence abetted—According as the offence abetted is compoundable or not.**

Punishment of abetment if person abetted does act with different intention from that of abettor.

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

***Procedure :*—Same as under s. 109.**

Liability of abettor when one act abetted and different act done.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it :

Proviso.

Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations.

a A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(*c*) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

***Procedure :*—Same as under s. 109.**

Abettor when liable to cumulative punishment for act abetted and for act done.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences ; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

***Procedure :*—Same as under s. 109.**

Abettor present when offence is committed.

114. Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

***Procedure :*—Same as under s. 109.**

Abetment of offence punishable with death or transportation for life — if offence not committed.

115. Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

If act causing harm be done in consequence.

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration.

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

***Procedure :*—Court by which offence abetted is triable—Cognizable, if offence abetted cognizable—According as warrant or summons may issue for offence abetted—Not bailable—According as offence abetted is compoundable or not.**

Abetment of offence punishable with imprisonment, if offence be not committed ;

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed, in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence ; or with such fine as is provided for that offence, or with both ;

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and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

if abettor or person abetted be a public servant whose duty it is to prevent offence.

Illustrations.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

***Procedure :*—Court by which offence abetted is triable—Cognizable, if offence abetted cognizable—According as warrant or summons may issue for offence abetted—According as offence abetted is bailable or not—According as offence abetted is compoundable or not.**

117. Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Abetting commission of offence by the public, or by more than ten persons.

Illustration.

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

***Procedure :*—Same as under s. 116.**

118. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or transportation for life,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence or makes any representation which he knows to be false respecting such design,

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to thre years; and in either case shall also be liable to fine.

Concealing design to commit offence punishable with death or transportation for life—

if offence be commited;

if offence be not committed.

Illustration.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

***Procedure :*—Court by which offence abetted is triable—Cognizable, if offence abetted cognizable—According as warrant, or summons may issue for offence abetted—Not bailable if offence committed but bailable if offence be not committed—According as offence abetted is compoundable or not.**

119. Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

Public servant concealing design to commit offence which it is his duty to prevent—

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both ; (1)

if offence be committed;

or, if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years; (2)

if offence be punishable with death, etc.;

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both. (3)

if offence be not committed.

Illustration.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

***Procedure :*—Court by which offence abetted is triable—Cognizable, if offence abetted cognizable—According as warrant or summons may issue for offence abetted—According as offence abetted is bailable or not (in case of 1) ; but not bailable (in case of 2) ; bailable (in case of 3)—According as offence abetted is compoundable or not.**

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

Concealing design to commit offence punishable with imprisonment--

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth,

if offence be committed;

and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

if offence be not committed.

***Procedure :*—Same as under s. 119.**

CHAPTER V-A.

CRIMINAL CONSPIRACY.

120-A. When two or more persons agree to do, or cause to be done—

Definition of criminal conspiracy.

(1) an illegal act, or

(2) an act which is not illegal by illegal means,

such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Punishment of criminal conspiracy.

120-B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

***Procedure :*—Special complaint—Other procedure same as for substantive offence.**

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

Waging or attempting to wage war, or abetting waging of war against the Queen.

121. Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall also be liable to fine.

Illustrations.

(*a*) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(*b*) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Conspiracy to commit offences punishable by section 121.

121-A. Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India, or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation.—To consitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

***Procedure :*—Same as under s. 121.**

Collecting arms, etc., with intention of waging war against the Queen.

122. Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

***Procedure :*—Same as under s. 121.**

Concealing with intent to facilitate design to wage war.

123. Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Same as under s. 121.**

Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.

124. Whoever, with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of anyPresidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor or Member of Council,

assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor or Member of Council,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Sedition.

124-A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

***Procedure :*—Special complaint—Session, Chief Presidency Magistrate, or District Magistrate, or Magistrate of the 1st class specially empowered—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Waging war against any Asiatic Power in alliance with the Queen.

125. Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Queen or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Committing depredation on territories of Power at peace with the Queen.

126. Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

***Procedure :*—Same as under s. 125.**

Receiving property taken by war or depredation mentioned in sections 125 or 126.

127. Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

***Procedure :*—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

128. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Public servant voluntarily allowing prisoner of State or war to escape.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

129. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

Public servant negligently suffering such prisoner to escape.

***Procedure :*—Special complaint—Session—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

130. Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the re-capture of such prisoner shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Aiding escape of, rescuing or harbouring such prisoner.

Explanation.—A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE.

131. Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, or attempts to seduce any such officer, soldier, sailor or airman from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.

Explanation.—In this section the words "officer," "soldier," "sailor" and "airman" include any person subject to the Army Act, the Indian Army Act, 1911 or the Air Force Act, as the case may be.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

132. Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, shall, if mutiny be committed in consequence of that abetment, be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of mutiny, if mutiny is committed in consequence thereof.

***Procedure :*—Same as under s. 131.**

Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.

133. Whoever abets an assault by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, on any superior officer being in the execution of his office shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session—Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Abetment of such assault if the assault is committed.

134. Whoever abets an assault by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Abetment of desertion of soldier, sailor or airman.

135. Whoever abets the desertion of any officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Harbouring deserter.

136. Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, has deserted, harbours such officer, soldier, sailor or airman shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

***Procedure :*—Same as under s. 135.**

Deserter concealed on board merchant vessel through negligence of master.

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Army, Navy or Air Force of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Abetment of act of insubordination by soldier, sailor or airman.

138. Whoever abets what he knows to be an act of insubordination by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Queen, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

138-A. [*Repealed.*]

Persons subject to certain Acts.

139. No person subject to the Army Act, the Indian Army Act, 1911, the Naval Discipline Act or the Air Force Act is subject to punishment under this Code for any of the offences defined in this Chapter.

140. Whoever, not being a soldier, sailor or airman in the Military, Naval or Air service of the Queen, wears any garb or carries any token resembling any garb or any token used by such a soldier, sailor or airman with the intention that it may be believed that he is such a soldier, sailor or airman shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Wearing garb or carrying token used by soldier, sailor or airman.

***Procedure :*—Any Magistrate — Cognizable — Summons — Bailable — Not compoundable.**

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

141. An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is—

Unlawful assembly.

First.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant ; or

Second.—To resist the execution of any law, or of any legal process ; or

Third.—To commit any mischief or criminal trespass, or other offence ; or

Fourth.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal righ of which he is in possession or enjoyment, or to enforce any right or supposed right ; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Being member of unlawful assembly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Punishment.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable.**

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining unlawful assembly armed with deadly weapon.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Not compoundable.**

145. Whoever joins or continues in an unlawful assembly knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining or continuing in unlawful assembly knowing it has been commanded to disperse.

***Procedure :*—Same as under s. 144.**

Rioting.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly, is guilty of the offence of rioting.

Punishment for rioting.

147. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Not compoundable.**

Rioting armed with deadly weapon.

148. Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

***Procedure :*—Court by which offence is triable—According as arrest may be made without warrant for offence or not—According as warrant or summons may issue for offence—According as offence is bailable or not—Not compoundable.**

Hiring or conniving at hiring, of persons, to join unlawful assembly.

150. Whoever hires or engages, or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

***Procedure :*—Court by which offence is triable—Cognizable—Warrant or Summons according to offence committed by person hired—According as offence is bailable or not—Not compoundable.**

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

Assaulting or obstructing public servant when suppressing riot, etc.

152. Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

153. Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and, if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Wantonly giving provocation with intent to cause riot.

if rioting be committed;

if not committed.

Procedure **:—Any Magistrate—Cognizable—Warrant (if rioting be committed)—or summons (if not committed)—Bailable—Not compoundable.**

153-A. Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Promoting enmity between classes.

Explanation.—It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majesty's subjects.

Procedure **:—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Not bailable—Not compoundable.**

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

Owner or occupier of land on which an unlawful assembly is held.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Liability of person for whose benefit riot is committed.

Procedure **:—Same as under s. 154.**

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

Liability of agent of owner or occupier for whose benefit riot is committed.

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Harbouring persons hired for an unlawful assembly.

157. Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable—Summary.**

Being hired to take part in an unlawful assembly or riot ;

158. Whoever is engaged or hired, or offers or attempt to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed.

and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons but warrant (if to go armed)—Bailable—Not compoundable—Summary (cl. 1 and 2).**

Affray.

159. When two or more persons, by fighting in a public place, disturb the public peace, they are said to " commit an affray."

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Punishment for committing affray.

160. Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

***Procedure :*—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

Public servant taking gratification other than legal remuneration in respect of an official act.

161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—" Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

" Gratification." The word " gratification " is not restricted to pecuniary gratifications, or to gratifications estimable in money.

" Legal remuneration." The words " legal remuneration " are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government, which he serves, to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(*a*) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(*b*) A, holding the office of Resident at the Court of a subsidiary Power, accepts a lakh of rupees from the Minister of that Power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(*c*) A, a public servant, induces erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

***Procedure* :—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

Taking gratification, by corrupt or illegal means, in order to influence public servant.

162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure* :—Same as under s. 161.**

Taking gratification for exercise of personal influence with public servant.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays

before the Government statements tending to show that the condemnation was unjust,—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

Punishment for abetment by public servant of offences defined in section 162 or 163.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*a*) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(*b*) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(*c*) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Public servant disobeying law, with intent to cause injury to any person.

166. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant framing an incorrect document with intent to cause injury.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

168. Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant unlawfully engaging in trade.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

169. Whoever, being a public servant, and being legally bound, as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

Public servant unlawfully buying or bidding for property.

***Procedure :*—Presidency Magistrate or Magistrate of 1s class—Non-cognizable—Summons—Bailable—Not compoundable.**

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

Personating a public servant.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Not compoundable.**

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description, for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Wearing garb or carrying token used by public servant with fraudulent intent.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable.**

CHAPTER IX-A.

Of Offences relating to Elections.

171-A. For the purposes of this Chapter—

(*a*) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat; provided that he is subsequently nominated as a candidate at such election ;

"Candidate," and "electoral right" defined.

(*b*) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

171-B. (1) Whoever—

Bribery.

(*i*) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right ; or

(*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery :

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

171-C. (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

Undue influence at elections.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

(*a*) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(*b*) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

***Procedure :*—Same as under s. 171-B.**

171-D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name,

Personation at elections.

and whoever abets, procures or attempts to procure the voting by any person in any such way,

commits the offence of personation at an election.

***Procedure :*—Same as under s. 171-B.**

171-E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both :

Punishment for bribery.

Provided that bribery by treating shall be punished with fine only.

Explanation.—" Treating " means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

***Procedure :*—Same as under s. 171-B.**

Punishment for undue influence or personation at an election.

171-F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Non-compoundable.**

False statement in connection with an election.

171-G. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

***Procedure :*—Same as under s. 171-F.**

Illegal payments in connection with an election.

171-H. Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

***Procedure :*—Same as under s. 171-F.**

Failure to keep election accounts.

171-I. Whoever, being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

***Procedure :*—Same as under s. 171-F.**

CHAPTER X.

Of Contempts of the Lawful Authority of Public Servants.

Absconding to avoid service of summons or other proceeding.

172. Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Special complaint—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Preventing service of summons or other proceeding, or preventing publication thereof.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Non-attendance in obedience to an order from public servant.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations.

(*a*) A being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(*b*) A being legally bound to appear before a Zila Judge, as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

***Procedure :*—Special complaint—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Omission to produce document to public servant by person legally bound to produce it.

175. Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ;

or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustration.

A, being legally bound to produce a document before a Zila Court, intentionally omits to produce the same. A has committed the offence defined in this section.

***Procedure :*—Special complaint—Court in which offence committed, subject to provisions of Ch. XXXV—or if not committed in Court—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Omission to give notice or information to public servant by person legally bound to give it.

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Furnishing false information.

177. Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*a*) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(*b*) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section VII, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wilfully misinforms the police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in the latter part of this section.

Explanation.—In section 176 and in this section the word " offence " includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460 ; and the word " offender " includes any person who is alleged to have been guilty of any such act.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary (cl. 1).**

Refusing oath or affirmation when duly required by public servant to make it.

178. Whoever refuses to bind himself by an oath or affirmation to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Special complaint—Court in which offence committed, subject to provisions of Ch. XXXV or if not committed in Court, Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary. This note equally applies to ss. 179 and 180.**

Refusing to answer public servant authorized o question.

179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Same as under s. 178.**

Refusing to sign statement.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

***Procedure :*—Same as under s. 178.**

False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation.

181. Whoever, being legally bound by an oath or affirmation or state the truth on any subject to any public servant or other person authorized by law to administer such oath or affirmation, makes, to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

False information with intent to cause public servant to use his lawful power to the injury of another person.

182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(*a*) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or,

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations.

(*a*) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(*b*) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(*c*) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Resistance to taking of property by lawful authority of public servant.

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Same as under s. 182.**

Obstructing sale of property offered for sale by authority of public servant.

184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Procedure **:—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Illegal purchases or bid for property offered for sale by authority of public servant.

185. Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Procedure **:—Same as under s. 184.**

Obstructing public servant in discharge of public functions.

186. Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Procedure **:—Same as under s. 184.**

Omission to assist public servant when bound by law to give assistance.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both ;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Procedure **:—Same as under s. 184.**

Disobedience to order duly promulgated by public servant.

188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

Procedure **:—Same as under s. 184.**

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both ;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient

that he knows of the order which he disobeys, and that this disobedience produces, or is likely to produce, harm.

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Threat of injury to public servant.

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 188.**

Threat of injury to induce person to refrain from applying for protection to public servant.

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered, as such, to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Same as under s. 188.**

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

Giving false evidence.

191. Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations.

(*a*) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(*b*) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(*e*) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

Fabricating false evidence.

192. Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

Punishment for false evidence.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial * * * * is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

***Procedure*:—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law of British India or England, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

Giving or fabricating false evidence with intent to procure conviction of capital offence.

and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence, shall be punished either with death or the punishment hereinbefore described.

if innocent person be thereby convicted and executed.

***Procedure*:—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment.

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment, with or without fine.

***Procedure*:—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

***Procedure*:—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—According as offence of giving such evidence is bailable or not—Not compoundable.**

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Issuing or signing false certificate.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

198. Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true a certificate known to be false.

***Procedure*:—Same as under s. 197.**

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

False statement made in declaration which is by law receivable as evidence.

***Procedure*:—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Using as true such declaration knowing it to be false.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

***Procedure :*—Special complaint—Session—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Causing disappearance of evidence of offence, or giving false information, to screen offender—

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

if a capital offence ;

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; (1)

if punishable with transportation ;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine (2) ;

if punishable with less than ten years' imprisonment.

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.(3)

Illustration.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

***Procedure :*—Session only (in case of 1) ; Session, Presidency Magistrate, or Magistrate of 1st class (in case of 2 and 3) or Court by which offence is triable (in case of 3)—Non-cognizable—Warrant—Bailable—Not compoundable.**

Intentional omission to give information of offence by person bound to inform.

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Giving false information respecting an offence committed.

203. Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In sections 201 and 202 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Destruction of document to prevent its production as evidence.

204. Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

False personation for purpose of act or proceeding in suit or prosecution.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.

206. Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a Civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Fraudulent claim to property to prevent its seizure as forfeited or in execution.

207. Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made; or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 206.**

Fraudulently suffering decree for sum not due.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Dishonestly making false claim in Court.

209. Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

***Procedure :*—Same as under s. 208.**

Fraudulently obtaining decree for sum not due.

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 208.**

False charge of offence made with intent to injure.

211. Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ; (1)

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class (in case of 1), also session (if punishable 7 years) but session only (if punishable with death or transportation)—Non-cognizable—Warrant—Bailable—Not compoundable.**

Harbouring offender—

212. Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment,

if a capital offence ;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine ;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

" Offence " in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any

of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class, or also Court by which offence is triable (if punishable for one year and not to ten years)—Cognizable—Warrant—Bailable—Not compoundable.**

Taking gift, etc., to screen an offender from punishment.

213. Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence ;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; (1)

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; (2)

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.(3)

***Procedure :*—Session (in case of 1) ; Session, Presidency Magistrate or Magistrate of 1st class (in case of 2) ; Presidency Magistrate or Magistrate of 1st class or Court by which offence is triable (in case of 3)—Non-cognizable—Warrant—Bailable—Not compoundable.**

Offering gift on restoration of property in consideration of screening offender.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence ;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; (1)

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;(2)

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.(3)

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

Illustrations [*Repealed by Act X of* 1882].

***Procedure :*—Session (in case of 1); Session, Presidency Magistrate or Magistrate of 1st class (in case of 2); Presidency Magistrate or Magistrate of 1st class or Court by which offence is triable (in case of 3)—Warrant—Bailable—Not compoundable.**

Taking gift to help to recover stolen property, etc.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Harbouring offender who has escaped from custody or whose apprehension has been ordered.

216. Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody,

or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

if a capital offence ;

if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

if punishable with transportation for ife, or with imprisonment.

if the offence is punishable with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine ;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India, and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

***Procedure :*—Session only (in case of 1); Session, Presidency Magistrate, or Magistrate of 1st class (in case of 2); Presidency Magistrate or Magistrate of 1st class, or Court by which offence is triable—Cognizable—Warrant—Bailable—Not compoundable.**

Penalty for harbouring robbers or dacoits.

216-A. Whoever, knowing or having reason to believe that any person are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them for punishment, shall be

punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Definition of "harbour" in sections 212, 216 and 216-A.

216-B. In sections 212, 216 and 216-A, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension.

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

Public servant in judicial proceeding corruptly making report, etc., contrary to law.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

***Procedure :*—Same as under s. 218.**

Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

***Procedure :*—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

221. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such persons to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say,

Intentional omission to apprehend on the part of public servant bound to apprehend.

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death ; (1) or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for life or imprisonment for a term which may extend to ten years ; (2) or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

***Procedure :*—Session only (in case of 1)—Presidency Magistrate or Magistrate of 1st class (in case of 2)—Presidency Magistrate or Magistrate of 1st or 2nd class (in case of 3)—Non-cognizable—Warrant—Bailable—Not compoundable.**

222. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence, or lawfully committed to custody intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say—

Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.

with transportation for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; (1) or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; (2) or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years, or if the person was lawfully committed to custody. (3)

***Procedure :*—Session only (in case of 1 or 2) but Session or Presidency Magistrate or Magistrate of 1st class (in case of 3)—Non-cognizable—Warrant—Non-bailable (in case of 1 and 2) but Bailable (in case of 3)—Not compoundable.**

223. Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Escape from confinement or custody negligently suffered by public servant.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Resistance or obstruction by a person to his lawful apprehension.

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Resistance or obstruction to lawful apprehension of another person.

225. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ; (1)

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; (2)

or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; (3)

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; (4)

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.(5)

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class (in case of cls. 3, 4 and 5)—of cl. 1) ; Add Session (in case of cl. 2) ; Session only (in case of cls. 3, 4 and 5)—Warrant—Cognizable—Not bailable—Not compoundable.**

Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.

225-A. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

(*a*) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

***Procedure :*—*As to clause* (*a*)—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

***Procedure :*—*As to clause* (*b*)—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

225-B. Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempt to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

226. Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Unlawful return from transportation.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishmen , and if he has suffered any part of that punishment, then with so much of that unishment as he has not already suffered.

Violation of condition of remission of punishment.

***Procedure :*—Court by which original offence was triable—Non-cognizable—Summons—Not bailable—Not compoundable.**

228. Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Intentional nsu or interruption to public servant sitting in judicial proceeding.

***Procedure:*—Special complaint—Court in which offence committed, subject to provisions of Ch. XXXV—Non-cognizable—Summons—Bailable—Not compoundable.**

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Personation of a Juror or Assessor.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

230. Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

"Coin" defined.

Queen's coin is metal stamped and issued by the authority of the Queen or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money ; and metal which has been

Queen's coin.

so stamped and issued shall continue to be the Queen's coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

Illustrations.

(*a*) Cowries are not coin.

(*b*) Lumps of unstamped copper, though used as money, are not coin.

(*c*) Medals are not coin, inasmuch as they are not intended to be used as money.

(*d*) The coin denominated as the Company's rupee is the Queen's coin.

(*e*) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is Queen's coin although it is no longer so used.

Counterfeiting coin.

231. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Counterfeiting Queen's coin.

232. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Making or selling instrument for counterfeiting coin.

233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Making or selling instrument for counterfeiting Queen's coin.

234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Possession of instrument or material for the purpose of using the same for counterfeiting coin;

235. Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the coin to be counterfeited is the Queen's coin,

if Queen's coin.

shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Session only (if Queen's coin)—Cognizable—Warrant—Not bailable—Not compoundable.**

236. Whoever, being within British India, abets the counterfeiting of coin out of British India shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Abetting in India the counterfeiting out of India of coin.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Import or export of counterfeit coin.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Import or export of counterfeits of Queen's coin.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

239. Whoever, having any counterfeit coin, which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be laible to fine.

Delivery of coin, possessed with knowledge that it is counterfeit.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

240. Whoever, having any counterfeit coin, which is a counterfeit of the Queen's coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin, possessed with knowledge that it is counterfeit.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Delivery of coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.

Illustration.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable.**

242. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable for fine.

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Possession of Queen's coin by person who knew it to be counterfeit when he became possessed thereof.

243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Person employed in mint causing coin to be of different weight or composition from that fixed by law.

244. Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Unlawfully taking coining instrument from mint.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Fraudulently or dishonestly diminishing weight or altering composition of coin.

246. Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Fraudulently or dishonestly diminishing weight or altering composition of Queen's coin.

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Altering appearance of coin with intent that it shall pass as coin of different description.

248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Altering appearance of Queen's coin with intent that it shall pass as coin of different description.

249. Whoever performs on any of the Queen's coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Delivery of coin, possessed with knowledge that it is altered.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Delivery of Queen's coin possessed with knowledge that it is altered.

251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Possession of coin by person who knew it to be altered when he became possessed thereof.

252. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Possession of Queen's coin by person who knew it to be altered when he became possessed thereof.

253. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Counterfeiting Government stamp.

255. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

Having possession of instrument or material for counterfeiting Government stamp.

256. Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

Making or selling instrument for counterfeiting Government stamp.

257. Whoever makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

Sale of counterfeit Government stamp.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

Having possession of counterfeit Government stamp.

259. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Using as genuine a Government stamp known to be counterfeit.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.

261. Whoever fraudulently, or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Same as under s. 260.**

Using Government stamp known to have been before used.

262. Whoever fraudulently, or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

263. Whoever fraudulently, or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Erasure of mark denoting that stamp has been used.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

263-A. (1) Whoever—

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(*c*) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

Prohibition of fictitious stamps.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section " fictitious stamp " means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word " Government," when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive Government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

264. Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false instrument for weighing.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

265. Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false weight or measure.

***Procedure :*—Same as under s. 264.**

266. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Being in possession of false weight or measure.

***Procedure :*—Same as under s. 264.**

267. Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making or selling false weight or measure.

***Procedure :*—Same as under s. 264.**

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Public nuisance.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

269. Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of disease dangerous to life.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable—Summary.**

270. Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Malignant act likely to spread infection of disease dangerous to life.

***Procedure :*—Same as under s. 269.**

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Disobedience to quarantine rule.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

272. Whoever adulterates any article of food or drink so as to make such article noxious as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Adulteration of food or drink intended for sale.

***Procedure :*—Same as under s. 271.**

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be

Sale of noxious food or drink.

punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Same as under s. 271.**

Adulteration of drugs.

274. Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Same as under s. 271.**

Sale of adulterated drugs.

275. Whoever, knowing any drug or medical preparation to have been adulterated, in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Same as under s. 271.**

Sale of drug as a different drug or preparation.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from dispensary for medicinal purposes, any drug or medicinal preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Fouling water of public spring or reservoir.

277. Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

Making atmosphere noxious to health.

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

***Procedure :*—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

Rash driving or riding on a public way.

279. Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

Rash navigation of vessel.

280. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable—Summary.**

281. Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exhibition of false light, mark or buoy.

Procedure **:—Session—Cognizable—Warrant—Bailable—Not compoundable.**

282. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Conveying person by water for hire in unsafe or overloaded vessel.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

Danger or obstruction in public way or line of navigation.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against probable danger to human life from such poisonous substance,

Negligent conduct with respect to poisonous substance.

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

Negligent conduct with respect to fire or combustible matter.

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Procedure **:—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

Negligent conduct with respect to explosive substance.

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Procedure **:—Same as under s. 285.**

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

Negligent conduct with respect to machinery.

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to pulling down or repairing buildings.

Procedare **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

289. Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Negligent conduct with respect to animal.

Procedure **:—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

Punishment for public nuisance in cases not otherwise provided for.

Procedure **:—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable—Summary.**

291. Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Continuance of nuisance after injunction to discontinue.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable—Summary.**

292. Whoever—

Sale, etc.. of obscene books, etc.

(*a*) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(*b*) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(*d*) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(*e*) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, writing, drawing, or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Procedure **:—Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Sale, etc., of obscene objects to young person.

293. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Obscene acts and songs.

294. Whoever, to the annoyance of others—

(*a*) does any obscene act in any public place, or

(*b*) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Procedure **:—Any Ma strate — Cognizable — Warrant — Bailable — Not compoundable.**

Keeping lottery-office.

294-A. Whoever keeps any office or place for the purpose of drawing any lottery not authorised by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.

Procedure **:—Special complaint—Any Magistrate—Non-cognizable—Summons—Bailable—Not compoundable.**

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

Injuring or defiling place of worship, with intent to insult the religion of any class.

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

295-A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the regilious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs.

Procedure **:—Session, Presidency Magistrate—Non-cognizable—Warrant—Not bailable—Not compoundable—Sanction.**

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Disturbing religious assembly.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

Trespassing on burial places, etc.

commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

298. Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Uttering words, etc. with deliberate intent to wound religious feelings.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Compoundable.**

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Culpable homicide.

Illustrations.

(*a*) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(*b*) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush, B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(*c*) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Murder.

Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations.

(*a*) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(*b*) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(*c*) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(*d*) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

When culpable homicide is not murder.

The above exception is subject to the following provisos :—

First. —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations.

(*a*) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(*b*) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(*c*) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of the powers.

(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(*e*) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills A. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(*f*) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purposes of such defence.

Illustration.

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

Culpable homicide by causing death of person other than person whose death was intended.

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Punishment for murder.

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Punishment for murder by life-convict.

303. Whoever, being under sentence of transportation for life, commits murder, shall be punished with death.

Procedure **:—Same as under s. 302.**

Punishment for culpable homicide not amounting to murder.

304. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Causing death by negligence.

304-A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Abetment of suicide of child or insane person.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Abetment of suicide.

306. If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Same as under s. 305.**

Attempt to murder.

307. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

Attempts by life-convicts.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

Illustrations.

(*a*) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(*d*) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

***Procedure*:—Same as under s. 305.**

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

***Procedure*:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Attempt to commit suicide.

309. Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

***Procedure*:—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Thug.

310. Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Punishment.

311. Whoever is a thug, shall be punished with transportation for life, and shall also be liable to fine.

***Procedure*:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants, and of the Concealment of Births.

Causing miscarriage.

312. Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

***Procedure*:—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in the last preceding section, without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Death caused by act done with intent to cause miscarriage.

If act done without woman's consent.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ;

and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

***Procedure :*—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Act done with intent to prevent child being born alive or to cause it to die after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

***Procedure :*—Same as under s. 314.**

Causing death of quick unborn child by act amounting to culpable homicide.

316. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die ; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

***Procedure :*—Same as under s. 314.**

Exposure and abandonment of child under twelve years, by parent or person having care of it.

317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Concealment of birth by secret disposal of dead body.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 317.**

Of Hurt.

Hurt.

319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

Grievous hurt.

320. The following kinds of hurt only are designated as " grievous " :—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

Voluntarily causing hurt.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said " voluntarily to cause hurt."

Voluntarily causing grievous hurt.

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said " voluntarily to cause grievous hurt."

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

Punishment for voluntarily causing hurt.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Any Magistrate—Non-cognizable — Summons — Bailable—Compoundable.**

Voluntarily causing hurt by dangerous weapons or means.

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument, which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

Punishment for voluntarily causing grievous hurt.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Procedure **:—Same as under s. 324.**

Voluntarily causing grievous hurt by dangerous weapons or means.

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Summons—Not bailable—Not compoundable.**

Voluntarily causing hurt to extort property, or to constrain to an illegal act.

327. Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not Bailable—Not compoundable.**

Causing hurt by means of poison, etc., with intent to commit an offence.

328. Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Voluntarily causing grievous hurt to extort property or to constrain to an illegal act.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Same as under s. 328.**

Voluntarily causing hurt to extort confession, or to compel restoration of property.

330. Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations.

(*a*) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(*b*) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(*c*) A, a revenue-officer, tortures A in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(*d*) A, a zemindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

Voluntarily causing grievous hurt to extort confession or to compel restoration of property.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Voluntarily causing hurt to deter public servant from his duty.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any, other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

Voluntarily causing grievous hurt to deter public servant from his duty.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

***Procedure :*—Any Magistrate—Non-cognizable—Summons—Bailable—Compoundable.**

Voluntarily causing grievous hurt on provocation.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

Act endangering life or personal safety of others.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Not compoundable—Summary.**

Causing hurt by act endangering life or personal safety of others.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

Causing grievous hurt by act endangering life or personal safety of others.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

Of Wrongful Restraint and Wrongful Confinement.

Wrongful restraint.

339. Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

Wrongful confinement.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations.

(*a*) A causes Z to go within a walled space, and locks Z in Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(*b*) A places men with fire-arms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

Punishment for wrongful restraint.

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Compoundable—Summary.**

342. Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Punishment for wrongful confinement.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable.**

343. Whoever wrongfully confines any person for three days, or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Wrongful confinement for three or more days.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

344. Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement for ten or more days.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Wrongful confinement of person for whose liberation writ has been issued.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Not cognizable—Summons—Bailable—Not compoundable.**

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Wrongful confinement in secret.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Compoundable with Court's sanction.**

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security, or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement to extort property or constrain to illegal act.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Summons—Bailable—Not compoundable.**

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable

Wrongful confinement to extort confession, or compel restoration of property.

security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Summons—Bailable—Not compoundable.**

Of Criminal Force and Assault.

Force.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling : Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move.

Criminal force.

350. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause, injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations.

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to Z ; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z ; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole, and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z ; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z ; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z ; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect

Z's sense of feeling, A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(*h*) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z

351. Whoever makes any gesture, or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustrations.

(*a*) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(*c*) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstance, might not amount to an assault, the gesture explained by the words may amount to an assault.

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Punishment for assault or criminal force otherwise than on grave provocation.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offience, is a question of fact.

***Procedure* :—Any Magistrate—Not cognizable—Summons—Bailable—Compoundable—Summary.**

353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force to deter public servant from discharge of his duty.

***Procedure* :—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

354. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force to woman with intent to outrage her modesty.

***Procedure* :—Same as under s. 353.**

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Compoundable.**

356. Whoever assaults or uses criminal force to any person, in attempting to commit theft on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempt to commit theft of property carried by a person.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Not bailable—Not compoundable.**

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Assault or criminal force in attempt wrongfully to confine a person.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Assault or criminal force on grave provocation.

Explanation.—The last section is subject to the same explanation as section 352.

***Procedure :*—Any Magistrate — Non-cognizable — Warrant — Bailable — Compoundable — Summary.**

Of Kidnapping, Abduction, Slavery and Forced Labour.

359. Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship.

Kidnapping.

360. Whoever conveys any person beyond the limits of British India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

Kidnapping from British India.

361. Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Kidnapping from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

362. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Abduction.

363. Whoever kidnaps any person from British India, or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for kidnapping.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

364. Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting in order to murder.

Illustrations.

(*a*) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(*b*) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

365. Whoever kidnaps or abducts any person, with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting with intent secretly and wrongfully to confine person.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

366. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping, abducting or inducing woman to compel her marriage, etc.

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

366-A. Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Procuration of minor girl.

Procedure **:—Same as under s. 366.**

366-B. Whoever imports into British India from any country outside India any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person,

Importation of girl from foreign country.

and whoever with such intent or knowledge imports into British India, from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person,

shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Procedure **:—Same as under s. 366.**

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

Procedure **:—Same as under s. 366.**

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Wrongfully concealing or keeping in confinement kidnapped or abducted person.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

369. Whoever kidnaps or abducts any child under the age of ten years, with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting child under ten years with intent to steal from its person.

Procedure **:—Same as under s. 368.**

370. Whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Buying or disposing of any person as a slave.

Procedure **:—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

371. Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Habitual dealing in slaves.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

372. Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Selling minor for purposes of prostitution, etc.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

373. Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Buying minor for purposes of prostitution, etc.

Explanation 1.—Any prostitute, or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation 2.—" Illicit intercourse " has the same meaning as in section 372.

Procedure **:—Same as under s. 372.**

374. Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Unlawful compulsory labour.

Procedure **:—Any Magistrate — Non-cognizable — Warrant — Bailable—Compoundable.**

Of Rape.

375. A man is said to commit " rape," who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :

Rape.

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

376. Whoever commits rape shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ;

Punishment for rape.

Unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—In case of sexual intercourse by a man *with his wife :* (If the wife be not under 12) Session, Presidency or District Magistrate ; (If the wife be under 12) Session only—Non-cognizable—Summons—Bailable—Not compoundable ; *In any other case*** **Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Of Unnatural Offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,

Unnatural offences.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

Of Theft.

378. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Theft.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations.

(*a*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(*b*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(*c*) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(*d*) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(*e*) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(*f*) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(*g*) A finds a ring lying on the high-road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(*h*) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(*i*) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(*j*) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(*k*) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(*l*) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly ; A has therefore committed theft.

(*m*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(*n*) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

(*o*) A is the paramour of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(*p*) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

Punishment for theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Procedure **:—Any Magistrate—Cognizable—Warrant—Not bailable—Not compoundable—Summary, if property worth not more than Rs. 50.**

Theft in dwelling house, etc.

380. Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Procedure **:—Same as under s. 379.**

Theft by clerk or servant of property in possession of master.

381. Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary, if property worth not more than Rs. 50.**

Theft after preparation made for causing death, hurt or restraint, in order to the committing of the theft.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(*a*) A commits theft on property in Z's possession ; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Of Extortion.

Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion."

Illustrations.

(*a*) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain moneys to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(*d*) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

Punishment for extortion.

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Putting person in fear of injury in order to commit extortion.

385. Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Same as under s. 384.**

Extortion by putting a person in fear of death or of grievous hurt.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person, or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Procedure **:—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Putting person in fear of death or of grievous hurt, in order to commit extortion.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Procedure **:—Same as under s. 386.**

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and, if the offence be one punishable under section 377 of this Code, may be punished with transportation for life.

Procedure **:—Same as under s. 386.**

Putting person in fear of accusation of offence in order to commit extortion.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and, if the offence be punishable under section 377 of this Code, may be punished with transportation for life.

Procedure **:—Same as under s. 386.**

Of Robbery and Dacoity.

Robbery.

390. In all robbery there is either theft or extortion.

Theft is " robbery " if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When theft is robbery.

Extortion is " robbery " if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

When extortion is robbery.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

Illustrations.

(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(*b*) A meets Z on the high-road, shews a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(*c*) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(*d*) A obtains property from Z by saying: "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

Dacoity.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit " dacoity ".

Punishment for robbery.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Attempt to commit robbery.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Same as under s. 392.**

Voluntarily causing hurt in committing robbery.

394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Same as under s. 392.**

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for dacoity.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dacoity with murder.

***Procedure :*—Same as under s. 395.**

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Robbery or dacoity, with attempt to cause death or grievous hurt.

***Procedure :*—Same as under s. 395.**

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Attempt to commit robbery or dacoity when armed with deadly weapon.

***Procedure :*—Same as under s. 395.**

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Making preparation to commit dacoity.

***Procedure :*—Same as under s. 395.**

400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for belonging to gang of dacoits.

***Procedure :*—Same as under s. 395.**

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Punishment for belonging to gang of thieves.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

Of Criminal Misappropriation of Property.

403. Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest misappropriation of property.

Illustrations.

(*a*) A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it : it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations.

(*a*) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs ; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

***Procedure:*—Any Magistrate—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Dishonest misappropriation of property possessed by deceased person at the time of his death.

404. Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Of Criminal Breach of Trust.

Criminal breach of trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Illustration.

(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(*d*) But if A, in the last illustration, not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(*e*) A, a Revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(*f*) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

Punishment for criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable.**

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Same as under s. 406.**

Criminal breach of trust by clerk or servant.

408. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable.**

409. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant or agent.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Of the Receiving of Stolen Property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which * * * criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Stolen property.

411. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Dishonestly receiving stolen property.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary if property worth not more than Rs. 50.**

412. Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dishonestly receiving property stolen in the commission of a dacoity.

Procedure **:—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Habitually dealing in stolen property.

Procedure **:—Same as under s. 412.**

414. Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assisting in concealment of stolen property.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary if property worth not more than Rs. 50.**

Of Cheating.

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which

Cheating.

act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations.

(*a*) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(*b*) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(*c*) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(*d*) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it, A cheats.

(*e*) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(*f*) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(*g*) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(*i*) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

Cheating by personation.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Punishment for cheating.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure*:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure*:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Punishment for cheating by personation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Cheating and dishonestly inducing delivery of property.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Procedure **:—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Of Fraudulent Deeds and Dispositions of Property.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

421. Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers, or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Dishonestly or fraudulently preventing debt being available for creditors.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Same as under s. 421.**

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.

423. Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Same as under s. 421.**

Dishonest or fraudulent removal or concealment of property.

424. Whoever dishonestly or fraudulently conceals or removes any property, of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Procedure **:—Same as under s. 421.**

Of Mischief.

Mischief.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits " mischief."

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(*a*) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(*b*) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(*e*) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(*h*) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

Punishment for mischief.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

***Procedure :*—Any Magistrate—Non-cognizable—Summons—Bailable—Compoundable when the only loss or damage caused is loss or damage to a private person—Summary.**

Mischief causing damage to the amount of fifty rupees.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable when the only loss or damage caused is loss or damage to a private person—Summary.**

Mischief by killing or maiming animal of the value of ten rupees.

428. Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.

429. Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to works of irrigation or by wrongfully diverting water.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd clsss—Cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

431. Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to public road, bridge, river or channel.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

432. Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by causing inundation or obstruction to public drainage attended with damage.

***Procedure :*—Same as under s. 431.**

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or such other thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

434. Whoever commits mischief by destroying or moving any land-mark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Mischief by destroying or moving, etc., a land-mark fixed by public authority.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Not compoundable.**

435. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards, or where the property is agricultural produce ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Bailable—Not compoundable.**

436. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief by fire or explosive substance with intent to destroy house, e.c.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

437. Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.

***Procedure :*—Same as under s. 436.**

438. Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

***Procedure :*—Same as under s. 436.**

439. Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.

***Procedure :*—Same as under s. 436.**

440. Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Mischief committed after preparation made for causing death or hurt.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Of Criminal Trespass.

441. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

Criminal trespass.

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass."

442. Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

House-trespass.

Explanation.—The introduction of any part of the criminal trespasser's body entering is sufficient to constitute house-trespass.

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

Lurking house-trespass by night.

House-breaking.

445. A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described ; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance ; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house, or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations.

(*a*) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

(*b*) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(*c*) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(*d*) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(*e*) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(*f*) A finds the key of Z's house-door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(*g*) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(*h*) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

House-breaking by night.

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."

Punishment for criminal trespass.

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Summons—Bailable—Compoundable—Summary.**

Punishment for house-trespass.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Compoundable—Summary.**

House-trespass in order to commit offence punishable with death.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

House-trespass in order to commit offence punishable with transportation for life.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

House-trespass in order to commit offence punishable with imprisonment.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine ; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

***Procedure :*—Any Magistrate—Cognizable—Warrant—Bailable—Compoundable with Court's sanction ; Session, Presidency Magistrate or Magistrate of 1st or 2nd class (if the offence is theft)—Cognizable—Warrant—Not bailable—Not compoundable.**

House-trespass after preparation for hurt, assault or wrongful restraint.

452. Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable.**

Punishment for lurking house-trespass or house-breaking.

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary.**

Lurking house-trespass or house-breaking in order to commit offence.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary.**

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

455. Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary.**

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.

457. Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine ; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Not bailable—Not compoundable—Summary.**

Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.

458. Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Cognizable—Warrant—Not bailable—Not compoundable.**

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.

460. If, at the time of committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Same as under s. 459.**

Dishonestly breaking open receptacle containing property.

461. Whoever dishonestly, or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

Punishment for same offence when committed by person entrusted with custody.

462. Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Cognizable—Warrant—Bailable—Not compoundable.**

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

Forgery.

463. Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Making a false document.

464. A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed ; or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

Illustrations.

(*a*) A has a letter of credit upon B for rupees 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000 intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase money. A has committed forgery.

(*c*) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(*d*) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees B commits forgery.

(*e*) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(*f*) Z's will contains these words—" I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(*g*) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words " Pay to Z or his order " and signing the endorsement. B dishonestly erases the words " Pay to Z or his order," and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(*h*) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(*i*) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(*j*) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(*k*) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations.

(*a*) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(*b*) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(*c*) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable; here A has committed forgery.

(*d*) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(*e*) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Punishment for forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure*:—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Forgery of record of Court or of public register, etc.

466. Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure*:—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Forgery of valuable security, will, etc.

467. Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividend thereon, or to receive or deliver any money, moveable property or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with

transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Session—Non-cognizable, but cognizable when the valuable security is a promissory-note of the Government of India—Warrant—Not bailable—Not compoundable.**

Forgery for purpose of cheating.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Forgery for purpose of harming reputation.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Forged document.

470. A false document made wholly or in part by forgery is designated "a forged document."

Using as genuine a forged document.

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

***Procedure :*—Special complaint—Same Court as that by which forgery is triable—Non-cognizable but cognizable when the valuable security is a promissory note of the Government of India—Warrant—Bailable—Not compoundable.**

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

472. Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure:*—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Same as under s. 472.**

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.

474. Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in the section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Same as under s. 472**

475. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting device or mark used for authenticating documents described in section 467 or possessing counterfeit marked material.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

476. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

477. Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security.

***Procedure:*—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

477-A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Falsification of accounts.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Not compoundable.**

Of Trade, Property and Other Marks.

Trade mark.

478. A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark,

and for the purposes of this Code the expression "trade mark" includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883, and any trade mark which, either with or without registration, is protected by law in any British Possession or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable.

Property mark.

479. A mark used for denoting that moveable property belongs to a particular person is called a property mark.

Using a false trade mark.

480. Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark.

Using a false property mark.

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Punishment for using a false trade mark or property mark.

482. Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Counterfeiting a trade mark or property mark used by another.

483. Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 482.**

Counterfeiting a mark used by a public servant.

484. Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

Making or possession of any instrument for counterfeiting a trade mark or property mark.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to

a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Summons—Bailable—Not compoundable.**

Selling goods marked with a counterfeit trade mark or property mark.

486. Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Compoundable with Court's sanction.**

Making a false mark upon any receptacle containing goods.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Not compoundable.**

Punishment for making use of any such false mark.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

***Procedure :*—Same as under s. 487.**

Tampering with property mark with intent to cause injury.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd Class—Non-cognizable—Summons—Bailable—Not compoundable.**

Of Currency-Notes and Bank-Notes.

Counterfeiting currency-notes or bank-notes.

489-A. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—For the purposes of this section and of sections 489-B, 489-C and 489-D, the expression " bank-note " means a promissory note or engagement for

the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as substitute for, money.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

489-B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Using as genuine forged or counterfeit currency-notes or bank-notes.

***Procedure :*—Same as under s. 489-A.**

489-C. Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Possession of forged or counterfeit currency-notes or bank-notes.

***Procedure :*—Session—Cognizable—Warrant—Bailable—Not compoundable.**

489-D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.

***Procedure :*—Session—Cognizable—Warrant—Not bailable—Not compoundable.**

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490. [*Repealed.*]

491. Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Breach of contract to attend on and supply wants of helpless person.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Summons—Bailable—Compoundable—Summary.**

492. [*Repealed.*]

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Marrying again during lifetime of husband or wife.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

***Procedure :*—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Bailable—Not compoundable.**

Marriage ceremony fraudulently gone through without lawful marriage.

496. Whoever, dishonestly, or with a fraudulent intention goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

***Procedure :*—Special complaint—Session—Non-cognizable—Warrant—Not bailable—Not compoundable.**

Adultery.

497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

***Procedure :*—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Compoundable.**

Enticing or taking away or detaining with criminal intent a married woman.

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable.**

CHAPTER XXI.

OF DEFAMATION.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Defamation.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(*a*) A says, "Z is an honest man; he never stole B's watch," intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one jo the exceptions.

Imputation of truth which public good requires to be made or published.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Public conduct of public servants.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration.

It is not defamation in A to express in good faith any opinion what ever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Publication of reports of proceedings of Courts.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Merits of case decided in Court or conduct of witnesses and others concerned.

Illustrations.

(*a*) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says: "I do dot believe what Z asserted at that trial, because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Merits of public performance.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z, "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says, "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," *A* is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Censure passed in good faith by person having lawful authority over another.

Illustrations.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Accusation preferred in good faith to authorized person.

Illustration.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Imputation made in good faith by person for protection of his or other's interests.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations.

(*a*) A, a shopkeeper, says to B, who manages his business, "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Caution intended for good of person to whom conveyed or for public good.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Special complaint—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Compoundable.**

Printing or engraving matter known to be defamatory.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Same as under s. 500.**

Sale of printed or engraved substance containing defamatory matter.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

***Procedure :*—Session, Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Compoundable.**

CHAPTER XXII.

OF CRIMINAL IMTIMIDATION, INSULT AND ANNOYANCE.

Criminal intimidation.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Intentional insult with intent to provoke breach of the peace.

***Procedure :*—Any Magistrate — Non-cognizable — Warrant—Bailable — Compoundable—Summary.**

505. Whoever makes, publishes or circulates any statement, rumour or report,—

Statements conducing to public mischief.

(*a*) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of Her Majesty or * * or in the Imperial Service Troops to mutiny or otherwise disregard or fail in his duty as such ; or

(*b*) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity ; or

(*c*) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community ;

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

***Procedure :*—Special complaint—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Not bailable—Not Compoundable.**

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;(1) and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Punishment for criminal intimidation.

If threat be to cause death or grievous hurt, etc.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class (in case of cl. 1) but Session, Presidency Magistrate or Magistrate of 1st class if threat be to cause death or grievous hurt—Non-cognizable—Warrant—Bailable—Compoundable (in case of cl. 1) but not compoundable when the threat be to cause death or grievous hurt.**

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

Criminal intimidation by an anonymous communication.

***Procedure :*—Same as under s. 506.**

508. Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do,

by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender

Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.

an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations.

(*a*) A sits *dhurna* at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(*b*) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

***Procedure :*—Presidency Magistrate or Magistrate of 1st or 2nd class—Non-cognizable—Warrant—Bailable—Compoundable.**

Word, gesture or act intended to insult the modesty of a woman.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

***Procedure :*—Presidency Magistrate or Magistrate of 1st class—Non-cognizable—Warrant—Bailable—Compoundable with Court's sanction.**

Misconduct in public by a drunken person.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

***Procedure :*—Any Magistrate—Non-cognizable—Warrant—Bailable—Not compoundable.**

CHAPTER XXIII.

Of Attempts to Commit Offences.

Punishment for attempting to commit offences punishable with transportation or imprisonment.

511. Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations.

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in the pocket. A is guilty under this section.

***Procedure :*—Triable by Court by which the offence attempted is triable—Cognizable if offence attempted is cognizable—Warrant or summons shall issue according as the offence is one in respect of which a warrant or summons shall ordinarily issue—Bailable, if offence contemplated is bailable—Compoundable, if offence attempted is compoundable.**

THE INDIAN PENAL CODE

BEING

ACT XLV OF 1860.[1]

(As Amended by all Subsequent Acts up to Date.)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the Assent of the Governor-General on the* 6*th October*, 1860.)

CHAPTER I.

INTRODUCTION

Whereas it is expedient to provide a general Penal Code for British India; It is enacted as follows :—

Preamble.

1. This act shall be called The Indian Penal Code, and shall take effect * * *[2] throughout the whole of the territories[3] which are or may become vested in Her Majesty by the Statute 21 and 22 Victoria, Chapter 106,[4] entitled "An Act for the better government of India." * * *[5]

Title and extent of operation of the Code.

1. Analogous Law.—The Indian Penal Code was the outcome of the scheme of codification of Indian laws undertaken on behalf of the Government, of which some detailed history has already been given in the Introduction.[6] Prior to this Act, the Criminal law in force in the three Presidency towns of British India was the English Criminal law, the mofussil being subject to the Anglo-Indian Regulations made by the three Legislative Councils, supplemented by other laws introduced by the Muhammadan rulers. In short, the law in force before the passing of this Act, was neither uniform nor universal, while it presented a strange mosaic of English, Mussalman and local laws, the first of which was, and even to this day is, wrapped in glorious uncertainties, the second of which was obviously unsuited to a civilised country, and the Regulations fashioned on the local Legislatures contained widely different provisions, many of which were, in the words of the authors of the Anglo-Indian Codes "amazingly unwise."

2. This section has undergone certain alterations since it had been originally enacted : the words "on and from the first day of May 1861" having been omitted after "and shall take effect" by the Repealing and Amending Act of 1891,[7] as no longer necessary, the same Act having also repealed the words "except the Settlement of Prince of Wales' Island, Singapur and Malacca," with which the section originally closed.

3. Extent of Application.—Besides applying to the territories to which it is made expressly applicable, the Act has now been extended to, or declared to be in force in, other localities as well, a list of which is, as far as it can be ascertained, given in foot-note 3 below.

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(1) All offences under the Indian Penal Code are to be enquired into and tried according to the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) ss. 5 and 28.

The Indian Penal Code is superseded by s. 11, Reg. V of 1872, in the Sindh Frontier Districts, in so far as that Regulation is inconsistent with it.

(2) The words and figures "on and from the first day of May, 1861," were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

(3) The Indian Penal Code has been applied to offences committed before the 1st

4. The Act also extends to the following :—

(1) The British Protectorates on the Eastern Coast of Africa, the Persian Coast and Islands.

(2) The Indian States and more particularly the following :—

(1) The Berar.
(2) The Hyderabad Residency Bazars.
(3) The Civil and Military stations of Bangalore.
(4) The Kathiawar Agency.
(5) Kolhapur Civil station.
(6) The Surat Agency.
(7) The Satara Jagirs (partially).
(8) Rajputana, the Parganas of Jodgarh, Dewair, Saroth, Chang, Kotkarna, and the station of Abu.
(9) Kashmir and Jammu.
(10) Part of the Navewan Assigned tract near Bhamo in Upper Burmah.
(11) The following British cantonments in Native States :— Agar, Aurangabad, Baroda, Bhuj, Bolaram, Deolali, Disah, Gunah, Hingoli, Jalna, Mhow, Mominabad, Nimach, Nowgong, Raichur, Secunderabad, Sehore, Sirdarpur, Sutna.
(12) Kasumpti (Keonthal).
(13) Frontier Tracts, Dera Ismail Khan and Dera Gazi Khan.
(14) The Baluchistan Agency Territories.

January, 1862, in the Punjab, *see* s. 39, Punjab Laws Act, 1872 (IV of 1872), and in Ajmer-Merwara, *see* s. 29, Ajmer Laws Regulation, 1877 (III of 1877).

It has been declared in force—

in the Sonthal Parganas by s. 3 of the Sonthal Parganas Settlement Regulation, 1872 (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (III of 1899);

in the Arakan Hill District by s. 2 of the Arakan Hill District Laws, Regulation, 1916 (I of 1916);

in Upper Burma generally except the Shan States, by s. 4 (1) and Sch. I of the Burma Laws Act, 1898 (XIII of 1898);

in British Baluchistan by s. 3 of the British Baluchistan Laws Regulation, 1913 (II of 1913);

in the Angul District by s. 3 of the Angul Laws Regulation, 1913 (III of 1913);

in the Chittagong Hill-tracts by the Chittagong Hill-tracts Regulation, 1900 (I of 1900);

(with modifications) in the Kachin Hill-tracts as regards hill-tribes, by s. 3 of the Kachin Hill-tribes Regulation, 1895 (I of 1895), s. 3;

similarly, in the Chin Hills, as regards hill tribes, by the Chin Hills Regulation, 1896 (V of 1896);

in the Paragana of Manpur by s. 2 and Sch. of the Manpur Laws Regulation, 1926 (II of 1926);

in Panth Piploda by s. 2 and Sch. of the Panth Piploda Laws Regulation, 1929 (I of 1929).

It has been declared under s. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely, the Tarai Districts of the Province of Agra (*see* Gazette of India, 1879, Pt. I, p. 505), the Districts of Hazaribagh, Lohardaga (now called the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum (*see* Gazette of India, 1881, Pt. I, p. 504).

By notification under ss. 3 and 5A of the same Act it has been declared in force in the Pargana of Manpur in Central India, *see* Gazette of India, 1899, Pt. II, p. 419.

The powers of a Local Government were at the same time conferred on the Agent to the Governor-General, Central India Agency, and also those of a High Court for the purposes of the Code, *see* Gazette of India, *ibid.*

It has been extended under s. 5 of the same Act to the Lushai Hills; *see* Gazette of India, 1898, Pt. II, p. 345.

(4) Repealed and re-enacted as 5 & 6 Geo. V, c. 61, Government of India Act, 1915, which is now repealed by Government of India Act, 1935 (25 & 26 Geo. 5 c. 42).

(5) The words "except the settlement of Prince of Wales' Island, Singapore and Malacca," were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

(6) *See* Penal Law (4th Ed.) (§ 32-34) (7) Act XII of 1891, Sch. 1.

Railways.

(3) Such parts of the following railways as pass through Indian States.

(1) Ahmedabad-Prantij Railway.
(2) Barsi Light Railway.
(3) Bengal-Nagpur Railway.
(4) Bhavnagar Railway.
(5) Billimoria-Kolamba Railway.
(6) Bombay, Baroda and Central India Railway.
(7) Cawnpore-Achnera State Railway.
(8) Delhi-Umballa-Kalka Railway.
(9) Dhond-Manmad Railway.
(10) Dhrangadhra Railway.
(11) Godhra-Lunawada Railway.
(12) Godhra-Rutlam-Nagda Railway.
(13) Gondal Porbandar Railway.
(14) Goona-Baran Railway.
(15) Great Indian Peninsula Railway.
(16) Hyderabad-Godaveri Valley Railway.
(17) Indian Midland Railway.
(18) Jammu and Kashmir Railway.
(19) Jamnagar and Dwarka Railway.
(20) Jetalsar-Rajkot Railway.
(21) Junagarh Railway.
(22) Kolar Gold Fields Railway.
(23) Kolhapur Railway.
(24) Kotri-Rohri Railway.
(25) Madras and Southern Maharatta Railway.
(26) Mehsana-Viramgam Railway.
(27) Morvi Railway.
(28) Mysore State Railway.
(29) Nizam's Guaranteed State Railway.
(30) North-Western Railway.
(31) Oudh and Rohilkhund State Railway.
(32) Palanpur-Deesa Railway.
(33) Petlad-Cambay Railway.
(34) Rajkot-Jamnagar Railway.
(35) Rajpipla State Railway.
(36) Rajputana-Malwa Railway.
(37) Sabarmati Roho Railway.
(38) Sangli State Railway.
(39) Southern Punjab Railway.
(40) Tapti Valley Railway.

Indian States.

5. The Penal Code is the working Code of all Indian States; but the following have expressly adopted it, *mutatis mutandis*, and with or without modifications :—

(1) Bombay States.—Akalkot, Jangira, Jath, Kolhapur, Malia, Miraj (Junior Branch), Muli, Ramsury, Savanur, Sawantwari, Sholapur.

(2) Central Provinces.—Bamra, Kanker, Khairagarth and Nandgaon.

(3) Indore.—A Penal Code, founded on Act XLV of 1860, was passed by the Maharaja Holkar some years before 1890.

(4) Mysore.—The Penal Code was in force during the British administration of the State. By the deed of transfer, 1st March 1881, it was included in the Schedule of Laws which, by section 91 of the deed, the Maharaja was bound to maintain. The Code of Criminal Procedure (Act X of 1882) was introduced by Reg. I of 1886 (Mysore).

(5) Puducottah.—The Penal Code was declared by the Raja to be the law of his State in 1882.

(6) Travancore.—The Penal Code and the Whipping Act were adopted in 1881.

Ex-territorial Extension.

6. The Code and its auxiliary the Procedure Code[8] have also been extended to the British Protectorates on the East Coast of Africa,[9] Zanzibar,[10] Somaliland,[11] and on the Persian Coast and adjacent Islands, the Settlement of Prince of Wales' Island, Singapur, Malacca, and the Nicobar Islands.[12] The Code further extends to the Island of Perim[13] and the Laccadive Islands;[14] and it has been adopted (with or without modifications) by the Straits Settlements and Ceylon.

7. Being a British enactment it has as such, of course, no operation in the Native Feudatory States, but cantonments, though territorially situate within Native States have been, by treaty, ceded to the British, and in such a case, the Code would, of course, apply to them. But it is not only to British territory that the Code can apply, since the Governor-General in Council is empowered by the Foreign Jurisdiction and Extradition Act, 1879, to extend any British enactment by a declaration even to foreign territory, and such declarations have

(8) *Mulana*, 1 A. 599 (600); *contra* in *Diljour*, 2 C. 225, F. B. offences committed before enactment of the Penal Code only triable in accordance with the procedure laid down in the Code of Criminal Procedure, (See s. 5, Act V of 1898).
(9) Order, 1897.
(10) *Ib*
(11) Order, 1899.
(12) Order, 1889.
(13) *Mangal*, 10 B. 258.
(14) *Charia*, 13 M. 353.

been made in the case of the civil and military stations of Bangalore[15] and other places.[16]

21 & 22 Vict., c. 106.

8. The reference to 21 and 22 Vict., c. 106 (since repealed by the Consolidating Act 5 and 6 Geo. V, c. 61)[17] is to the Government of India Act, 1858, the provisions of which cannot be affected by legislation in India. This Statute transferred the Government of India from the East India Company to the Crown,[18] which became thenceforward entitled to all the territories previously governed by the Company. All such territories were, however, to be governed by the Governor-General in Council, whose authority and powers are therein defined. Only territories acquired by the Governor-General in Council for His Majesty will thus be subject to the Code. What such territories are at the present moment has been already set out.

Code of Criminal Procedure.

9. It is provided by the Code of Criminal Procedure that all offences under this Code shall be investigated, enquired into, tried and otherwise dealt with according to its provisions.[19] The Penal Code is thus the substantive law, of which the Procedure Code furnishes the adjective law to put in force its provisions.

10. **Principle.**—This Code was the outcome of the genius of Lord Macaulay, whose defence of a systematized Code has already been noticed in the Introduction.[20] The great advantage of a Code like the present is its simplicity, uniformity and certainty; its drawbacks are its rigorous inelasticity and inadaptability to individual circumstances.

11. **Meaning of Words.**—"*British India*" is defined in the General Clauses Act as follows:—"British India" shall mean all territories and places within Her (now His) Majesty's dominions which are, for the time being, governed by Her Majesty through the Governor-General of India or through any Governor or other Subordinate to the Governor-General of India.[21] British India is not synonymous with "British possession," which has been defined by the same Act to mean any part of His Majesty's dominions exclusive of the United Kingdom; and, where parts of those dominions are under both central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.[22] British India is thus British possession, but not *vice versa*. It will be noticed that British India is defined to be a territory which is *governed* by the Governor-General in Council. As the Native States and the tributary Mahals are not so governed, they are not British India and the Code, as such, does not extend to them.[23] "*Shall be called the Indian Penal Code*": The word "shall" has the force of "may," a word now used in similar places in the Indian Acts.[24] "*Which are or may become vested*," *e.g.*, British Burmah. Such territories need not necessarily form part of British India—Burmah does not—but they must, nevertheless, be British possession acquired under the provisions of 21 and 22 Vict., c. 106.

12. **Commencement and Extent.**—An Act of the Indian Legislature takes effect from the date it receives the assent of the Governor-General. Such assent was given to the Code on the 6th October 1860. It should, therefore, have applied as from that date, were it not for the clause in the section which fixed the 1st January 1862, as the date for its enforcement. The Code was, however, applied in the Punjab[25] and Ajmer-Merwara[1] to offences committed even before

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(15) *Hayes*, 12 M. 39.

(16) *See* List of British Enactments Act in force in foreign territories.

(17) 5 & 6 Geo. V, c. 61 is the Government of India Act, 1915 which is now repealed by *ib.* of 1935 (25 & 26 Geo. V, c. 42).

(18) *Cf.* 5 & 6 Geo. V, c. 61, s. 1, now *see* 25 & 26 Geo. V, c. 42.

(19) S. 5, Cr. P. C. (Act V of 1898).

(20) *See* Penal Law (4th Ed.) (§ 35).

(21) Ss. 2 (7), 71, Act X of 1897.

(22) *Ib.*, 2 (8).

(23) *E.g.*, it does not extend to Mourbhanj. (*Keshub*, 8 C. 985, F.B.; *Horsee Mahapatro* v. *Dinobundo*, 7 C. 523; *Bichiranand* v. *Bhugbut*, 16 C. 667).

(24) *E.g.*, s. I, Code of Criminal Procedure (Act V of 1898).

(25) Act IV of 1872, s. 39.

(1) Reg. III of 1877, s. 29.

that date, but apart from such exception, it is not applicable to offences committed before its enactment.[2]

13. Rules for the Interpretation of the Code.—The rules for the interpretation of criminal statutes follow the solicitude which law feels for the life and liberty of the subject. On the principle that it is better that a hundred guilty persons should escape than that an innocent person should suffer, it resolves all reasonable doubts in favour of the accused. On the principle that an accused must be presumed to be innocent till he is proved to be guilty, law requires the accuser to prove all facts compatible with his guilt and incompatible with his innocence.[3] And in this respect law does not weigh in the golden scales the conflicting testimony offered by each side, but taking its stand on the side of the accused, it examines all facts and circumstances with care and circumspection, so that it may not abuse the liberties of those who are placed under its protection.[4]

14. And as it required clear demonstration of facts it requires also clear enunciation of law. For no one can be convicted of a doubtful offence.[5] So the Law Commissioners responsible for the first draft of the Code remarked: "In criminal cases, with which we are now more immediately concerned, we think that the accused party ought always to have the advantage of a doubt on a point of law, if that doubt be entertained after mature consideration by the highest judicial authority, as well as of a doubt on a matter of fact. In civil suits which are actually pending, we think it, on the whole, desirable to leave to the Courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation."[6] In criminal cases, therefore, the law must be precise and intelligible, and the facts proved must be clear and unequivocal. And so far as regards law, while it may be so, still there may be doubts and difficulties which it is the function of the rules to solve. Indeed, as human language is never so precise and inflexible as to admit of no misinterpretation, it is always necessary, and indeed desirable, that these rules, which form, as it were, the Grammar of the Code, should be carefully observed. And for this purpose, it is necessary to examine the whole Code, analyse its scheme and study its vocabulary. Indeed, in order to facilitate this work the draftsmen have avowedly adopted a plan, the object of which is to make the Code self-contained, so far as possible, regarding its construction. In the first place, they have added definitions of terms used in the Code, the object of which is to provide a uniform nomenclature and thus avoid the perplexing variety of senses in which the same term may have been used in cognate enactments or popular parlance. "In our definitions," they observe, "we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning and no more than our own meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a very few students after long application. Yet, such definitions are found, and must be found in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them he will give a smoother and more attractive appearance to his workmanship; but in that case, he flinches from a duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every Judge in the Empire, and will probably be performed by no two Judges in the same way. We have, therefore, thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code."[7]

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(2) 1 W. R. Cr. Letters 325.
(3) *Nobokisto*, 8 W. R. (Cr.) 87; *Ahmad*, 11 W. R. (Cr.) 25, (27); *Madhub Chunder*, 21 W. R. (Cr.) 13 (20); *Deputy Legal Remembrancer* v. *Karuna*, 22 C. 174.
(4) *Beharee*, 3 W. R. 23 (26).
(5) *Imami*, 35 A. 24.
(6) Prefatory Address, p. xviii.
(7) Prefatory Address, pp. xiv, xv.

History of Legislation.

15. It is held that reference to the History of Legislation is permissible but can only be made when reasonable doubt is entertained as to the construction of a Statute. The proper course is, in the first instance, to examine the language of the Statute, to interpret it, to ask what is the natural meaning uninfluenced by any consideration derived from the previous state of the law. If this fails, resort might be had to extraneous aids to interpretation, *e.g.*, the history of legislation, the analogous rules of English Law and the underlying policy which the law was intended to promote or the mischief it was aimed to arrest. A Court is bound to administer the law as enunciated by the Legislature and should neither enlarge nor restrict the sphere of its application.

Illustrations.

16. Besides definitions, the draftsmen have, for the same purpose, enlisted the aid of illustrations. The definitions were framed to expound the general terms used in the Code, and they are necessary for the elucidation of the sections generally. "The definitions and enacting clauses contain the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects would be on the events of common life."[8] And again: "The illustrations will lead the mind of the student through the same steps by which the mind of those who framed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of Geometry it is constantly found that a theorem, which, read by itself, conveyed no distinct meaning to the mind, becomes perfectly clear, as soon as the reader casts his eye over the statement of the individual cases taken for the purpose of demonstration. Our illustration, we trust, will, in a similar manner, facilitate the study of the law."[9] "Thus the Code will be at once a statute book and a collection of decided cases. The decided cases in the Code will differ from the decided cases in the English law books in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the Judges, but by the Legislature, by those who make the law, and who must know more certainly than any Judge can know what the law is which they mean to make."[10] Of course, the illustrations appended to the section are merely expository. They are not exhaustive. If they were, there would have been then no necessity for the sections. They must be only understood to hit off the salient features of the section which remains the only law to be looked at for all purposes. And as the illustrations "make nothing law which would not be law without them,"[11] it follows that if they are inconsistent with the section, it is the section that has to be followed, and the illustrations may be ignored.[12]

Sub-headings.

17. Besides definitions and illustrations, the framers of the Code have sub-divided the Code into chapters, each prefaced by a suitable heading which may be regarded as preambles to them, and reference to which is legitimate for their construction.[13]

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(8) Prefatory Address, p. xvi.
(9) *Ib.*, p. xv.
(10) *Ib.*, xvi.
(11) *Ib.*, p. xvi, cited *supra*.
(12) *Fakirappa*, 15 B. 491 (496); *Govinda Pillai* v. *Thayammal*, 28 M. 57; *Koylash* v. *Sonatan*, 7 C. 132 (135); *Rino Subedar*, 16 I.C. (S.) 753; *Satishchandra* v. *Ramdyal*, 48 C. 388 S.B.
Proviso—*Alangamonjori* v. *Sonamoni*, 8 C. 637; *Vyankataswami*, 2 B. H. C. 106.
Saving Clause—*Sitaram Vithal*, 11 B. 657.
Marginal Notes (no aid to construction)—*Balraj* v. *Jagat Pal*, 26 A. 393 (406); *Mahomed Ayoob*, 2 Bom. L. R. 918; *In the matter of Two Second Grade Pleaders*, 34 M. 29; *Dukhi Mullah*, 23 C. 55.
(13) *Ram Sanker* v. *Ganesh*, (1907) 29 A. 385, F. B.; *The Directors, etc., Hammer Smith* v. *Brand*, (1868) L. R. 4 H. L. 171.

Specific Offence.

18. Again, it will be observed that the Code first defines offences generally. It then sets out other offences which, though falling into the category of general offences so defined, are distinguished from them by the presence of special circumstances which call for lighter or graver penalties. In such cases, it is the specific section dealing with the specific offence that ought to be requisitioned, and it would be wrong to resort to the general section merely because all its ingredients are present in a particular case.[14] For instance, a man clubs another man to death. Here the offender has certainly committed hurt; but it is not all, for he may have committed grievous hurt, or grievous hurt with a dangerous weapon, or culpable homicide not amounting to murder, or even murder deserving the extreme penalty of the law. All such offences are of the same kind, but they differ in their characteristics and gravity, so as, in fact, to form distinct and different offences. Their discrimination is no doubt the outcome of comparatively modern refinement, but nevertheless it is one which marks the different grades of criminal responsibility which always existed, though it was not always recognized.

Strict Construction.

19. Lastly, as all penal laws affect the liberty of the subject, they have to be construed strictly.[15] Nothing should be assumed to exist which does not appear. If a section is ambiguous or susceptible of another construction, the construction more favourable to the accused should be adopted. It should not be forgotten that it is the duty of tribunals to interpret the law and not to make it. They have defined rules embodied in a Code and it is their duty to follow them. If there are any lacunæ in the law, it is no part of their functions to supplement them, for hard cases make bad law. As their Lordships of the Privy Council observed: "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."[16] The correct attitude of the mind in dealing with crimes should be that which Maxwell has well summarized. He says: "Penal laws must be construed strictly. But it is the paramount duty of the judicial interpreter to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object. The rule of strict construction does not, indeed, require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity or from what is left unexpressed, which characterise the judicial interpretation of affidavits in support of *ex parte* applications, or of a Magistrate's convictions where the ambiguity goes to the jurisdiction. Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested, for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language. This would be to defeat, not to promote, the object of the Legislature, to misread the statute and misunderstand its purpose. A Court is not at liberty to put limitations on general words which are not called for by the sense, or the objects or the mischief of the enactment; and no construction is admissible which would sanction an evasion of an Act. But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it, which do not fall both within the reasonable meaning of its terms and within the meaning and scope of the enactment. To determine that a case is within the intention of a statute, its language must authorize the Court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are

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(14) *Kuloda Prosad*, 11 C.W.N. 100.

(15) *Patandin*, 2 A. L. J. 26; *Birajpal*, 7 A. L. J. 181; *Bista*, 1 B. 308; *Ganesh Narayan*, 13 B. 600; *Narottamdas*, *ib.* 681; *Kola Lalang*, 8 C. 214; *Kazi Zeamuddin*, 28 C. 504; *Bissumbhar*, 5 C. W. N. 108; *Sheodin*, 10 A. 115.

(16) *Gokul Mandar* v. *Pudmanand*, 29 C. 707 (715) P. C.; *Kari Singh*, 40 C. 433; *Barendra K. Ghose*, 52 C. 197 P. C.

enumerated. If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent for a Court to extend them."[17]

20. In other words, while it is in the province of the Court to place a rational construction on the law, it is no part of its function to gloss over an ambiguity, inconsistency or confusion which is plainly apparent and not obviously reconcilable. It is then the duty of the Legislature to amend the law. It is no part of the Judge to blink it. So James, L.J., in delivering the judgment of the Privy Council, said: "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included, if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."[18] So in another case, Willis, J., observed: "I quite agree that criminal enactments are not to be extended by construction when an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question, and makes it criminal."[19]

21. When it is said that a penal statute must be construed strictly what it implies is, that nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself.[20] "It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the Act of Parliament do not authorize it."[21]

22. Of course, in construing a statute, whether penal or not, due effect should be given to every word—*verba aliquid operati debent*;[22] but criminal statutes differ from civil in this that in the former the primary duty of the Court is not to make sense but to see if it reads sense. If the words are doubtful, recourse may then be had to the subject-matter, but this is only a secondary rule.[23] In civil law, the rule of equity guides one in the construction of an enactment, but in penal statutes it would be very dangerous to charge one with an offence which the Legislature had omitted to enact. For how is the subject in such cases to know the will of the Legislature and guide his own course accordingly? Moreover, as Lord Watson remarked: "Intention of the Legislature is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from

(17) *Per* Lord Tenterden in *Proctor* v. *Manwaring*, 3 B. & A. 145; Maxwell on the Construction of Statutes, Chap. X (3rd Ed.), 367-370. *See* also *Juggomohan Bukshee* v. *Roy Mothoora Nath Chowdhary*, 7 W. R. 18 P. C.; *Nga Po Chein*, 13 I. C. (R.) 390.

(18) *Dyke* v. *Elliot*; "*The Gauntlet*," L. R. 4 P. C. 184 (191).

(19) *Britt* v. *Robinson*, L. R. 5 C. P. 503 (513, 514).

(20) *Kola*, 8 C. 214, following *Lord Huntingtower* v. *Gardiner*, 1 B. & C. 297 (299); *Rex* v. *Bond*, 1 B. & Aldr. 390 (392).

(21) *Per* Abbot, J., in *R.* v. *Bond*, 1 B. & Aldr, 390 (392); *Deumal*, 3 S. L. R. 66.

(22) "Words ought to have some operation." *Kazi Zeamuddin*, 28 C. 504.

(23) *The Inhabitants of Hodnette*, 1 T. R. 96 (101).

that which it has chosen to enact, either in express words, or by reasonable and necessary implication."[24] Debates in the Legislative Councils, Statements of Objects and Reasons, or Reports of the Select Committees are no guide to the construction of a Code,[25] much less a Penal Code, the provisions of which must be plain and unambiguous so as to afford both a clear warning and a certain proof of guilt.[1] If these observations are true about penal statutes generally, they are particularly apposite to the Penal Code, which, for its minuteness and comprehensive rigour, is perfectly Draconian ; indeed, so much so that there is scarcely any act or movement, which, if judged malignantly, may not be brought within its ambit. In its attempts to be exhaustive the Code has ceased to be exact. It strove to be scientific, but it has become illogical, so that its interpreters have to exercise the greatest circumspection in construing it.

English Cases.

23. Speaking of the materials drawn for the ground-work of the Code, the framers referred to the English system as "artificial," "complicated," "framed without slightest reference to India," and very "defective," and they, therefore, declined to make it, more than any local system, the ground-work of the Code. "Cases decided in England must, therefore, be received in India with a careful allowance for the great difference of the law in the two countries."[2] As Story remarks : "The common law has been expounded to meet the exigencies of the times as they have arisen,"[3] and has, so far as traditional impediments allowed, improved the defence of society, as the weapons of its enemies have been improved, and so West, J., remarked : "The anomalies of the English law arising from its peculiar history have no place here. It is no doubt, an *exemplum vitus imitable*, but we should look rather to its general and regular development than to the abnormal growths which here and there disfigure its venerable form, and which, perhaps, most strike the eye of a careless observer. The comprehensive views of Macaulay and his colleagues are manifested in their report presenting the Penal Code : and they ought, I think, to be seconded by a corresponding method of interpretation."[4]

Punishment of offences committed within the said territories.

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories.[5] * * *

24. Analogous Law.—The legislative powers of the Supreme Government, at the time of the passing of this Code, were defined in 3 and 4 Will. IV, c. 85, which empowers the Governor-General in Council "to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force, in the territories of India, or any part thereof, and to make laws and regulations for all persons, whether British or Native, foreign or otherwise, and for all Courts of Justice, whether established by Her Majesty, Charters, or otherwise, and the jurisdictions thereof, and for all places and things whatsoever, within and throughout the whole and every part of the said territories and for all servants of the said Company within the dominions of the Princes and States in

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(24) *Salomen* v. *Salomen & Co.*, (1897) A. C. 22 (38) ; *Bank of England* v. *Vagliano*, (1891) A. C. 107 ; *Norendro* v. *Kamalabasini*, 23 C. 563, P. C.

(25) *Walji* v. *Jaganath*, 2 B. 84 ; *Gopal* v. *Sakoji*, 18 B. 133 ; *Surab Sundari* v. *Uma Prosad*, 31 C. 628 ; *Sri Churn*, 20 C. 1017, F. B. ; *Administrator-General* v *Premlal*, 22 C. 788, P. C. ; *Gopal* v. *Parsotam*, 5 A. 121, F. B. ; *Kadir Baksh* v. *Bhawani*, 14 A. 145.

(1) Cf. *Secretary of State* v. *Balwant*, 28 B. 105 ; *Rash Behari* v. *Bhugwan*, 17 C. 209.

(2) *Per* West, J., in *Moorga*, 5 B. 338 (362, 363), F.B.; *Hoondraj* v. *Mithomal*, 84 I.C. (B.) 58 ; *Potaraju*, 36 M. 216 ; *Kari Sing*, 40 C. 433 ; *Satish Chandra* v. *Ramdyal*, 48 C. 388 S.B. ; *cf. Bejoy Singh* v. *Commissioner, Income-tax*, 60 C. 1029 P. C.

(3) Conflict of Laws, § 24.

(4) *Per* West, J., *dissentient* in *Moorga*, 5 B. 338, F. B.

(5) The words and figures "on or after the said first day of May, 1861" were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

alliance with the said Company, except that he shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of the Acts, or any provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of Her Majesty or the said Company, or any provision or Act hereafter to be passed in any wise affecting the said Company or the said territories or the inhabitants thereof; or any laws which shall in any way affect any prerogative of the Crown or the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories."

25. In accordance with this power the Governor-General in Council has power to extend the Code to any person, British or Indian, whether a British subject or a foreigner. And, *prima facie*, this Code is the sole penal law for all territories described and comprised in the preceding section. But under the provisions of The Scheduled Districts Act,[6] the local Government may, with the previous sanction of the Governor-General in Council, exclude the operation of the Code from any scheduled District, by notification published in the *Gazette of India*, and also in the local gazette, if any.[7] In the original Code the words "on or after the 1st day of May 1861," occurred after the word "territories." But they were, by a subsequent Act[8] altered to "the 1st day of January 1862," and every part of the Code was to be construed as if the words "the 1st day of January 1862" had been used instead. These words were altogether deleted by a subsequent Act as no longer necessary.[9] Offences committed before the 1st of January, 1862, are still punishable under the old regulations.[10] These regulations are many and widely divergent,[11] and their general scope has already been set out in the Introduction.[12] Such offences may be enquired into and tried by any Criminal Court in India in accordance with its own procedure[13] except in the case of persons entitled to be tried by the Supreme Court of the three Presidencies (*e.g.*, European British subjects in case of commission of grave offences), when it shall certify the case to the Governor of the Presidency concerned who may thereupon order his trial by the High Court.[14]

26. Principle.—The object of this section is to declare the liability of every person, irrespective of rank, nationality, caste or creed, to be punished under its provisions.[15] In this respect it makes no distinction between a British subject and a foreigner, who enters the British territories and thus, by accepting the protection of British laws, virtually gives an assurance of his fidelity and obedience to them and submits himself to their operation. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act being no offence in his own country.[16] But, though by virtue of this section, every person, be he even the King, is liable to punishment under this Code, it does not necessarily imply a power in the criminal courts to punish all persons irrespective of rank, status, race and nationality. For, as the powers of the Courts are regulated by the Code of Criminal Procedure, it follows that though a person may have committed an offence within the meaning of this Code, still it does not necessarily follow that there is a tribunal competent in this country to punish him. Thus, for example, there is no Court competent in this country to hear, try or determine any indictment or information against the

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(6) Act XIV of 1874.
(7) S. 3. Act XIV of 1874.
(8) Act VI of 1861.
(9) Act XII of 1891, Sch. 1.
(10) *Mulna*, 1 A. 599 (600); *Contra*, *Diljour*, 2 C. 225, F.B.
(11) Ben. Reg. XVII of 1817; Reg. XII of 1818; Bom. Reg. XIV of 1827; XVIII of 1827; XXII of 1827; Mad. Reg. VI of 1811; Reg. XIII of 1816; XIV of 1832.
(12) *See*, 1 Penal Law (4th Ed.).
(13) The Admiralty Offences (Colonial) Act. 1849, 12 & 13 Vict., c. 96, s. 1, extended to India by the Admiralty Jurisdiction (India) Act, 1860, 23 & 24 Vict., c. 88, s. 1; *Kastya*, 8 B. H. C. R. Cr. 36.
(14) The Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96, s. 2.
(15) *Mahabir Sing*, 25 A. 31.
(16) *Esop*, 7 C. & P. 456. Though this is no defence, yet it is a matter to be considered in mitigation of punishment.

Governor-General and members of his executive council,[17] the Governors of Bombay and Madras and the members of their executive councils,[18] and the Chief Justices and Judges of the Indian High Courts,[19] for any act done in their public capacity. Offences committed by them shall, however, be enquired of, heard, tried and determined in the Court of King's Bench in London,[20] in accordance with the procedure defined in the English Statutes.[21] Foreign sovereigns and ambassadors, their families, secretaries, messengers and servants fall into the same category.[22]

27. It will be observed that the Code enacts that, in future, all offenders shall be punished only under the Code and not otherwise, which implies that the Code being exhaustive, all infractions of law, as laid down in this Code, shall only be punished in the manner therein laid down. As James, J., remarked in a case : " It must be borne in mind that, up to the date of the enactment of Act XVII of 1864, the Legislature took no steps towards expressly repealing the old criminal law. Possibly, it may have been thought hazardous to repeal it wholesale and without such a careful scrutiny as would ensure the rescission of such parts alone of the old law as the Penal Code rendered superfluous ; whatever may have been the reason, the old law was left in the Statute Book, and but for the provision of s. 2, the great body of acts and omissions punishable under the Penal Code might have been still prosecuted under the old law."[23]

28. Meaning of Words.—"*Every person*" means all persons irrespective of nationality, allegiance, rank or status, caste, colour or creed. "*Shall be liable to punishment*" means that they run the risk of being punished, and not that they shall be punished which depends upon the powers of the Courts constituted to try offenders. The " person " here spoken of is a *natural* as distinguished from a *juridical* person, such as a corporation. "*And not otherwise*" means that no person can be punished for any act which amounts to an offence under the Code otherwise than according to the provisions thereof, except when the same act is made punishable by some local or special law.[24] Of course, the clause could not mean that if a given set of facts constitute an offence both under the Code as well as some local or special law, the offender can only be punished under the Code and not under any other law. The clause is rather intended to direct attention to the forms of punishments prescribed in the Code, which have superseded other forms which were in vogue prior to its enactment. "*Act or omission*" : A mere act or omission, however immoral, is not punishable, unless it is contrary to the provisions of the Code.[25] "*Within the said territories*" refers to the territories defined in the preceding section.

29. Persons subject to the Code.—It has been already remarked (§§ 26-27) that all persons are equally subject to the Code. But while it is so, it must be remembered that the authority of the Code may not reach all persons. As the Code is an Act of the Governor-General in Council, its authority is necessarily limited by his legislative authority. And, as the Governor-General in Council cannot legislate so as to " affect the prerogative of the Crown or the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom," (§ 24) it follows that the act does not, and cannot, affect the established prerogative of the Crown or the common law of England. Now, as according to this common law the King can do no wrong,[1] and, as, by the Constitution of England, his authority is paramount, it follows that the King cannot be proceeded against under the Code, both because

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(17) 13 Geo. III, c. 63, ss. 15, 16 ; 21 Geo. III, c. 70, s. 1 ; 37 Geo. III, c. 142, s. 11 ; 9 & 10 Geo. III, c. 97, s. 3 ; 4 Geo. IV, c. 80, s. 7 ; *see* Government of India Act, 1915, s. 110 (5 & 6 Geo. V, c. 61 ; now *ib.* 1935 (25 & 26 Geo. V, c. 42) s. 306.

(18) 37 Geo. III, c. 142, s. 11 ; 39 & 40 Geo. III, c. 79, s. 3 ; now *see* Government of India Act, 1935, s. 306.

(19) 13 Geo. III, c. 63, ss. 17, 39 ; 37 Geo. III, c. 142, s. 11 ; now *see* Government of India Act, 1935 (25 & 26 Geo. V, c. 42) s. 306.

(20) 11 Will. IV, c. 12 ; 18 Geo. III, c. 63, s. 39 ; 21 Geo. III, c. 70, ss. 4, 5.

(21) 24 Geo. III ; c. 25, ss. 645-8 ; 26 Geo. III, c. 57, ss. 1-28.

(22) 7 Anne, c. 12, 35, ss. 3, 4, 6.

(23) 3 M. H. C. R. (App.) 11 ; *Gokul Mandar* v. *Pudmanand Sing*, 29 C. 707 (715) P.C. ; *Kari Sing*, 40 C. 433.

(24) Commrs.' 2nd Rep., ss. 537, 538 ; *Kari Sing*, 40 C. 433 (439).

(25) *See* s. 33, *infra*.

(1) 1 Black., p. 246.

it does not apply to him as also because there is no Court competent to try him. As Blackstone says; "No suit or action can be brought against the Sovereign even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without any authority to redress; and the sentence of a Court would be contemptible, unless that Court had power to command the execution of it; but who, says Finch, shall command the King? Hence it is likewise that, by the law, the person of the Sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary, for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the Pope, the independence of the Kingdom would be no more; and if such power were vested in any domestic tribunal, there would soon be an end of the Constitution by destroying the free agency of one of the constituent parts of the legislative power."[2]

30. Besides the King, foreign ambassadors, their families, secretaries, messengers, and servants are also not subject to any municipal law. As Blackstone observes; "The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who are not subject to any laws but those of their own country, their actions are not subject to the control of the private law of that State wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made, but an ambassador ought to be independent of every power except that by which he is sent, and in consequence, ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends or makes an ill-use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him or avow himself the accomplice of his crimes."[3] Of course, in order to be exempt, an ambassador must have been sent by a foreign Government. If he is not, the mere fact that he was recognised by His Majesty's Government is insufficient to clothe him with immunity.[4] It is also said that the immunity of ambassadors extends only to such crimes as are *mala prohibita*, and not to those that are *mala in se*, as murder.[5] For a direct attempt against the life of the Sovereign, an ambassador or one of his suite would be directly punishable by the State.[6]

31. The immunities of ambassadors are enjoyed by all diplomatic agents of which the following classes were adopted by the Regulations passed at the Congress of Vienna .—

(1) Ambassadors.

(2) Legates (who are papal ambassadors extraordinarily charged with special missions, primarily representing the Pope as head of the Church, always cardinals, and sent only to States acknowledging the spiritual supremacy of the Pope).

(3) Nuncios (who are ordinary ambassadors and residents, and are never cardinals).

(4) Envoys and Ministers Plenipotentiary.

(5) Ministers accredited to the Sovereign.

(6) *Charges d'affaires*, accredited to the Minister of Foreign Affairs.

"The immunities of the diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and *attaches*, whether civil or military, forming part of the mission, but not personally accredited because

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(2) 1 Black., p. 242; followed *per* Brett, L.J., in *The Parlement Belge*, L. R. 5 P.D. 197 (198).

(3) 1 Black., pp. 253, 254. The Diplomatic Privilege Act, 1708 (7 Anne, c. 21). As to when he may be arrested, *see* Hall's International Law, pp. 168, 169 (3rd Edn.); *Magdelana Steam Navigation Co.* v. *Martin*, (1859) 2 E. & E. 94; *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352.

(4) *Per* Brett, L.J., in *The Parlement Belge*, L. R. 5 P. D. 197 (206).

(5) Kerr on Blackstone, Vol. I, p. 224 (4th Edn.). *See* also Phillimore's International Law, Vol. II, p. 202 (3rd Edn.).

(6) 2 Black., 254; 1 Hale P. C., ss. 96, 99 2 Phil. International Law, p. 202 (3rd Edn.).

of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity.....It is no doubt generally held that they cannot be arrested on a criminal charge and that a civil suit cannot be brought against them without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities or, whether he will reserve the case or action for trial in his own country."[7] As an ambassador's house is the reputed part of his sovereign's realm, it follows that his children partake of the nationality of his father wherever they may be born.[8]

Foreign Sovereigns.

32. As foreign ambassadors are exempt from the Code, so are also foreign sovereigns, and for the same reason. As Marshall, C.J., observed : " The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates, and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. One sovereign being in no respect amenable to another and being bound by the obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."[9] It has, therefore, been held to be in accordance with the laws of nations that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there.[10] Indeed, the exercise of such jurisdiction would be incompatible with the regal dignity, that is to say, with his absolute independence of every superior authority.[11]

Aliens.

33. Aliens are not privileged against the criminal law of a country. All aliens, whether friendly or hostile, may be proceeded against for any crime committed by them. But in respect of acts of war, alien enemies cannot, it would appear, be tried by Criminal Courts, though they may be dealt with by martial law.[12] Troops of a foreign sovereign nation are also said to be *de jure gentium* exempt from the municipal laws of the State through which they are accorded a passage.

Governors and Judges.

34. Besides, the foreign sovereigns and diplomatic agents who are exempt from the operation of criminal law, either by treaty or international comity, there are other high dignitaries of the State who are equally exempt from the jurisdiction of the ordinary tribunals, and they are, therefore, liable to punishment for offences committed by them, but there is no tribunal in the country to punish them. It was thus enacted by the East India Company Act, 1780, " that the Governor-General and Council of Bengal shall not be subject jointly or severally to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any Act or Order or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only and acting as Governor-General in Council."[13] " Provided

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(7) Hall's International Law (3rd Edn.), pp. 174, 175.

(8) *De Geen* v. *Stone*, 22 Ch. D. 243 (254).

(9) *The Exchange* v. *M'Faddon*, 7 Cranch 116 (136) ; *The Parlement Belge*, L. R. 5 P. D. 197 (205) ; *Mighell* v. *The Sultan of Johor*, (1894) 1 Q. B. 149.

(10) *Per* Lord Langdale in *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1 (50).

(11) *The Parlement Belge*, L. R. 5 P. D. 197 (207) ; *Secretary of State* v. *Moment*, 17 C. W. N. 169.

(12) *Hawk*, P.C.C. 17, s. 6.

(13) 21 Geo. III, c. 70, Preamble. *See* Government of India Act, 1915, s. 110 (5 & 6 Geo. V, c. 61), now *ib.* of 1935 (25 & 26 Geo. V, c. 42) s. 306.

also, that nothing herein contained shall extend or be construed to extend to discharge or acquit the said Governor-General and Council jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit or process before any competent Court in this Kingdom, or to give any other authority whatsoever, to their acts, than acts of the same nature and description had by the laws and statutes of this Kingdom before this Act was made."[14] Similar exemptions in favour of the Governors of Madras and Bombay and Members of their Council were made by another Statute passed in 1797.[15] This Act, passed for the better administration of justice at Calcutta, Madras and Bombay, defined the powers of the Supreme Courts,[16] but exempted from their jurisdiction the Governors in Council by the following saving clause: "Nothing in this Act shall extend to subject the persons of the Governor or any of the Council at the respective settlements or the persons of the Recorders of the said Courts to be arrested or imprisoned in any suit, action or proceeding in the said Court; nor shall it be competent for the said Courts within their respective jursidictions to hear or determine or to entertain and exercise jurisdiction in any suit or action against the Governor or any of the Council at the said settlements of Madras and Bombay respectively, for or on account of any act or order of any other act, matter or thing whatsoever counselled, ordered or done by them in their public capacity or acting as Governor in Council." This exemption was re-affirmed in the Government of India Act, 1800, which established the Supreme Courts of Judicature in those places. The exemption of the Chief Justice and Judges of the Supreme (now High) Court is similarly insured by the Regulating Act of 1772, which provided a scheme for the Government of India :—

"S. 17. And it is hereby further enacted and provided that nothing in this Act shall extend to subject the person of the Governor-General or of any of the said council or chief justice and judges respectively for the time being to be arrested or imprisoned upon any action, suit or proceeding in the said Court.[17] But they may be proceeded against in the Court of King's Bench in London."[18]

35. As to these Statutes, it may be observed that they provide for exemptions for acts done by the Governors and their executive councillors in their official capacity. Their exemption to this extent is obviously dictated by high policy, for, if the heads of Government are permitted to be prosecuted for their official acts, how is the government of the country to be carried on? So far, therefore, the officials are immune against their prosecutions in this country. But they are not wholly irresponsible, for the very Acts which create the exemption provide an elaborate procedure for their trial in England. Their exemption is, therefore, only temporary and territorial. Moreover, it does not extend to their private acts unconnected with the discharge of their high functions. It would appear that if a Governor were to commit a murder on the highway, he would not be exempt from trial in this country like any other offender. At any rate, this appears to be the trend of the Regulations on the subject.

Indian Princes.

36. Indian feudatory princes and princes in political alliance with Government are not British subjects, nor are their territories British territory.[19] They are, therefore, exempt from the operation of the Penal Code.[20] And, as, being heads of their own State, they cannot be tried by the tribunals of their creation, it follows that in their case there is no judicial trial at all. Offences committed by them do not, however, as a rule, go unpunished, though the procedure

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(14) 21 Geo. III, c 70, Preamble. *See* Government of India Act, 1915, s. 110 (5 & 6 Geo. V, c. 61) s. 4, *ib.* of 1935 (25 & 26 Geo. V, c. 42) s. 306.

(15) 37 Geo. III, c. 142, s. 14, cl. 2, 3, 4. *See* now Government of India Act, 1935 (25 & 26 Geo. V, c. 42) s 306.

(16) Established by 13 Geo. III, c. 63.

(17) The East India Company Act (commonly called the Regulating Act), 1772 (13 Geo. III, c. 63) s. 17.

(18) *Ib.*, ss. 39, 40, 41. As to the procedure against Indian offenders in England, *see* 24 Geo. III, c. 25, ss. 64-85; and 26 Geo. III, c. 57, ss. 1-28.

(19) *Mhd. Yusufuddin* v. *Q.-E.*, 25 C. 20, P. C.

(20) S. 1, *ante*.

adopted for their trial is not that provided by the Code of Criminal Procedure,[21] nor is the evidence adduced sifted in the light of the Indian Evidence Act.[22] The action of the Government in bringing them to justice is an act of State,[23] against which there is no appeal to judicial tribunals, and the sentence passed on them need not conform to the description of punishments provided in the Code.[24] The usual practice adopted by Government in cases of alleged crime is to appoint a commission of enquiry which takes such evidence as is forthcoming, draws up its report and submits it to Government for "the information of its mind."[25] The Government then passes a final order, and in doing so, it may or may not adopt the recommendation or findings of the report. If the person affected by the order is aggrieved, his only remedy is by a memorial to the higher political authority, before whom he is entitled to no audience by counsel. He has no remedy in the Civil Court against his conviction, if unjust; for, this being an Act of State the Municipal Courts have no jurisdiction to enquire into or judge of its propriety or correctness.

37. Juridical Persons.—The "person" here spoken of, of course, means and includes a natural person, though the definition of this word as given in section 11 "includes any company or association or body of persons whether incorporated or not." But inasmuch as *mens rea* is the true test of criminal responsibility, it is apprehended that there can be no crime, unless there is the presence of criminal intention. The person here spoken of is, therefore, used in a narrower sense than in section 11 where the term is defined.

38. "And not otherwise."—The object of this clause has already been explained before (§§ 26-28). The Code being an exhaustive enactment of pains and penalties, all transgressions of its provisions shall only be punishable in conformity with its rules.[1] No person can claim that he shall be judged according to the English Law and not by the Penal Code.[2] If, for example, a person commits adultery, which is a crime in the Code but no offence in England, he cannot claim exemption from punishment on the ground that he is only subject to the English law and ought to be tried as such.[3] So a person who utters a libel, cannot have his tongue pulled out by its root, and while "a tooth for a tooth, and an eye for an eye" may be the dictate of a religious code, it finds no place in the Code. Non-compliance with certain social rituals or non-compliance with the rules of the so-called code of honour was in certain cases regarded as not only an offence against the society but also against the State, and was accordingly visited by condign punishment. All breaches of social etiquette, caste or custom are now no longer penal and they are, therefore, now no longer punishable merely because they were punishable before. The Penal Code is now, therefore, not only the penal but also a moral Code, and by defining transgressions, it necessarily declares what it does not regard as culpable.

39. "Within the said territories."—It is to be observed that the Code only provides for the punishment of offences committed within the territories "which are or may become vested in His Majesty by the Statute 21 and 22 Victoria, Chapter 106."[4] If, therefore, a person commits an offence under the Code but beyond the limits of the said territories, he cannot be proceeded against under the Code, except so far as is otherwise provided by sections 3, 4 and 108-A. For example, a subject of a Native State, who is guilty of receiving stolen property within the Native State, cannot be punished under the Code.[5]

40. The question what area is comprised "within the said territories" must depend on what is, at any time, vested in His Majesty by virtue of the Statute 21 and 22 Victoria, Chapter 106 (§ 8). Besides the territories so vested, international

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(21) Act V of 1898.
(22) Act I of 1872.
(23) *In re Maharaja Madhava Singh*, 6 Bom. L. R. 763, P. C.
(24) *Per* Lord Davey, in *ib.*, p. 763.
(25) *Ib.*, p. 763.
(1) *Per* Lord Devay in *Gokul Mandar* v. *Pudmanund Singh*, (1902) 29 C. 707 (715) P. C.
(2) *Kastya*, 8 B. H. C. R. (Cr.) 63; *Gopal Naidu*, 46 M. 605, F. B.
(3) *Kari Singh*, 49 C. 433.
(4) S. 1, *ante*, *see* § 8.
(5) *Gunjra*, 48 A. 687.

law assigns to a State territorial jurisdiction in respect of acts done within a marine league or three geographical miles from low-water mark of the shore.[6] In other words, the *territories*, strictly speaking, of a State include not only the compass of land in the ordinary acceptation of the term, belonging to such State, but also that portion of the sea lying along and washing its coast which is commonly called its maritime territory.[7] Over all this territory the ordinary courts of the country are empowered to exercise jurisdiction in England with the consent of a Secretary of State, and in a colony with the consent of a Governor.[8] This jurisdiction is conferred on the State for its defence and security,[9] to prevent smuggling and poaching on its shore fisheries, and to protect its coastline. And the Courts are empowered to try offences committed within that area as it leads to the effectual trial of offenders on and near shore[10] in accordance with the provisions of the Territorial Waters Jurisdiction Act, 1878, the principal clauses of which were set out in the previous edition of this work, (*see* § 26, 4th Ed.)

Offences on High Seas.

41. This Code has, then, no application to offences committed on the high seas, and an offence so committed would, therefore, have to be tried under the English law.[11] If, for example, a person commits adultery within three miles of the shore, he may be indicted under the Penal Code, but if he commits it beyond, he will escape scotfree, for adultery is not a crime under the English law. So where the accused was charged for an unnatural offence committed on board an East India ship lying in St. Katherine's Docks, he was held to have been rightly convicted though he was a native of Bagdad where his act would not have amounted to an offence.[12] So in one case, the prisoners Elmstone and Whitwell, who were the Brokers, resident in Bombay, of a British ship named *Aurora*, conspired in Bombay with Harriot, her Master, and one Marks, her carpenter, that it should be destroyed before it reached Liverpool, the object of the conspirators being to defraud the underwriters, upon certain cargo shipped by them. The ship sailed from Bombay on the 11th of June 1870, and when it had proceeded about 50 miles off the harbour, Marks set on fire, and in collusion with the Master it was destroyed. The four co-conspirators were arrested and committed for trial in Bombay, and the question was whether their offence came under the Penal Code[13] or the English law, and the Full Bench held that while the *procedure* applicable was Indian, the substantive law applicable to their case was the English law.[14] The same view was taken by another Full Bench of the Calcutta High Court in a case in which the prisoner Thompson had grievously hurt one Ned on board the British ship *Scindia* upon the high seas.[15]

42. Indeed, the Governor-General in Council has no power to legislate for offences committed on the high seas outside the territorial limits of British India, his jurisdiction extending only to the high seas within three miles off its coasts.[16] So where certain villagers sallied out in boats and maliciously removed a number of fishing stakes lawfully fixed in the sea, by the residents of a neighbouring village, within three miles of the shore, it was held that they were rightly convicted of mischief under the Code.[17] This precedent is, however, no authority for the view that the subject has no rights whatever over this area. It is no doubt reckoned

(6) *Rolet* v R., L. R. 1 Pr. C. Ca. 198; *Q.* v. *Anderson*, L. R. 1 Cr. Ca. 161; *Q.* v. *Musson*, 8 E. & B. 900; *Embleton* v. *Brown*, 30 L. J. M. C. 1; *Kastya*, (1871) 8 B. H. C. R. (Cr.) 63; *Potestatem terroe finiri ubi finitur armorum Vis* [*De Dominio Maris*, chap. II; *R.* v. *Elmstone*, 7 B. H. C. R. (Cr.) 89].

(7) *Per* Kemball, J., in *Kastya*, 8 B. H. C. R. (Cr.) 63.

(8) The Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73), Preamble.

(9) *Ib.*

(10) Admiralty Offences Act (12 & 13 Vict., c. 96), extended to India by the Admiralty Jurisdiction Act (23 & 24 Vict., c. 88).

(11) 12 & 13 Vict., c. 96, s. 2; *Reg.* v. *Elmstone*, 7 B. H. C. R. (Cr.) 86; *Reg.* v. *Thompson*, 1 B. L. R. (Cr. O. J.) 1; *Kastya*, 8 B. H. C. R. (Cr.) 63.

(12) *Esop*, 7 C. & P. 456; *Chill*, 8 B. H. C. R. 92; *Watkins*, 2 M. H. C. R. 444.

(13) S. 437; and ss. 56 & 109.

(14) *R.* v. *Elmstone*, 8 B. H. C. R. 89; *Q.* v. *Thompson*, 1 B. L. R. (Cr.) 1.

(15) *Q.* v. *Thompson*, 1 B. L. R. (Cr.) 1; on the strength of 12 & 13 Vict., c. 96, s. 1.

(16) *Kastya*, 8 B. H. C. R. (Cr.) 63.

(17) *Ib.*

amongst the *jura regalia* of the Crown, so that no one can acquire thereon any right by mere occupancy.[18] But it is nevertheless a part of the *res publica* over which all subjects have a common right of enjoyment.

Men of War.

43. But as regards a ship of war on the high seas, all nations have agreed to certain limitations of their absolute territorial jurisdiction. "She constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and dignity. The implied license under which such a vessel enters a friendly port may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territories she claims the rights of hospitality."[19] This immunity which is undoubtedly enjoyed by men of war has been, by international comity, extended to troopships,[20] and indeed, to all ships of the State. "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty."[21] And it is on this ground that the exemption of warships has been justified: "The exemption of a public ship of war of a foreign government from the jurisdiction of our Courts depends rather upon its public than upon its military character."[22] But since the immunity rests upon its public character, it cannot be claimed if it is used for trading purposes. And if it is substantially used for this purpose,[23] she cannot claim immunity; but then, on the other hand, if she is declared by a sovereign authority by the usual means to be a ship of war or a ship of the State, the Court cannot inquire by contentious testimony whether that declaration is or is not correct. A ship may, for example, be used for carrying the mails, which is a national purpose. If, therefore, she also carries passengers and freight, she does on that account forfeit her general immunity.

44. As, however, the question of jurisdiction depends upon the place of commission of the offence, it may be sometimes necessary to inquire into that question, and the Courts are so far able to make an inquiry, for otherwise the Court is not in a position to say whether it has or has not jurisdiction.[24]

Airships and Aeroplanes.

45. On the principle, *cujus est solum ejus est usque ad cœlum et ad inferos*,[25] the column of air resting on the earth belongs to him who is the owner of the soil. Consequently, offences committed in airships and other aerial craft would be ordinarily subject to the law of that country; though it is possible that, by treaty or otherwise, some other arrangement might be come to between the nations for determining the *venue* of the offence and the law and procedure applicable to it.

Punishment of offences committed beyond, but which by law may be tried within the territories.

3. Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories.

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(18) Ins. II. 1, fr. 1, 2, 3; *Blundell* v. *Caterall*, 5 B. & Ald. 268; *Bluest* v. *Pipon*, 1 Knapp. P. C. C. 60; *Malcomsan* v. *O'Dea*, 10 H. L. C. 593, *Sir H. Constable's case*, 5 Rep., 105 (*b*).

(19) *Per* Marshall, C.J., in *The Exchange*, 7 Cranch, 116; cited with approval *per* Brett. L. J., in *The Parlement Belge*, L. R., 5 P. D. 197 (209); *The Prince Fredrick*, 2 Dod. 451 (466); *De Haber* v. *The Queen of Portugal*, 17 Q. B. 171.

(20) *The Athol*, 1 Wm. Rob. 374.

(21) *Briggs* v. *The Lightships*, 11 Allen 157.

(22) *The Thomas Scott*, 10 L. T. (N. S.) 726; *The Parlement Belge*, L. R. 5 P. D. 197 (213).

(23) *The Parlement Belge*, L. R. 5 P. D. 197 (219).

(24) *The Parlement Belge*, L. R. 5 P. D. 197 (220); *Motee Chand* v. *Mohendranath*, 9 W. R. (Cr.) 29.

(25) "Whoever is the owner of the soil, it is his even to the firmament, and to the centre of the earth."

46. Analogous Law.—The "any law" referred to in the section would now be s. 188 of the Code of Criminal Procedure.[1] Now, as the definition of offence in the Procedure Code is "any act or omission made punishable by any law for the time being in force," including "any act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act, 1871,"[2] it follows that a Native Indian subject may be prosecuted in British India for any thing done in foreign lands, if it is an offence under any Indian enactment, though it may be an act of virtue in the place of commission. The clause as to sanction is his only safeguard, but it is a safeguard against which he has evidently no appeal. If, for instance, a Native Indian vindicates himself by fighting a duel in France, his conduct would be gentlemanly in the place of his exile, but it will be a crime in India, for which the tribunals of his country may hang him. So again, if a Native Indian commits adultery in England, he commits no crime, for adultery is no crime there, but he may be prosecuted for his act in India, because adultery is a crime in this country. And so, by parity of reasoning, the same liability attaches to a European British subject or a servant of the King in respect of acts committed in the Native States.[3]

47. It may be observed that the generality of the wording of this section would seem to indicate that it extends even to offences committed on the high seas. But, if so, the section would appear to be so far *ultra vires*, for the Indian Legislature does not possess power to legislate for the high seas (§§ 41-42). Indeed, it may be gravely doubted, if it has any power to legislate for the trial and punishment in respect of offences committed in other territories and jurisdictions governed and administered by, and equally representing, the Crown and Government of England.[4]

Historical Retrospect.

48. Anyhow, the course of legislation on the subject is well worth recapitulation here. Leaving alone, for the present, the English Statutes on the subject, the first Act dealing with offences committed beyond British India was the Offenders in Foreign States Act, 1849[5], which purported to consolidate and supersede the several Regulations[6] which, more or less, provided for the punishment of offences committed beyond British India. This Act made "all subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service, and for six months afterwards, and also all persons who shall have dwelt for six months within the British territories under the Government of the East India Company" amenable to Indian law for all offences committed by them within the territory of any foreign Prince or State.[7] Section 1 of this Act which had repealed all the previous Regulations on the subject was itself, however, repealed by the Repealing Act of 1870.[8] Two years later the Foreign Jurisdiction and Extradition Act[9] was passed which again made provision for the punishment of offences committed beyond the territorial jurisdiction of the Government. But the preamble to the Act referred only to the "Native States," in which term, however, such a place as Cyprus was held to be included.[10] This Act was superseded by a similar Act passed in 1879[11], in which Chapter III[12] dealt with the apprehension and trial of such offenders. These two Acts made all "British subjects" equally liable to prosecution for offences committed by them beyond British India. In 1882, the Code of Criminal Procedure was passed and the two sections in the Foreign Jurisdiction Act dealing with foreign offences were transposed to this Code, where they became its sections 188 and 189,[13] and the corresponding chapter in the former Act was by the same piece of legislation repealed. These provisions of the Code have been reproduc-

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(1) Act V of 1898.
(2) *Ib.*, s. 4 (*o*).
(3) *Chill*, 8 B. H. C. R. 92.
(4) But see *Po Thaung*, 5 L. B. R. 221, 12 Cr. L. J. 198.
(5) Act I of 1849.
(6) Reg. V of 1809; Reg. VIII of 1813; Reg. I of 1822, s. 1; Reg. IX of 1822; Reg. VIII of 1829 of the Bengal Code; Reg. II of 1829; Reg. XII of 1832 of the Madras Code; Reg. II of 1827, s. 4 of the Bombay Code.
(7) S. 2, Act I of 1849.
(8) Act XIV of 1870.
(9) Act XI of 1872.
(10) *Garmukh Singh*, 2 A. 218, F. B.
(11) Act XXI of 1879.
(12) Ss. 9-10.
(13) Act X of 1882.

ed in the Consolidating Act of 1898[14] and in consonance with the alteration thus effected the Foreign Jurisdiction and Extradition Act of 1879 was re-christened the Extradition Act, and it was again revised and re-enacted in 1903.[15]

49. So far, then, as regards Indian enactments, the only provision now in force is that embodied in the Code of Criminal Procedure, which has been set out at length elsewhere (§ 46).

50. Adverting to the English Statutes on the subject, there is nothing therein to affect British Indian subjects. But so far as they relate to the trial of British subjects, they are instructive, and contrast strangely with the Indian enactment. In England the authority of the Parliament to legislate for persons outside the United Kingdom appears to be conceded.[16] "That is a rule based on international law by which one sovereign power is bound to respect the subjects and rights of all other sovereign powers outside its own territory."[17] But the Parliament is most reluctant to legislate with respect to offences committed by British subjects in foreign territory.[18] It has, however, provided for punishment only in the following cases, namely: (*i*) offences committed at sea,[19] (*ii*) treason,[20] (*iii*) murder and manslaughter,[21] (*iv*) slave trade offences,[22] (*v*) offences against the Explosive Substance Act, 1882,[23] (*vi*) offences such as forgery and perjury, committed abroad with reference to proceedings in some British Court,[24] (*vii*) bigamy,[25] and (*viii*) offences against certain provisions of the Foreign Enlistment Act, 1870.[1] It may be added that there is no provision to bring foreign offenders to trial in British India, though they may be extradited to their own country.

51. Principle.—This section merely enacts for the uniformity of trial of offences committed beyond the limits of British India, for which he is liable to be tried in British India, in accordance with any law passed by the Governor-General in Council. The section does not authorize such a trial, nor does it specify the offences that are so triable. It merely enacts that, if a person is to be tried for such offences at all, it shall be under the Code. The question whether it is within the competency of a State to punish offenders for offences not committed within its territorial jurisdiction is one upon which there is some difference of opinion. On the one hand, it is asserted that since, subject to treaty or express compact, the judicial power of every State is co-extensive with its legislative power,[2] no State can punish acts committed beyond its territorial jurisdiction. So Wheaton says: "By the common law of England which has been adopted in this respect by the United States, criminal offences are considered as altogether local, and are justifiable only by the Courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States, and even in these two countries, it has been frequently disregarded by the positive legislation of each in the enactment of Statutes, under which offences committed by a subject or citizen within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the person owes allegiance, and whose laws he is bound to

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(14) Act V of 1898.
(15) Act XI of 1903, see the changes since brought about by repealing Act of 1914 and the Amending Act of 1930.
(16) *See* Westlake's International Law, 127; *per* Russell, C.J., in *R.* v. *Jameson*, (1896) 2 Q. B. 425 (430).
(17) *Ib.* 430.
(18) Ilbert's Government of India, ch. VII, p. 407.
(19) 4 & 5 Will. IV, c. 36, s. 22; 24 & 25 Vict., cc. 94 & 97; 57 & 58 Vict., c. 60, s. 684. As to Colonies, *see* 12 & 13 Vict., c. 96.
(20) 35 Hen. VIII, c. 2 (Act of 1543), s. 4.
(21) 24 & 25 Vict., c. 100, s. 9; 2 Steph. History of Criminal Law, p. 2.
(22) 5 Geo. IV, c. 114, ss. 9, 10.
(23) 46 & 47 Vict., c. 3.
(24) 52 & 53 Vict., c. 10, s. 9.
(25) 24 & 25 Vict., c. 100.
(1) 33 & 34 Vict., c. 90.
(2) Wheaton's International Law, ss. 111-113; Hardcastle on Statute Law (2nd Edn.), ch. VII; *per* Russell, C.J., in *R.* v. *Jameson*, (1896) 2 Q. B. 425 (430). In 1839 the question was referred to eminent jurists by the Government of India, and they recorded it as their opinion that the Legislative Council of India had power to legislate for offences committed on the high seas, but later on a different view was given by the law advisers of the Crown. *See* Forsyth's Cases and Opinions, pp. 17, 32; Ilbert's Govt. of India, pp. 442, 443.

obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favour of the jurisdiction of the Courts of the offender's country."[3]

52. Meaning of Words.—"*By any law*," that is, any *other* law. Such laws have been set out before (§ 46). "*For any act*," which would include also illegal omissions.[4] (§ 46).

53. Legislative Powers of the Indian Government.—In the preceding discussion some reference has been made to the ex-territorial power of legislation of the British Parliament. The ex-territorial legislative powers of the Government of India may be here considered. "The Government of India is the creation of Statute. Its powers are derived wholly from the Acts of Parliament and are limited with reference to persons, places, and subject-matter by the Acts of Parliament by which they are conferred."[5] As it has been shown (§§ 24, 25) that the latter wields such a power, the question is narrowed down to this—whether it has delegated its power to the Indian Legislature. At the time of the enactment of the Code, the Indian Legislature possessed the powers conferred on it by the Government of India Act, 1833,[6] which empowered it to make laws for all territories of the East India Company "and for all places and things whatsoever within and throughout the whole and every part of the said territories, and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company."[7] The question whether this section enabled the Indian Legislature to legislate for the trial and punishment of offences committed beyond its territories was referred by it to four eminent English jurists, who recorded their opinion in the affirmative,[8] but they refrained from mentioning from what particular words in the section that power was deducible. As it is, it was not long before the law advisers of the Crown recorded the contrary opinion.[9]

54. This section was, however, superseded by the Act of 1861,[10] which after the usual clause gave the Indian Legislature power to legislate "for all places and things, whatever, within the said territories, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty."[11] Another Act passed four years later professed to enlarge its powers of legislation "by authorizing him (*i.e.*, the Governor-General in Council) to make laws and regulations for all British subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise."[12] In 1869, another Act empowered the Indian Legislature to make laws and regulations for all persons, being Native Indian subjects of Her Majesty, without and beyond, as well as within the Indian territories, under the dominions of Her Majesty."[13]

55. As to these Acts Sir Courtenay Ilbert remarks: "The language used in the Act of 1861, if construed literally, would seem wide enough to include the territories of any friendly State, whether in Europe or elsewhere. But some limitation must be placed upon it, and it may perhaps be construed as including States having treaty relations with the Crown through the Government of India, whether subject to the suzerainty of Her Majesty or not. However this may be, the power of the Indian Legislature to make laws binding on persons, other than Natives of British India, outside British India and the Native States of India, seems, under existing circumstances, to be open to question."[14]

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(3) Wheaton's International Law, s. 113, *et seqq*.
(4) S. 32, *post*.
(5) Ilbert's Govt. of India, ch. VII, p. 442.
(6) 3 & 4 Will. IV, c. 85.
(7) *Ib*., s. 43.
(8) *See* opinion cited *in extenso* in Ilbert's Govt. of India, ch. VII, pp. 442, 443.
(9) Forsyth's Cases and Opinions on Constitutional Law, pp. 17, 32
(10) 24 & 25 Vict., c. 67, re-enacted and codified as Government of India Act, 1915, s. 65 (1) (*a*) (5 & 6 Geo. V, c. 61), now see *ib*. of 1935.
(11) 24 & 25 Vict., c. 67, s. 22 (explained by 55 & 56 Vict., c. 14, s. 2) now Government of India Act, 1935, (25 & 26 Geo. V, c. 42).
(12) S. 1, 28 & 29 Vict., c. 15.
(13) S. 1, Indian Councils Act, I of 1869 (32 & 33 Vict., c. 98).
(14) Ilbert's Govt. of India, ch. VII, p. 445.

56. All the previous statutes on the subject were consolidated and re-enacted as the Government of India Act, 1915, which is now repealed by Government of India Act, 1935.[15]

4. The provisions of this Code apply also to any offence committed by—

Extension of Code to extra-territorial offences.

(1) any Native Indian subject of Her Majesty in any place without and beyond British India ;

(2) any other British subject within the territories of any Native Prince or Chief in India ;

(3) any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India.

Explanation.—**In this section the word "offence" includes every act committed outside British India which, if committed in British India, would be punishable under this Code.**

Illustrations.

(*a*) *A*, a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

(*b*) *B*, a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(*c*) *C*, a foreigner, who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.

(*d*) *D*, a British subject living in Indore, instigates *E* to commit a murder in Bombay. *D* is guilty of abetting murder.

[***Servant of the Queen***—S. 14, *post*. ***British India***—S. 15, *post*.]

57. Analogous Law.—This section was substituted by the amending Act, 1898,[16] but in view of the last section and similar provisions of s. 188 of the Criminal Procedure Code, it appears to be redundant.

58. The combined effect of these sections is as follows :—

(1) If an offence is committed by a British Indian subject in British India, it is triable under the Penal Code.

(2) If an offence is committed

(*a*) by any native Indian subject of His Majesty in any place without and beyond British India,[17] or

(*b*) (*i*) by any other British subject, or (*ii*) by any other servant of the King, whether a British subject or not, within the territories of any Native Prince or Chief in India, it is triable under the Penal Code. (s. 4, cl. 1-3).

(3) If an offence is committed beyond the limits of the said territories, it may be tried in accordance with this Code, as if such offence had been committed within the said territories. But the person to be thus tried for an act must be liable "by any law passed by the Governor-General of India in Council."[18] These words apparently restrict the operation to the cases specified in the Extradition Act,[19] and ss. 186 and 188 of the Criminal Procedure Code. (Effect of s. 3).

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(15) Government of India Act, 1915 (5 & 6 Geo. V, c. 61) now repealed by *ib.*, 1935 (25 & 26 Geo. V, c. 42).

(16) The original s. 4 was repealed by s. 2 of the Indian Penal Code Amendment Act 1898 (IV of 1898), and the section printed in the text substituted for it. For Statement of Objects and Reasons of the Bill which became Act IV of 1898, and for Report of Select Committee, *see* Gazette of India, 1897, Pt. V, p. 183, *ibid.*, Pt. V, p. 13.

(17) *Garmukh Singh*, 2 A. 218 F. B.

(18) *Essub Ibrahim*, (1845) Perry's Oriental Cases, 577 ; *De Sylva*, (1909) 11 Bom. L. R. 221.

(19) Act XI of 1903, an Act consolidating the Foreign Jurisdiction Act and the Extradition Act of 1879, with subsequent changes brought about by the Repealing Act of 1914 (Act X of 1914) and the Amending Act of 1930 (Act VIII of 1930).

(4) If any offence is committed by a British subject in foreign territories, he is triable by the British Courts.[20] But an offence committed by a foreigner in a foreign territory cannot, on the principles of International law, be tried in British India. It is an accepted doctrine that the law of the country where the crime is committed governs the nature of the offence and the Courts of that country alone have jurisdiction to try the offender.[21]

(5) Lastly, if an offence is committed

(*i*) by a foreigner in British India,[22] or

(*ii*) by a foreigner in a foreign territory, but he continues the criminal act in British India,

can it be said that the British Courts acquire jurisdiction to try him? It is submitted that they do acquire such jurisdiction.

59. The Bombay High Court, in one case,[23] held the view that, if a person stole certain property in a foreign country, and subsequently disposed it of in British India, the Courts in the latter country had no jurisdiction to punish for the disposal of the stolen property, since it was merely an accessory to the main offence not punishable in British India. This view is obviously unsound and was dissented from in other cases,[24] and has since been overruled by the Legislature by the amendment of s. 410.[25] There are, however, certain offences, such as murder, piracy, or promotion of revolt which the laws of all nations regard as far too heinous to escape punishment in the country where they are committed. If the law were otherwise it might imperil the peace of states; but the comity of nations draws a line between a direct excitement of revolt and an agitation for political reform, though it may result in a revolt.

60. Form of Charge.—In all criminal cases in which it is necessary to frame a charge, it should describe the place of commission of the offence in such a manner as to shew whether it is within or beyond the limits of British India. And where the Court would not have jurisdiction but for the special circumstances here mentioned, the charge should state them. A charge, for instance, in the case of a European British subject, or a servant of His Majesty, should be worded thus :—

(1) "That you, being a British subject (*or* a servant, of His Majesty the King-Emperor on or about the day of , at , within the dominions of did, etc."

If the offence was committed on the high seas, state—

"(2) That you, on or about day of then being a British subject (*omit these words if the accused is a foreigner*) on board the British ship on the high seas, did and thereby committed an offence punishable, etc."

If the accused be a Native Indian subject, then substitute those words for "British subject" in the first form.

61. Meaning of Words.—The term "*any native Indian subject*" means "natives of British India being British subjects." The subjects must obviously be so *de jure* and not *de facto*.[1] "*British India*" for the meaning of which *see* § 11, *supra* and s. 15, *post*. "*Other British subjects*" means approximately "European British subjects."[2] (§§ 63-64) "*Any servant of the Queen,*" whether British, Native Indian or foreigner. The term is defined in S. 14, *post*.

62. A Native Indian Subject.—The term "Native Indian" is but of recent origin. It is defined in the Parliamentary Statute of 1870, though for the limited purpose of that Statute only, as "any person born and domiciled within the dominions of Her Majesty in India, or parents habitually resident in India and not established there for temporary purposes only."[3] This definition has since been adopted

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(20) *Bande Ali*, (1927) 621.

(21) *Anandgir*, 7 S.L.R. 128, 24 I.C. 599; *Kishen Koer*, P. R. No. 20 of 1878; *Roda*, P.R. No. 30 of 1889; *Baladeva*, 28 A. 372; *Gokaldas Amarsee*, (1933) S. 333; Story's Conflict of Laws, § 23, *Pirtal*, 10 B. H. C. R. 356; *Nawabji*, (1881) P.R. No. 37.

(22) *Wheeler*, (E.C.D.) (1929) S. 161; S. 2, *ante* comm.

(23) *Moorga*, 5 B. 338 F. B.

(24) *Shankar*, 6 C. 307; *Lahya*, 1 B. 50.

(25) Act VIII of 1882.

(1) *Fakir*, (1885) P. R. No. 1 of 1884.

(2) Ilbert's Govt. of India, ch. VII, p. 447.

(3) 33 & 34 Vict., c. 3, s. 6, cl. 3.

as a fair working definition in later Acts of Parliament, though out of deference to Indian sentiments the word "native" has been omitted from them.[4] It would be noticed that the definition does not require that the persons born should be legitimate issue, though in the Criminal Procedure Code, where the term "European British subject" is described, a child or grand-child of a European British subject, to be so classed, is required to be by legitimate descent.[5] Again, under the Statute, a person can only be a native Indian subject, if he is born of parents, *i.e.*, "both the parents" and not only one of them, habitually resident in India. The term "habitually resident in India" implies that the parents have not only a fixed place of abode in British India, but that they frequently resort to it for the purpose of residence. It does not exclude the existence of a second home, but it does imply that the primary and principal home of such persons is in British India.[6] This cannot be said of persons in the civil or military service of Government, who live here for temporary purposes only. The same thing might be said of missionaries, professional and commercial men, whose progeny would not then be natives of India, within the meaning of this term, though their legitimate issue would fall under that category.

63. British Subjects.—The term "other British subject" approximately means a European British subject, though, in older Acts[7] it applied to Indian British subjects as well. There is, however, no legal authority in support of its narrower interpretation, (meaning a European British subject), but it has become so established by current usage. And in order to give effect to this interpretation, the Legislature subsequently to those Acts coined a new phrase "European British subjects," which was defined in the Codes of Criminal Procedure of 1882[8] and 1898.[9] But the phrase itself already had passed into legal vocabulary in 1870 when an Act was passed to define the liability of such persons to the High Courts of Madras and Bombay.[10] But while the term "European British subject" may be a fair working equivalent for the older "British subject," it is by no means synonymous with it. And, moreover, the new phrase suffers so much from vagueness and redundancy that even if it be regarded as the definition of the older term it does not carry sense much farther. As Sir Courtenay Ilbert remarks: "This definition is open to much criticism, and obviously errs both by way of redundancy and by way of deficiency. It can hardly be treated as a precise equivalent of the term 'British subject' in its older sense, although it is intended to have approximately the same meaning. If the term 'British subject' in the Act of 1865[11] were to be construed as equivalent to 'European British subject' in the Indian Code of Criminal Procedure, there would appear to be no power under the existing statutory enactments for the Indian Legislature to make laws, say, for a native of Ceylon in the territories of the Nizam (being neither a European British subject nor a native of India). But the language of the Act of 1865[12] can hardly be construed in the light of an artificial definition which was invented at a subsequent date. And even if the expression is used in a restricted sense, probably the most reasonable construction to put on it is that it includes all British subjects except natives of India."[13]

European British subject.

64. The amenability of a European British subject to this Code depends upon (*a*) whether he was domiciled in this country atthe time of the offence, (*b*) the nature of the offence committed by

(4) *Cf.* S. 99, Government of India Act, 1915, 5 & 6 Geo. V, c. 61) now repealed by the present Government of India Act (25 Geo. V., c. 42).

(5) S. 4, Cr. P. C., as amended by Act XII of 1923, s. 2.

(6) *Order* v. *Skinner*, 3 A. 91 (101), P. C.; similarly held in *Morris* v. *Baumgarten*, *Bourke*, 128.

(7) *See* Act I of 1849; The Government of India Act, 1865 (28 Vict., c. 17) s. 1; Indian Councils Act, 1869 (32 & 33 Vict., c. 98) s. 1.

(8) S. 4, Act X of 1882.

(9) S. 4, Act V of 1898.

(10) Act XXII of 1870, Preamble.

(11) The Government of India Act, 1865, 28 Vict., c. 17.

(12) The words in the brackets are our own.

(13) Govt. of India, pp. 447, 448.

him, and (*c*) the mode of trial to which he might be subject. It is now settled that all persons residing in British India, irrespective of nationality, are liable for all offences punishable under this Code.

65. **Servants of the Queen.**—Section 14 defines this term. The legislative authority of the Government of India is expressly declared to extend to "all servants of the Government of India within the dominions of Princes and States in alliance with His Majesty."[14] Servants of the King are not all necessarily public servants—a class defined in section 21, nor are all public servants necessarily servants of the King. The liability of the servants of the King to punishment under the Indian Code is a matter of discipline and administrative necessity. But while it is no doubt so, it does not confer on a Court in British India any jurisdiction to try him for an offence committed in a Native State; the procedure then for bringing him to trial is that regulated by the Code of Criminal Procedure,[15] subject to which alone he can be brought to trial."[16]

66. **Jurisdiction and Procedure.**—As regards procedure, offences committed in British India present no difficulties. They are normal cases, for which the procedure prescribed is that contained in the Procedure Code. But offences committed outside British India require notice, for in respect of them the procedure applicable is neither uniform not in every case identical. Now, offences committed outside British India may be committed in (*i*) a part of British territory *outside* British India, or (*ii*) on the high seas, or (*iii*) in a Native State, or (*iv*) in a foreign State. As regards offences committed by a person in a British territory outside British India, the general rule in the case of a British subject, whether European or Indian, is that he may be tried on the spot in accordance with the local laws of the country. And, if he has, in the meantime, quitted the jurisdiction of the State, he may be either proceeded against under the Fugitive Offenders Act[17] or the Indian Extradition Act.[18]

67. **Ex-territorial Jurisdiction.**—The ex-territorial jurisdiction of the Indian Courts must, of necessity, be regulated by an Act of Parliament, for since the powers of the Indian Legislature are circumscribed by the Charter of its creation (§ 53), it cannot legislate for territories beyond the ordinary jurisdiction of the Governor-General in Council. Now, as regards the Indian Courts, their powers over British subjects as well as servants have always extended to offences committed in the Native States. Thus it was provided as follows: "And be it further enacted that all His Majesty's subjects, as well as servants of the said United Company as others, shall be or hereby declared to be amenable to all Courts of Justice, both in India and Great Britain of competent jurisdiction to try offences committed in India, for all acts, injuries, wrongs, oppressions, trespasses, misdemeanours, offences, and crimes whatever, by them or any of them done or to be done or committed in any of the lands or territories of any Native Prince or State, or against their persons or properties or the persons or properties of any of their subjects or people, in the same manner, as if the same had been done or committed within the territories directly subject to and under the British Government in India.[19] So the Charter of the Supreme Court empowered them to take cognizance of all treasons, murders, crimes, extortions, misdemeanours, trespasses, wrongs, and oppressions committed by any of Her Majesty's subjects in any of the territories subject to or dependent upon the Government of Bombay, or in the territories of Native Princes or States in alliance with the Government of Bombay.[20] This power was transferred to the High Courts on their constitution.[21] But this is a power which can be exercised only by the Chartered High Courts. It cannot be delegated to any other Court, *e.g.*, the Court of a Judicial Commissioner, though it may, in other matters, possess and exercise co-ordinate

(14) 24 & 25 Vict., c. 67, s. 22; now Government of India Act, 1935, (25 & 26 Geo. V, c. 42).
(15) *Natwarai*, 16 B. 178.
(16) S. 188.
(17) The view taken in *Daya Bhima*, 13 B. 147, has been overruled by amendment of S. 188 of the Cr. P. C. (V of 1898).
(18) Act XV of 1903.
(19) S. 4, 33 Geo. III, c. 52, s. 67.
(20) S. 44.
(21) *Chill*, 8 B. H. C. R. 92; *Watkins*, 2 M. H. C. R. 444.

jurisdiction.[22] If such a power is delegated by Government, it will be *ultra vires*, because the Government of India is only empowered[23] to authorize the High Courts established by Royal Charter[24] to try Christian subjects residing in Native States.[25]

68. Therefore, as regards European British subjects and servants of the King, the High Courts possess, by their Charter, jurisdicton to try them for offences committed outside British India in the territories of Native Princes in alliance with His Majesty. And as they have the jurisdiction, it is no defence for the accused that the offence in respect of which he is being proceeded against was not a crime in the State where he had committed it.[1] And this jurisdiction is in no way affected by any supersession of the native administration by officers appointed by the Government of India.[2] The latter has, however, under the terms of its constitution, doubtless powers to extend within or remove from the jurisdiction of the High Courts any territory.[3] This was expressly laid down by Their Lordships of the Privy Council in a case in which, by an Act[4] passed by the Governor-General in Council, the Lieutenant-Governor of Bengal had been empowered to remove certain tracts within his administrative jurisdiction from the ordinary jurisdiction of the Courts of Civil and Criminal Judicature.[5] And as regards the powers of the High Courts, the same high tribunal held that the terms of the Act,[6] creating the High Courts, and conferring on them jurisdiction in any part of Her Majesty's Indian territories, were meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council.[7]

69. Jurisdiction of the High Courts.—Subject, however, to the legislative control of the Governor-General in Council, the powers of the Indian High Courts extend to the territories placed within their ordinary jurisdiction. Besides this jurisdiction they also possess, as seen before, ex-territorial jurisdiction which empowers them to take cognizance of offences committed out of British India, on land or high seas.

Jurisdiction over Subjects in Foreign States.

70. Besides Native States which, being under the paramountcy of the Government of India, are ordinarily subject to its directions, there are a number of Asiatic Foreign States over which His Majesty has, by treaty, capitulation, grant, usage, sufferance, or other lawful means, acquired ex-territorial jurisdiction, which has also been delegated to the Indian Courts.

On High Seas.

71. Admiralty Jurisdiction.—Adverting now to the offences committed on the high seas, which are no man's territory, the jurisdiction of the Indian Courts depends upon what is known as the admiralty jurisdiction. It is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. It extends over all ships of a nation that use its flag, whether they be anchored or sailing, whether on the high seas or in rivers below the bridges where the tide ebbs and flows and where great ships go.[8] And it makes no difference whether the ship is made fast to the bottom of the river by anchor and cable, or to its side by ropes from the quay.[9] In such a case, only two questions arise, the first, a question of place, the second, a question of person. In order to establish the British jurisdiction, all that is necessary is that the ship should be a British ship sailing under the British flag, which may be established by parol, it being by no means essential that

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(22) *Ward*, 5 M. 33.
(23) 28 & 29 Vict., c. 15, s. 3.
(24) 24 & 25 Vict., c. 104.
(25) (1865) 28 & 29 Vict., c. 15, s. 3; *Ward*, 5 M. 33; now *see* Government of India Act, 1935 (25 & 26 Geo. V, c. 42).
(1) *Chill*, 8 B. H. C. R. 92.
(2) *Watkins*, 2 M. H. C. R. 444.
(3) *Burah*, 4 C. 172, P. C.
(4) Act XXII of 1869, s. 9.
(5) *Burah*, 4 C. 172, P. C., overruling on this point, *Burah*, 3 C. 63, F. B.
(6) 24 & 25 Vict., c. 104.
(7) *Burah*, 5 C. 172, P. C.
(8) *Per* Lord Blackburn in *Anderson*, L.R. 1 C. C. R. 161; 38 L. J. (M. C.) 12.
(9) *Anderson*, L. R. 1 C. C. R. 161; *Jemot* cited in Arch. Plead. (16th Edn.), p. 395; *Allen*, 1 Moo. C. C. 154; *Carr*, 10 Q. B. D. 76 (79); *Lesley*, (1860) 29 L. J. (M. C.) 97.

the register of the vessel be produced.[10] For if the ship was registered as a British ship and sailed under the British flag, but the owner is not a natural-born British subject, the admiralty jurisdiction will not extend to offences committed upon it.[11] On the other hand, if the owner was a British subject,that jurisdiction will extend to all offences committed thereon, whether the offenders be British subjects or foreigners. In that case, the question how the offender happened to come on board is immaterial. He may have gone there voluntarily or may have been brought there against his will ; in any case the Admiralty Court will have jurisdiction over him.[12]

72. So far, then, the law is clear and well settled. The only difficulty that the subject presents is with respect to what shall be considered as the line of demarcation between the country and the high sea. Here, too, the jurisdiction of the Courts of the country up to a marine league is undisputed (§§ 39-42). The difficulty, however, arises where the offence committed is in harbours or below the bridges in great rivers which are partially enclosed by land. But here the question is one of fact and not of law, for if the haven, creek or river is within the body of a country, both the Admiralty as well as the Common Law Courts have concurrent jurisdiction.[13]

73. At one time, offences committed on the high seas were said to be exclusively within the jurisdiction of the Admiralty Court, but they are now placed within the jurisdiction of the ordinary Criminal Courts.[14] The Admiralty Offences Act confers upon all Magistrates jurisdiction to try and dispose of all offences committed by any person " upon the sea, or in any haven, river, creek or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea or in any such haven, river, creek or place shall be brought for trial to any colony."[15] The Merchant Shipping Act, 1894, further makes provision for the trial of such offences by the ordinary tribunals,[16] while the Courts (Cononial) Jurisdiction Act[17] enables the Courts in this country to regulate the procedure at the trial and the sentence by the law of India.[18]

74. It has been already stated before, that the High Courts in India have generally inherited the jurisdiction possessed by their Supreme Courts which they have replaced. These Courts possessed the jurisdiction of the High Court of Admiralty in England as it stood in 1823.[19] Their jurisdiction in Vice-Admiralty was created by commission from the High Court of Admiralty in England in 1843.[20] With the exception of the Allahabad High Court, which has no Admiralty jurisdiction, the other three High Courts are, now, by Statute, declared to be Colonial Courts of Admiralty,[21] within the meaning of the Colonial Courts of Admiralty Act.[22] These three High Courts therefore now possess the same jurisdiction in Admiralty as the Admiralty Courts in England.

75. Mofussil Courts.—As regards the Mofussil Courts, it appears that they did not possess any jurisdiction prior to 1860 when a limited jurisdiction was conferred on them by the Admiralty Jurisdiction (India) Act.[23] This jurisdiction was, however, enlarged in 1894 by the provision of the Merchant Shipping Act, which gave all Courts jurisdiction to try offenders wherever found.[24]

(10) Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104, s. 106); *Sven Seberg*, L. R. 1 C. C. R. 264 ; *Frank Allen*, 10 Cox, 405.

(11) *Adolph Bjornsen*, 10 Cox. 74.

(12) *Sven Seberg*, L. R. 1 C. C. R. 264 ; *Benito Lopesz Christian Sattler*, (1858) 7 Cox 431; *In re Susanah*, 9 B. & C. 446 ; *In re Parisot*, (1889) T. L. R. 344; *Savarkar*, 13 Bom. L. R. 296; *Salimullah*, 39 C. 487 (490).

(13) *John Bruce*, 2 Leach. 1093 ; *Essub Ibrahim*, (1845) Perry's Oriental Cases, 577; *DeSylva*, 11 Bom. L. R. 221.

(14) Admiralty Offences Act, 1849 (12 & 13 Vict., c. 26); Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60).

15) S. 1, Admiralty Offences Act, 1849 (12 & 13 Vict., c. 96).

(16) 57 & 58 Vict., c. 60, ss. 684, 687; also see *ib*., ss. 689, 690.

(17) 37 & 38 Vict.. c. 27, s. 3.

(18) *Elmstone*, 7 B. H. C. R. (C. C.) 89; *Salimullah*, 30 C. 487.

(19) *The Asai*, 5 B. H. C. O. C. J. 64 ; *Bardot* v. *The Augusta*, 10 B. H. C. 110 contra *The Portugal*, 6 B. L. R. 323 (330, 331).

(20) As to the meaning of Vice-Admiralty Court, *see* Colonial Courts of Admiralty Act, 1819 (53 & 54, Vict., c. 27, s. 9).

(21) Act XVI of 1891.

(22) 53 & 54 Vict., c. 27.

(23) 23 & 24 Vict., c. 88, ss. 1-2.

(24) S. 686, 57 & 58 Vict., c. 60.

5. Nothing in this act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV, Chapter 85,[25] or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said territories, or the inhabitants thereof ; or any of the provisions of any[1] Act for punishing mutiny and desertion of officers, soldiers, [sailors][2] or airmen[3] in the service of Her Majesty, or of any special or local law.

Certain laws not to be affected by this Act.

76. Analogous Law.—The provisions of 3 and 4 William IV, c. 85, here referred to or those of the Government of India Act, 1883, which, apart from this section, cannot be affected by legislation in India.[4] This Statute was passed for effecting an arrangement with the East India Company and for the better government of His Majesty's Indian territories, till the 30th April 1854. Its scope has been sufficiently discussed in the foregoing pages (§§ 24, 25). Several Acts have since been passed by Parliament "affecting the East India Company, or the said territories or the inhabitants thereof," and as they are all Acts of Parliament, they remain, as a matter of course, unaffected by the acts of the Indian Legislature. (§ 53). The Act "for punishing mutiny and desertion of officers and soldiers in the service of Her Majesty" is the English Mutiny Act, 1878. Provision for punishment of desertion is made in the Army and Navy Act,[5] confirmed and amended by the Annual Army Acts. This Act provides a Criminal Code of its own,[6] and a special procedure for the trial of offenders by Court-martial.[7] It also lays down a list of persons who are subject to military law.[8]

77. Principle.—This section is enacted *ex majori cautela*, for, the enactments, purporting to be thereby saved, are from their very nature unaffected by the Code. The saving of special or local law is in accordance with the general principle *generalia specialibus non derogant*.[9] These certainly required to be saved in view of the sweeping provisions of section 2 which, as observed by the Madras High Court, "has either no operation at all, or else, as I believe it to have done, it repealed all existing penal enactments in force on the date from which the Code was to come into operation. Then the effect of section 5 was to qualify this general repeal, and to declare that notwithstanding it, offences defined by special and local laws should continue to be punishable as heretofore. It may be that it was not competent to the local Legislature to repeal or affect the provisions of some of the laws enumerated in section 5 ; but that is immaterial so far as special and local laws are concerned, for clearly they might have been, and but for section 5, would, as I conceive, have been repealed. If, therefore, a person were required to ascertain from the Penal Code what acts and omissions are punishable in British India as offences, he would properly answer that it appeared from section 2 and section 5 that all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws and some other laws enumerated in section 5, and these alone and none others were punishable as offences."[10]

78. Meaning of Words.—"*Is intended to repeal*," that is, as there was no intention, there should be no effect. Though the words may convey that sense,

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(25) Repealed by 5 & 6 Geo. V, c. 6, Government of India Act, 1915.

(1) *See* now the Army Act, 44 & 45 Vict., c. 58, as continued and amended by subsequent Annual Army Acts.

(2) The word "sailors" was inserted by the amending Act of 1934 (Act XXXV of 1934).

(3) For the words "and soldiers" the words "soldiers or airman" were substituted by the Repealing and Amending Act, 1927 (Act X of 1927).

(4) 24 & 25 Vict., c. 67, s. 22 : 32 & 33 Vict., c. 98, s. 3. All Statutes bearing on the Government of India were formally repealed, and consolidated in the Government of India Act, 1915 (5 & 6 Geo. V, c. 61 ; now *see Ib.* of 1935 (25 & 26) Geo. V., c. 42).

(5) 44 & 45 Vict., c. 58.

(6) 44 & 45 Vict., c. 58, ss. 4-44.

(7) *Ib.*, ss. 45-75.

(8) *Ib.*, ss. 175-183.

(9) "General words do not derogate from special." General words do not repeal or modify special legislation—*Seward* v. *Vera*, 10 App. Cas. 68 ; *Hawkins* v. *Gathercole*, 6 De M. & G. 1.

(10) 3 M. H. C. R. (App.) 11.

nevertheless they should not be so construed. "*Special or local law*": "Special law" is defined to be a law applicable to a particular subject,[11] *e.g.*, the Opium Act,[12] and a "Local law" is applicable only to a particular part of British India.[13] The meaning of this clause is that where the special or local law is *in conflict* with the Code, the latter shall not apply. But where there is no conflict, effect may be given to both.[14] This section is, thus, a saving clause to section 2, and might have been added as its proviso. It was, as Innes, J. remarked, perhaps too long to be introduced into section 2 parenthetically, and was, on that account, and also perhaps for greater clearness, placed by itself.[15] If section 2 had stood alone without this section, its effect would have been to render inoperative such parts of the existing criminal law as provided for the punishment of acts and omissions which were contrary to the provisions of the old law for the punishment of acts and omissions which were not contrary to the provisions of the Code.

79. Saving of Other Laws.—As regards the exemption of the Acts of Parliament, the section merely enacts what would be the result without it. The saving of any of the provisions of any Act for punishing mutiny and desertion of officers and soldiers, refers alike to the English Statute. But the saving of any special or local law was necessary. For if the clause had not existed, the result of section 2 would have been necessarily to repeal all such laws. As it is, the clause is no authority for the proposition that the Code has no application to any case covered by any special or local law. For all that the clause enacts is that the Code shall not "repeal, vary, suspend or affect them." Therefore, if the provisions of the Code and the special or local Act coincide, it is perfectly competent to the Court to proceed under either. It is only in case of conflict between the two that the provisions of the special or local Act are preferably to be resorted to, if they are complete in themselves.[16]

80. Where, for instance, the accused took out a Municipal license for the possession of some carriages and horses and filed a schedule to his statement regarding the number of animals in respect of which he applied for the license, which was alleged to be false, and for which he was prosecuted under different sections of the Code. The accused moved the High Court in revision, and it was held that no prosecution under the Penal Code lay, as the Municipal Act itself provided a penalty for the act.[17] But this case is no authority for the proposition that whenever there is a special law providing a penalty, it alone should be applied to the exclusion of the general criminal law. So where the trustee of a temple misappropriated property belonging to it, the fact that the Regulation of 1817[18] provided for punishment for breach of trust on the part of trustees and managers of Hindu temples, is no reason for excluding the operation of the Code,[19] unless, of course, there be anything in the special or local Act to exclude its operation.[20]

81. Hence, where, for instance, the Mutiny Act[21] provides that British soldiers serving in India or its dependencies may be tried by a general Court-martial, the provision being merely permissive does not exclude jurisdiction of the civil tribunal.[22] So a person offending against the Police Act and the Code may be proceeded against under either,[23] and the fact that he was convicted under one Act rather than the other is then immaterial,[24] though, of course, in such a case he could not be convicted under both the Acts.[25]

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(11) S. 41, *post*.
(12) *McDonell*, 3 R. 524.
(13) S. 42, *post*.
(14) *Ramachandrappa*, 6 M. 249; *Nageshappa*, 20, B. 543; *Bayne*, 8 Bom. L. R. 414; *Sadasiva Pillai*, 1 Weir 26; *Jiwaram* (1932) A. 69, but *contra* in *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131.
(15) 3 M. H. C. R. (App.) 11.
(16) *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131; *Jiwaram*; (1932) A. 69.
(17) *Ib*.
(18) S. 16.
(19) *Anon*, 1 M. 55.
(20) *Imam Baksh*, (1885) P. R. No. 10.
(21) (1878) 41 Vict., c. 10 (An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army and their Quarters).
(22) *Maguire*, 5 C. 124.
(23) *Fatleh Khan*, (1874) P. R. No. 11.
(24) *Kassimuddin*, 8 W. R. (Cr.) 55; *Gopal Sein*, 8 W. R. (Cr.) 16.
(25) *Hussun Ali*, 5 N. W. P. H. C. R. 49.

82. And so, it is now provided in the General Clauses Act that "where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under any of those enactments, but shall not be liable to be punished twice for the same offence."[1] But this, of course, assumes that there is nothing in the one to exclude the operation of the other. For instance, such would be presumed to be the case where the offence is merely a *delict* under a special Act,[2] which does not expressly save the provisions of the general criminal law. In other words, where a special or local Act prescribes its own penalties they are presumed to be exhaustive, unless there is anything in the Act to save the general law. It may be added that, as a rule, where an act is punishable both under the Code as well as under a special or local law, the preferable course is to convict under the special law and not under the Code,[3] both because *specialia generalibus derogant*[4] as well as because the special Acts were primarily constituted to punish such delinquencies. But the practice of the Courts on this point lacks unanimity.[5]

83. Preservation of Common Law Rights.—Besides the special and local laws hereby preserved, the Code has not, it was said, affected the common law rights possessed by the superior Courts of this country. In England, the superior Courts of Record have the most extensive jurisdiction in respect of contempt. In all cases of contempt, a superior Court may fine the offender, order him into custody, or take security for his good behaviour, and this, although an indictable offence has been committed. Any further or threatened acts may be restrained by injunction. These inherent powers of summary committal attaching to the superior Courts of England were held available also to the Indian High Courts.

84. So far as regards India, this was settled by a decision of the Privy Council, which decided that a contempt of Court of the High Court, being contempt of the Court of Record was punishable by it, independently of this Code, and that its order was, therefore, not open to appeal or revision.[6] But this power extends only to the imposition of the sentence of fine or imprisonment. It does not confer on the Court the power to disbar an advocate, against which he may appeal.[7]

85. But, it was said, that these are the powers which the High Courts have inherited from their predecessors the late Supreme Courts. They are, therefore, the powers which exclusively belong to them, and are not possessed by other Courts of co-ordinate jurisdiction, *e.g.*, the Chief Courts or the Courts of the Judicial Commissioner. These and the other inferior Courts have their jurisdiction confined to commit for contempts committed in *facie curiæ* and not to those committed out of Court.[8] Nor was the High Court held to possess the jurisdiction to punish as an offence, in a summary proceeding, conduct in relation to a proceeding in the mofussil criminal courts, such as comments on a case pending before those courts, as even in the case of the High Court at Calcutta, such jurisdiction was not inherited from

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(1) Act X of 1897, s. 26, *Ramachandrappa*, 6 M. 249; *Sadasiva Pillai*, 1 Weir 26; *Bayne*, 8 Bom. L. R. 414.

(2) *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131 (139), a case under the Bengal Municipal Act.

(3) *Bokoo*, (1864) W. R. 21; 3 M. H. C. R. (App.) 11; *Kuloda Prasad Majumdar*, 11 C. W. N. 100; *Rup Deb*, 11 A. L. J. 340.

(4) "Things special take from things general." In a case (*Hussun Ali*, 5 N. W. P. H. C. R. 49) where the prisoner had been convicted twice over for the same act, both under the Code as well as a special Act. Turner, J., quashed the conviction under the special law, but no reasons are given for the preference—probably the three months' sentence already undergone by the prisoner would have been too severe under the local Acts (Cattle Trespass Act).

(5) In conflict the Code applied in *Hussun Ali*, 5 N. W. P. H. C. R. 49; *Ramachandrappa*, 6 M. 249; special law applied—*Bokoo*, (1864) W. R. (Cr.) 21; 3 M. H. C. R. (App.) 11; *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131; *Sadasiva Pillai*, (1865) 1 Weir 26; *Bayne*, 1 Bom. L. R. 414; *Rup Deb*, (1913) 11 A. L. J. 340.

(6) *Surendranath Banerjee* v. *High Court*, 10 C. 109, P. C., following *Rainy* v. *The Justices of Sierra Leone*, 8 Moo. P. C., 47 (54); *McDermott* v. *The Justices of British Guiana*, 5 Moo. P. C. (N. S.) 466.

(7) *Smith* v. *Justices of Sierra Leone*, 3 Moo. P. C. 367 (368), Proceedings are of a quasi-criminal character.—*Weston* v. *Bengalee*, 15 C. W. N. 771.

(8) S. 228, *post* and ss. 477, 487, Cr. P. C.

any of its three abolished predecessors—the Supreme Court, the Sudder Dewany and the Sudder Nizamat Adalats and in any of the other High Courts was not vested by the Charter Act,[9] or the Letters Patents under it, as such conduct is not contempt of the High Court, nor does the High Court's power of superintendence over the mofussil courts imply any power of protecting those courts from improper interference.[10]

Contempt of Courts Act.

86. But though their Lordships of the Privy Council had supported the assumption of jurisdiction by the High Courts in cases of contempts, their decision is not easily reconcilable with provisions of this section. But that uncertainty has now been set at rest by the enactment of the Contempt of Courts Act[11] which regularizes and regulates the jurisdiction of the courts in dealing with that offence.

87. This enactment protects the Court ; but it is still a question whether counsel in India can invoke the aid of the English common law and claim the same absolute privilege which their confreres enjoy in England. That they cannot appears to be clear, though the analogy of cases relating to contempt of court might suggest an exception, for which, however, there is no legislative sanction. The subject will be found discussed under s. 499.

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(9) Government of India Act, 1915, ss. 101-114 (5 & 6 Geo. V., c. 6) now repealed by *ib.* of 1935.

(10) *Governor* v. *Koli Lal*, 20 I. C. (C.) 81 ; *Davies*, (1906) 1 K. B. 32; *Venkat Row*, 21 M. L. J. 832.

(11) Act XII of 1926.

CHAPTER II.

GENERAL EXPLANATIONS.

Definitions in the Code to be understood subject to exceptions.

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter[12] entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision or illustration.

Illustrations.

(*a*) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception[13] which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) *A*, a Police-officer, without warrant, apprehends *Z*, who has committed murder. Here *A* is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend *Z*, and therefore the case falls within the general exception[14] which provides that "nothing is an offence which is done by a person who is bound by law to do it."

88. Analogous Law.—The first illustration is based on s. 76, illustration (*b*).

89. Principle.—This chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms are here defined and explained, and the meanings, thus announced, are steadily adhered to throughout the subsequent chapters. Sir James Stephen suggests that the object of this chapter is to prevent captious Judges from wilfully misunderstanding the Code, and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this chapter to see what the meaning of the Code is.[15]

90. The object of this section is to state that the Code has been drawn upon the assumption of absence of all exceptional and extenuating circumstances which have been brought together under the head of "General Exceptions" and which, therefore, control the entire Code. Therefore, for the purpose of seeing whether any act or omission constitutes an offence, it is not sufficient merely to look to within the four corners of the sections, but also to see if the act or omission is covered by the general exceptions. The regulation of exceptions to a general chapter has made the Act more compendious and intelligible, but it is a system which has not been followed in the drafting of several Statutes in England.

Sense of expression once explained.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

91. Analogous Law.—This section is in accordance with the maxim of common law: *Inclusio unius est exclusio alterius.*[16] So referring to this clause Holloway, J., said that to say that every expressoin "shall have a particular meaning everywhere," is to say that it shall have no other meaning anywhere. The point, therefore, is to ascertain the meaning of that explanation, and if the words, taken grammatically, have a definite, certain and unequivocal meaning, if they constitute

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(12) Chapter IV, *infra*.
(13) In s. 82, *infra*.
(14) In s. 76, *infra*.
(15) (1860) Proceedings of Council, p. 1261.
(16) "The inclusion of one is the exclusion of another," or "*expressio unius est exclusio alterius*" (The mention of one is the exclusion of another).

a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed. "If, however, the expression does not include the complete thought of the Legislature or if the words are equally susceptible of several meanings, we are to seek in other parts of the same Statute, or, in other Statutes certainly in those *in pari materia* with this, the one of the several possible meanings which ought to be put upon the words."[17]

92. Principle.—All terms explained in the Code bear the Code meaning throughout the Act ; so that, if a term is used in one sense in one place, it must be taken to have been used in the same sense in other places as well. If, therefore, that sense, when so applies, is, in any concatenation in the Code, found to be absurd, then, it is sufficient repudiation of its meaning in conjunction with words, though it may then seem appropriate.

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

93. Analogous Law.—This section really means what is provided by the English Interpretation Act, 1889,[18] which enacts as follows :—

"1. In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears :—

"(*a*) words importing the masculine gender shall include females ; and

"(*b*) words in the singular shall include the plural, and words in the plural shall include the singular."

This provision is enacted so far as regards India in the General Clauses Act[19] as follows :—

"'13. In all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context—

"'(1) words importing the masculine gender shall be taken to include females ; and

"'(2) words in the singular shall include the plural, and *vice versa*.'"

94. Principle.—Though the section states that the pronoun "he" and its derivatives are used of any person whether male or female, the language of the section itself is either inaccurate or inadequate to express the sense it purports to convey. For, if the section be held to declare that the pronoun "he" is everywhere used in the Code even to denote a female, it is only partially true, for there are sections in which the appropriate pronoun has been and could not but be used.[20] And yet having regard to the last section, this should not have been the case. But, though the language of the section is inapt, its meaning is clear, for it means no more than that the pronoun "he" includes also females.

Number.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

95. Analogous Law.—The section conveys the sense expressed in section 2 of the English Interpretation Act,[21] and section 13 of the General Clauses Act,[22] cited under the last section.

"Man" : Woman.

96. Meaning of Words.—"*The contrary appears*," that is, unless the contrary intention appears.

10. The word "man" denotes a male human being of any age : the word "woman" denotes a female human being of any age.

97. Analogous Law.—The term "man" is here defined in its restricted popular sense as denoting only a human being of the male sex, of any age, but not

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(17) 3 M. H. C. R. (App.) 11.
(18) 52 & 53 Vict., c. 63, s. 1.
(19) Act X of 1897, s. 13.
(20) *E.g.*, ss. 354, 375, 493, 494 Expl. 498.
(21) 52 & 53 Vic., c. 63, s. 1; *Tatia Mahadeo*, 17 I.C. (B.) 794.
(22) Act X of 1897.

one in the womb. The term "man," as used in the Representation of the People Act, 1867[23] was in one case[24] so interpreted overruling the contention made for the suffragettes that it must be interpreted generically as including all persons of the human species; but Byles, J., though conceding that the term was so used in scientific treatises on zoology or fossil organic remains, held that it could not be interpreted in that sense in a Parliamentary Statute.[25]

98. Principle.—In the language of Byles, J., in the case last cited "it is a well-known rule in the construction of Statutes, that, as they are framed for the guidance of the people, their language is to be construed in its ordinary and popular sense."[1] Therefore, since the ordinary and popular sense of the word "man" is confined to denote a male person, the utility of the section becomes apparent.

99. Meaning of Words.—"*Of any age*" implies that the human being must be sensate. A human foetus, if living, is a human being within the comprehension of this term. A child of six is, of course, a man or a woman according to its sex.[2]

11. The word "person" includes any Company or Association, or body of persons, whether incorporated or not.

"Person."

100. Analogous Law.—The following explanation of the term "person" occurs in section 19 of the English Interpretation Act[3] and section 3 (39) of the General Clauses Act.[4]

"S. 19. In this Act and in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."

"S. 3 (39). Person shall include any company or association or body of individuals, whether incorporated or not."

101. Meaning of "Person."—The term "person" in its primary and ordinary sense means and includes a human being, whether a man, woman or child. It is used in that sense in ordinary parlance and in many sections of the Code.[5] But it is not invariably so used. For there it includes not only such natural beings but also fictitious persons such as a company or association.[6] In this respect, the term follows the connotation which it has received in English Law.[7]

102. "*Prima facie* the word "person" in a public Statute includes a corporation as well as a natural person."[8] The definition makes this authoritatively clear, but as it merely enunciates a permissible rule of construction, it leaves the matter as to the particular sense in which it is used in a particular juxtaposition in the Code undecided. Indeed, the latitude here given may, at least, lead to four senses in accordance with the context and the combination in which the word is used. It may, for instance, mean (*i*) only a natural person, or (*ii*) only an artificial person, or (*iii*) invariably both, or lastly (*iv*) sometimes one and sometimes the other. The particular sense in which the term has been used in the various sections will be found discussed in the ensuing commentary. But, while the term, as described here, includes some fictitious persons, it does not include all. For instance, an idol or an endowment is a juridical person like a company or association, but it is not comprised in the terms. On the other hand, the term is wide enough to include Government as representative of the whole community. And so, in one case, Melville, J., so held in connection with the term as used in section 27 which enacts that "when property is in possession

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(23) 30 & 31 Vict., c. 102, s. 3.
(24) *Charitan* v. *Lings*, L. R. 4 C. P. 374 (392).
(25) *Ib.*
(1) *Ib.*, p. 392.
(2) *Tatia*, 17 I. C. (B.) 794.
(3) 52 & 53 Vict., c. 63.
(4) Act X of 1897.
(5) *E.g.*, 56, 73, 84-87, 100, 105, 114, 137, 139, 141, 149-151, 153, 157, 159, 170, 192, 216, 220-225, 278, 297, 298, 490, 491, 497 and ch. xvi.
(6) "Club" is a person; *Cooke*, 23 I.C. (Bur.) 195.
(7) *Per* Lord Blackburn in *Pharmaceutical Society* v. *London* &c., *Supply Association*, 5 App. Cas. 857; so the word "person" in the Legal Practitioners' Act (XVIII of 1879), s. 6, was in view of the context, previous history and general policy held to exclude a woman—*Regina Gaha*, 44 C. 290 S. B.
(8) *Ib.*, *per* Lord Selbourne, C.J.

of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of the Code." It was accordingly held that possession of wood in the Government Forest of a forest officer was possession of the Government within the meaning of that section.[9]

"Incorporate."

103. The term "incorporate" implies legal recognition, incorporation being the formation of a legal body with the quality of perpetual existence and succession, except as limited by the Royal Charter, or Act effecting the incorporation.[10]

"Public."

12. The word "public" includes any class of the public or any community.

104. Analogous Law.—This section only defines "public" as a substantive, but it does not declare that its derivatives shall have allied meanings. For instance, "publication" is commucication to the public but not necessarily to the public here described. Again, a "public meeting" may be open to the public in the sense here conveyed, or it may not. A public performance is not open only to "any community," though it is open to the "class of the public" which pays for the admission.

105. Meaning of "Public."—In popular parlance the word "public" means the general body of mankind or of a nation, state or community. It is also sometimes used in a more restricted sense of denoting only a particular body or aggregation of people as an author's public.[11] But as used in the Code it may assume a still further variety. For, as including "any class of the public" the term implies any sub-division of the public ever so small but still large enough to form a "class" and which excludes the possibility of a mere individual. So again, the term "community" is used here interchangeably with "public", and as a community may consist of a sect, race or a body of men united on any given principle, the term is sufficiently wide to include only a collection of men possessing some common bond of union. So a bequest in trust "for the community of the convent at *A* was held to be one for the benefit of the members for the time being of that convent."[12] The members of a community may, therefore, fluctuate, but the community remains unchanged so long as its central principle remains. But the term "public" is a wider term and means only the people spoken of collectively. It consists of classes and communities, but the principles that they possess in common need not be shared by the public at large. In other words, "public" is a generic term of which class and communities are species.

"Queen."

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

106. Analogous Law.—It is similarly provided by the General Clauses Act that "Her Majesty" or "the Queen" shall include Her successors.[13] So now, "the King" would denote His Majesty King George V and his successors. In constitutional monarchies, such as England, the name of the Sovereign is, ordinarily, used to denote the State. So, while, in England and this country, offences against the state are often described as offences against the Queen, in republican countries they are described as offences against the State, and indeed, this nomenclature has bee adopted even in the Code, as the heading to that class of offences dealt with in Ch pter VI.[14] And, in the sections treating with such offence, the term "Queen" has, of course, been used in its impersonal sense as typifying the constituted authority of the State. Similarly, while the name of the King or Queen is invariably used as the prosecutor in cognizable cases, the term is properly understood to mean that the prosecution has been instituted by or under the authority of Government. In this sense the King becomes a juridical person, and in this sense, it is true that the King

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(9) *Hanmanta*, 1 B. 610 (622).
(10) *See* s. 41, Indian Companies Act (VI of 1882).
(11) WEBSTER.
(12) *Bradshaw* v. *Jackman*, 21 I. L. R. Ir. 12.
(13) S. 3 (23), Act X of 1897.
(14) Ss. 121-130.

never dies. It is in this sense that the term has been used in the next section where the phrase "servant of the Queen" means no more than a Government servant.

"Servant of the Queen."

14. The words "servant of the Queen" denote all officers or servants continued, appointed or employed in India by or under the authority of the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the Better Government of India," or by or under the authority of the Government of India or any Government.

107. Analogous Law.—The term "Government of India" is defined in section 16 and "Government" in section 17. The 21 and 22 Vict., c. 106 referred to, and now cited as the Government of India Act,[15] was passed in 1858, and it had the effect of placing British India under the direct Government of the Crown. It lays down the regulations for the conduct of the Government of India, and the officers and servants continued, appointed or employed under its authority are:—

The Secretary of State (s. 4) Under Secretaries (s. 7); Members of Council of India (ss. 15, 16, now s. 3); Establishment of the Secretary of State (s. 21, now s. 17); Vice-President of Council (s. 29, now s. 7); Governor-General for India (s. 29, now s. 33); Governors of Presidencies (s. 29, now s. 46); Advocate-General (s. 29, now s. 114); Members of the Council of the Governor-General and Governors (s. 32, ss. 63-84); Covenanted Civil Servants (s. 33, now ss. 97-100). Cadets and other departmental appointments (s. 58, now s. 19).

108. All the officers thereunder enumerated are "servants of the Queen," but the list is far from exhaustive, for to them must be added all servants appointed by or under the authority of the Government of India or any Government and which would include all persons commonly designated as Gazetted and non-Gazetted officers. In other words, all officers whose appointment is made by or requires the sanction of any local Government or Administration are servants of the King. But though they are servants of the King, they are not necessarily "public servants" within the meaning assigned to that term in s. 21.

"British India."

15. The words "British India" denote the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the Better Government of India."

109. Analogous Law.—This section ended with the words "except the Settlement of the Prince of Wales's Island, Singapore, and Malacca," but they were struck out by an Amending Act of 1891.[16]

The Statute 21 & 22 Victoria, Chapter 106, known as the Government of India Act, 1858, being in parts repealed and replaced by several subsequent statutes, has now been (except s. 4) wholly repealed by the consolidating Government of India Act, 1915.[17] (§ 8)

110. The definition of British India as here given is practically the same as was afterwards adopted in the General Clauses Act of 1868[18] now re-enacted with slight verbal variation in the Consolidating Act of 1897.[19]

111. As this Act applies only to Acts made after its commencement on the 11th March 1897, the Code, as originally enacted and amended up to that date, remains unaffected. But it may be a question whether the definition in the General Clauses Act would apply to subsequent amendments of the Code. The fact that the Code has given a working definition of the term would not "be anything repugnant in the subject or context"[20] within the meaning of the Act so as to give preference to the Code definition, and yet, if the definition of the Act of 1897 be adopted, there are noticeable changes which are by no means susceptible of an easy reconciliation

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(15) The Short Titles Act, 1896 (59 & 60 Vict., c. 14); 21 & 22 Vict., c. 106, is now re-enacted as the Government of India Act, 1915 (5 & 6 Geo. V., c. 61), in certain parts amended by the Act of 1916 (6 & 7 Geo. V, c. 37); 9 & 10 Geo. V, c. 101.

(16) Act XII of 1891, sch. I.

(17) 5 & 6 Geo. V, c. 61, sch. IV.

(18) Act I of 1861, s. 2 (8). Repealed by Act X of 1897.

(19) General Clauses Act (X of 1897), s. 3 (7).

(20) S. 3, Act X of 1897.

with the definition of the Code. For, while it is easy to see what territories have become vested in His Majesty, it is not equally easy to say what places are "governed" by him. That the term "governed" implies direct administration may be conceded, but it is not always easy to say when "Government" ends and "management" or "control" begins. So far as regards Native States, the English Interpretation Act defines their relation to the Government of India.[21] But this definition does not find place in the Indian Act. And even if it did, there still remains an intermediate class of states, and states from time to time placed within political control in which it may be difficult to define the nature of supervision exercised by Government.

112. The territories ordinarily classed as forming British India have already been set out under section 1.

"Government of India."

16. The words "Government of India" denote the Governor-General of India in Council, or during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively.

113. Analogous Law.—This definition corresponds *per litera et verba* with the definition of the same term in the General Clauses Acts of 1868[22] and of 1897.[23] It is not defined in the English Interpretation Act.[24]

114. The term as here and in the General Clauses Act defined means not the administration of India, but the chief executive officers in whom is vested the authority for the administration of the country. In other words, it means the men by whom the administration[25] of India is carried on, and not the system by which that administration is regulated. But this is not the only sense in which the phrase is used, for it is used in that sense only "as regards the powers which may be lawfully exercised by them or him respectively." The other sense in which the term is commonly understood is not here recognized, because reference to it was unnecessary in the Code. But it is, nevertheless, a connotation of the term which has found its use in section 124-A of the Code since added to it.

"Government."

17. The word "Government" denotes the person or persons authorized by law to administer executive government in any part of British India.

115. Analogous Law.—The term "Government" here is not used in its generic sense as implying the form of government by employing a body of men exercising an executive authority in British India, but only the person or persons who exercise it. The term Government includes Local Government[1] and would now include all Provincial Governments within its meaning.

116. A special meaning has been given to the term "Government" as used in this section read with ss. 255-263-A (both inclusive) which deal with the counterfeiting of Government Stamps.[2]

117. As regards the definition of "Government" in this section it is to be observed that the executive administrator of *any part* of British India is "Government." It is not necessary that that part should be a presidency or a province, or even a division. For the part may be ever so small; if the person is legally empowered to administer executive government therein, he is the "Government" within the meaning of this section. Now, what is an executive government? It would seem

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(21) "India" shall mean British India together with any territories of any Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General of India, s. 18 (5) Interpretation Act (1889).

(22) S. 2 (*g*), Act I of 1868.

(23) S. 3 (22), Act X of 1897.

(24) 52 & 53 Vict., c. 63.

(25) Act X of 1897.

(1) The General Clauses Act (Act X of 1897) s. 3 (2).

(2) *Cf.* S. 2 of the Indian Criminal Law Amendment Act (Act III of 1895).

that the collection of revenue and the maintenance of peace are its chief functions, and a person empowered to maintain peace and collect revenue would be "Government" of that place. The Collector or Deputy Commissioner of a District would, therefore, be the "Government" of his District.[3] And so it has been held that the Collector even acting in the management of a *Khas Mahal*, the property of the Government, is the Government within the meaning of this section.[4]

Govt. Stamps.

118. But the word has a much wider significance in sections 255-263-A, which refer to offences relating to Government stamps, in which the term includes not only the officers here described, but also persons "authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country."[5] This definition was added to the Code as a result of the Vienna Convention, and it was inserted at the instance of the Post Office to prevent the use of fictitious stamps on letters received from abroad.

119. In these sections, then, the term "Government" includes the executive government of Native States and of all British colonies and dependencies and foreign States wherever situated.

"Presidency."

18. The word "Presidency" denotes the territories subject to the Government of a Presidency.

120. Analogous Law.—The General Clauses Act[6] defines "Presidency-town," but not "Presidency" as follows :—

Presidency-town.

"3 (41). "Presidency-town' shall mean the local limits for the time being of the Ordinary Original Civil Jurisdiction of the High Court of Judicature at Fort William, Madras, or Bombay, as the case may be."

121. The term "Presidency" is a survival from the times of the East India Company who had divided its possessions in the East into three Presidencies, each Presidency being under a Council of 12 to 16 members, of whom one was the President or Governor, who carried on the administration of his Presidency by a majority of votes. The method of government proved cumbrous and dilatory and several Acts were passed to reform it. In 1773, the Regulating Act created a Governor-General of Bengal for the Presidency of Bengal, who was to be assisted by four Councillors and whose supremacy over the other three presidencies of Madras, Bombay and Benecoolen was therein declared.[7] The Presidency of Benecoolen ceased to exist in 1824, and the Presidency of Bengal was abolished in 1854 when a Lieutenant-Governor was appointed to administer Bengal. It was reconstituted in 1912.[8] There were, therefore, only two presidencies those of Madras and Bombay from 1854 to 1912, when the three Presidencies were again restored.

122. The Government of India Act, 1935, has abolished all distinctions between the Presidencies and the provinces, though it saves the powers exercised by the Presidency High Courts as successors of the old Supreme Court and the *Sadar Diwani Adalat*.[9]

123. It is to be noted that the definition of "Presidency" here given is different from the definition of the "Presidency-town" as given in the General Clauses Act.[10] Calcutta, for instance, continued to be the Presidency-town under the General Clauses Act, even when Bengal had ceased to be a Presidency.

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(3) *Bajoo Singh*, 26 C. 158.
(4) *Ib.*
(5) *Cf.* S. 263-A (4), *post.*
(6) Act X of 1897.
(7) In Sumatra founded in 1686 and delivered to the Dutch on 11th March 1824 in exchange for Malacca and its dependencies (5 Geo. IV, c. 108).
(8) By Proclamation referred to in the Bengal, &c., Laws Act (VII of 1912).
(9) The Government of India Act, 1935.
(10) Act X of 1897.

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

"Judge."

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(*a*) A collector exercising jurisdiction in a suit under Act X of 1859 [11] is a Judge.

(*b*) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(*c*) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.

(*d*) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

124. Meaning of "Judge."—In its ordinary and normal sense the word "Judge" means only a Judge of the High Court.[12] It does not mean a presiding officer of any Court. But the term has been enlarged as to its meaning in a number of Acts both here as well as in England, so that, in law, it may now mean any person competent to deliver a definitive judgment. So in the old Code of Civil Procedure,[13] a "Judge" was the presiding officer of a Court, and this definition has been preserved in the present Code. The same extended sense is conveyed by the Code of Criminal Procedure in which "Judicial proceeding" is defined to be any proceeding in the course of which evidence is, or may be, legally taken on oath.[14] Of course, the judicial proceeding as here understood, need not necessarily be of a "Judge," for a person may be empowered to administer oath, and not competent to deliver a definitive judgment. He may be only competent to submit a report or record an opinion. Illustration (*d*) furnishes an apt illustration of this. It is, thus, clear that the term, "judicial proceeding", is wider, and does not imply proceedings of a Judge, though all proceedings of a Judge are judicial proceedings.

125. According to the definition, every person officially designated a Judge is a Judge. Besides Judges of the High Court, Sessions Judges, District Judges, Assistant Sessions Judges and Subordinate Judges are ordinarily persons so designated. Besides these, persons who are authorized to give[15] a definitive judgment in a legal proceeding[16] are also included. Now, what is a definitive judgment? As used here, it means no more than a final judgment. A person, then, who is competent to deliver a final judgment, whether subject to confirmation on appeal or not,

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(11) Act X of 1859 (*an Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal*) has been repealed in the Chota Nagpore Division of Bengal (except as to the District of Manbhum and the Tributary Mahals) by the Chota Nagpore Landlord and Tenant Procedure Act, 1879 (Bengal Act I of 1879). *see* now the Chota Nagpore Tenancy Act, 1908 (Beng. Act VI of 1908), and in the rest of Bengal (except as to Calcutta, Orissa and the Scheduled Districts) by the Bengal Tenancy Act, 1885 (VIII of 1885). It is now in force in the District of Manbhum, in the Darjeeling District and in part of the Jalpaiguri District in Bengal and such parts of it as are not inconsistent with the portions of Act VIII of 1885 which have been extended to the Orissa Division are in force in that Division.

Act X of 1859 had been repealed in the Province of Agra (except as to certain Scheduled Districts) by the United Provinces Tenancy Act, 1901 (II of 1901), and in the Central Provinces by the Central Provinces Tenancy Act, 1920 (I of 1920).

(12) *Per* Barke, B., in *Elsley* v. *Kirby*, 12 L. J. Ex. 97; *Kissam* v. *Link*. (1896) 1 Q. B. 574; *Re Noyce*, (1892) 1 Q. B. 642; *Miles* v. *Presland*, 4 My. & C. 431; *Foster* v. *Edwards*, 48 L. J. (Q. B.) 767; *Seth* v. *Reading*, 17 Q. B. D. 131.

(13) S. 2, Act XIV of 1882; now *see* s. 2 (8), Act V of 1908.

(14) S. 4 (*m*), Act V of 1898.

(15) "Judgment means the statement given by the Judge of the grounds of a decree or order," s. 2 (10), C. P. C. (Act V of 1908): In the Cr. P. C., Ch. XXVI (ss. 366-373) deals with Judgment.

(16) Co. Litt., 39*a*, 168*a*.

is a Judge. And so is a person who is a member of a Bench so empowered. A member of the Bench of Magistrates being, for instance, individually incompetent to deliver a definitive judgment, is, nevertheless, a Judge, because the Bench, of which he is a member, is so competent. But a Magistrate, as such, (except, of course, when expressly so empowered), entitled to certify an affidavit within the meaning of s. 539 of the Criminal Procedure Code, is not a judge.[17]

Meaning of Judgment.

126. A judgment here means a formal adjudication upon any point claimed or contested by a party appearing before a Court. In the language of the Code it is the sentence of the law pronounced by the Court upon the matter contained in the record.[18] In a criminal case, a conviction is a judgment. But a miscellaneous interlocutory order is not.[19] But inasmuch as such orders are ordinarily passed by persons possessing the larger powers of delivering judgment, the distinction is, for the present purposes, immaterial.

127. Secondly, since the judgment must be delivered in a "legal proceeding" it is apprehended that a "legal proceeding" is not different from a "judicial proceeding" as defined in the Code of the Criminal Procedure.[20] Similar definition occurs in the English Bankers' Book Evidence Act, 1879 where the "legal proceeding" is defined to mean "any civil or criminal proceeding or enquiry in which evidence is, or may be given, and includes an arbitration."[21] The identity of the two is thus clearly established, for it is manifest that the definition of "judicial proceeding" is taken from the definition of "legal proceeding" in the English Statute.

"Court of Justice."

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration.

A panchayat acting under Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

128. Analogous Law.—The Regulation referred to in the illustration has been repealed by the Madras Civil Courts Act.[22]

129. What is a Court.—"Court," says Lord Coke, "is a place where justice is judicially ministered, and is derived *a cura quia in curiis publicis curas gerebant.*"[23] But this definition appears to be too narrow. For as Fry, L.J., observed, "A Court may perform various functions. The Court of Parliament is a Court, although many of its functions are not judicial. The members are, however, entitled to have absolute immunity for words there spoken. There are other Courts which are not Courts of Justice, but which are rather Courts of Investigation, *e.g.*, a Coroner's Court."[24] So there are several Acts in which the term "Court" has received a definition of its own. But the Court, here intended, is the Court of Justice which, according to the definition, means a Judge or Bench of Judges when acting judicially. The term has, however, another significance, as meaning the *place* where justice is administered, which was originally its meaning, as Coke has pointed out in his definition.

130. It is to be observed that a Court of Justice is only properly so designated when the Judge or the body of Judges is acting judicially. And they can only act judicially when they are conducting judicial proceeding as before defined (§ 124). If they are only dealing with merely administrative business, they are not

(17) *Ramchandra*, 5 Pat. 110.
(18) *R.* v. *Biggins*, 26 J. P. 437.
(19) Definition of "Order" in C. P. C. (Act V of 1908), s. 2 (14).
(20) S. 4 (*m*), Cr. P. C.
(21) 42 & 43 Vict., c. 11.
(22) Act III of 1873.
(23) Co. Litt., 58*a*.
(24) *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431.

a Court of Justice.[25] So a Court-martial, holding an enquiry into the conduct of an officer, cannot be said to be a Court of Justice, nor is their inquiry a judicial proceeding, though a witness examined by them without administering oath stands in the same situation as a witness giving evidence before a judicial tribunal.[1] So the London and County Council, when hearing applications for music and dancing licenses are not a Court, and therefore, not a Court of Justice.[2] So also a Poor Rate Assessment Committee is not a Court.[3] But an officer enquiring into an Income-Tax objection in this country would appear to be a Court of Justice as regards that inquiry, for his proceedings are declared to be "judicial" by the Act,[4] though otherwise the proceedings are merely administrative and not judicial. The Court of Admiralty is, of course, a Court of Justice,[5] and so are the Vice-Admiralty, and Vice-Admiralty Prize Court.[6]

"Public servant."

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely :—

First.—**Every Covenanted servant of the Queen ;**

Second.—**Every Commissioned Officer in the Military, [Naval or Air][7] Forces of the Queen, while serving under the Government of India or any Government ;**

Third.—**Every Judge ;**

Fourth.—**Every officer of the Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court ; and every person specially authorized by a Court of Justice to perform any of such duties ;**

Fifth.—**Every juryman, assessor or member of a panchayat assisting a Court of Justice or public servant ;**

Sixth.—**Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;**

Seventh.—**Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;**

Eighth.—**Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;**

Ninth.—**Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty;**

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(25) *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 409.

(1) *Per* Lord Cairns, L., in *Dawkins* v. *Lord Rokeby*, L R. 7 H. L. 744 (754); O. A. from S. C. L. R. 8 Q. B. 255.

(2) *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431.

(3) *R.* v. *St. Mary Abbots*, (1891) 1 Q. B. 378.

(4) S. 37, Income Tax Act (II of 1886).

(5) 26 & 27 Vict., c. 116, s. 3; 32 & 33 Vict., c. 91, s. 3; 33 & 34 Vict., c. 90, s. 30.

(6) 17 & 18 Vict., c 18, s. 3; *ib.* c. 19, s. 3; 26 & 27 Vict., c. 24, s. 2; 36 & 37 Vict., c. 88, s. 2.

(7) The words "Naval or Air" were substituted for the words "or Naval" by the Repealing and Amending Act, 1927 (Act X of 1927).

Tenth.—Every officer whose duty is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.[8]

Illustration.

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.[8]

131. Analogous Law.—The term "public servant" bears some analogy to the term "servant of the Queen," elsewhere defined.[9] Besides the persons comprised in the definition a large body of men have been so declared within the meaning of the section, by several local Acts.[10]

(8) Clause Eleventh and Explanation 3 have been added by S. 2 of the Indian Election Offences and Inquiries Act (Act XXXIX of 1920).

(9) S. 14, *ante*.

(10) The following are such Acts or Regulations arranged alphabetically :—**a** : Ajmere Government Wards Regulation (I of 1888) s. 11 (2) ; Allahabad University (XVIII of 1887) s. 18 (1) ; Angul District Railway (I of 1894) s. 56 ; Assam Labour and Emigration (VI of 1901) s. 4 (2) ; Assam Forest Regulation (VII of 1891) s. 69 ; **b** : Bengal Court of Wards (Bengal Act IX of 1879) ss. 5, 9-A ; Bengal Public Parks (II of 1904) s. 7 ; Births, Deaths and Marriages Registration (VI of 1886) s. 14 ; Boilers Act (V of 1923) s. 5 (5) ; British Baluchistan Forest Regulation (V of 1890) s. 36 ; British Burma Pilots (XII of 1883) s. 8 (2) ; Broach and Kaira Incumbered Estate (XXI of 1881) s. 33 ; Broach Thakurs Relief (XV of 1872) s. 17 ; [A Karkun employed to execute revenue process is a public servant; *Isub Musa*, B. U. C. 117] ; Bombay Civil Courts (XIV of 1869) s. 33 ; Bombay Court of Wards (Bombay Act I of 1905) s. 2 (12) ; Bombay Local Boards (Bombay Act I of 1880) s. 71 ; Bombay Municipal (Bombay Act III of 1888) s. 521 ; Burma Canal (Burma Act II of 1905) s. 167 ; Burma Embankment (Burma Act IV of 1909) s. 12 ; Burma Forest (XI of 1881) s. 76 ; Burma Forest (IV of 1902) s. 75 ; Burma Municipalities (Burma Act III of 1898) ss. 44, 139 ; Burma Steam Boilers and Prime Movers (XVIII of 1882) s. 12 ; **c** : Calcutta Municipal (Bengal Act III of 1899) s. 646 ; Cattle Trespass (I of 1871) s. 6 ; Census Act (XVI of 1890) s. 3 (2) ; Central Provinces Court of Wards (XXIV of 1899) s. 19 (2) ; Central Provinces Government Wards (XVII of 1885) s. 12 (2) ; Chhota Nagur Incumbered Estate (VI of 1876) s. 21 ; Chittagong Port Commissioners (Bengal Act of 1887) s. 63 ; Civil Courts (Bengal Act VI of 1871) s. 33 ; Coroners (IV of 1871) s. 5 ; Court of Wards (U. P. Act III of 1899) s. 30; **d**: Dourine (V of 1910) s. 4 (2); **e**: Embankment (XIII of 1877) s. 14 ; Emigration (XVII of 1908) 14 (2) ; Emigration (XXI of 1883) ss. 16 (4), 18 ; **f**: Factories (XII of 1911) s. 4 (6) ; **g**: Glanders and Farcy (XIII of 1869) s. 4 (2) ; **h** : Hazrare Forest Regulation (VI of 1893) s. 413 ; **i** : Inland Steam Vessels (VI of 1884) ss. 7, 38 ; **k** : Kanungos and Patwari (N. W. P. Act IX of 1889) s. 17 ; **l**: Land Record Maintenance (Bengal Act III of 1895) s. 33 ; Land Revenue Act (N. W. P. Act XIX of 1873) s. 35 ; **m** : Madras Canals & Ferries (Mad. Act II of 1890) s. 11 ; Madras District Municipal (Mad. Act IV of 1884) s. 41 ; Madras Forest (Mad. Act V of 1882) s. 60 ; Madras Forest (V of 1882) s 66 ; Madras Labour Emigration (Mad. Act V of 1866) s. 3; Madras Local Boards (Mad. Act V of 1884) s. 43 ; [A Sanitary Inspector is a public servant, *Tiruvengada*, 21 M. 428] ; Madras Marriage and Divorce (XV of 1865) s. 23 ; Madras Municipal Act (Mad. Act I of 1884) s. 56 ; Madras Rivers Conservancy (Mad. Act VI of 1884) s. 23 ; Merchant Shipping (VII of 1880) s. 50 ; (V of 1883) s. 14 (2) ; Municipal (U. P. Act I of 1900) s. 51 ; Museum (Indian) (XXII of 1876) s. 14 ; **n**: N. W. P. and Oudh Land Revenue (U.P. Act III of 1901)s. 27; **o**: Oudh Talukdars Relief (XXIV of 1870) s. 22 ; **p** : Parsee Marriage and Divorce (XV of 1865) s. 23 ; Pegu and Sittang Canal (II of 1881)

132. Principle.—In all civilized countries, persons designated "the public servants" form a class by themselves as requiring special protection of the law and as, on the other hand, deserving specially rigorous treatment for abuse of power. Persons who are the embodiment of law and authority naturally possess many immunities and privileges, and they are visited by the correspondingly severe penalties of law, if they deviate from the course prescribed to them by their duty. The Code has accordingly prescribed exceptional pains and penalties to provide for offences committed by and against public servants.

133. The too comprehensive nature of the description of "public servant" was objected to at the time of the draft, but the Indian Law Commissioners defended it, adding: "Supposing the several descriptions he (Mr. Norton) specifies to be as comprehensive as he takes them to be, yet it does not appear to us that they are faulty in this respect, with reference to the provisions in the two chapters relating to public servants in the application of which recourse will be had to them. We think they will be found sufficiently distinct and definite for the purpose they are to serve. We have no apprehension that there will be any difficulty in determining who are positively excluded as not falling under any of the descriptions in clause 14."[11]

134. Meaning of Words.—"*Public Servant*": The section describes the term by enumeration. The term may generally be defined to signify any person duly appointed and invested with authority to administer any part of the executive power of the Crown or to execute any other public duty imposed by law, whether it be judicial, ministerial, or mixed. "*Other person to whom any cause or matter has been referred for decision or report*": The "cause or matter" must be one in controversy.[12] "*Every officer whose duty it is as such officer to take, etc., property*": This means a person employed to exercise to some extent delegated function of Government: he must be either himself armed with some authority of a representative character, or his duties must be immediately auxiliary to those of some one who is so armed.[13] For the meaning of other clauses see below.

135. Who are Public Servants?—This section does not define public servants, but describes them only by enumeration, which itself is merely illustrative and by no means exhaustive. Speaking generally, a "Public servant" must, firstly, be a *servant*, and secondly a *public* servant. It is not necessary that a servant should receive any salary or emoluments for his work, since an honorary servant discharging a public duty is as much a servant as a stipendiary servant in the pay of the Crown.[14] Thus a peon who was remunerated by a fee on processes served by him in a Collector's Court,[15] or a candidate entertained without any pay in the Tahsil Office for learning work in the hope and expectation of eventually being taken on the staff[16] were both held to be public servants.

136. Secondly, it is essential that a public servant must be in charge of some *public* duty.[17] Public duty is no where defined in the Code, and no general

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s. 14; Police (V of 1861) s. 8; Prisons (IX of 1894) s. 23; [A convict warder or overseer is a public servant. *Muhammada*, (1908) P. R. No. 22]; Punjab Steam Boilers and Prime Movers (Punj. Act II of 1902) s. 12; Punjab Military Transport (Punj. Act I of 1903) s. 4 (2); **r**: Railway Act (IX of 1890) ss. 4, 137 (1); Rangoon Port Commissioners (XV of 1879) s. 64: Rangoon Port (Burma Act IV of 1905) s. 107; Rangoon Victoria Memorial (Burma Act I of 1908) s. 4; Registration (XVI of 1908) s. 84; **s**: Sind Incumbered Estates (XX of 1896) s. 35; Small Cause Court (XV of 1882) s. 52; Steam Boilers (N. W. P. and Oudh Act I of 1899) s. 12 (3); Steamship (VII of 1884) ss. 9, 37 (3); **t**: Telegraph (XIII of 1885) s. 31; **u**: United Provinces District Board (U. P. Act III of 1906) s. 41; U. P. Steam Boilers and Prime Movers (U. P. Act I of 1889) s. 12 (3); Upper Burma Oil Field Regulation (VI of 1910) s. 12; Upper Burma Registration Regulation (II of 1897) s. 7 (2); **v**: Victoria Memorial (X of 1903) s. 4.

(11) First Report, § 78. This section was clause 14 in the Draft Bill.

(12) *Debi Din*, (1886) A. W. N. 295.

(13) *Ramajirav*, 12 B. H. C. R. 1; *Nizamuddin*, 28 C. 344.

(14) *Parmeshar Datt*, 8 A. 201; followed in *Ramachandra Shahu*, 12 Pat. 184; *Mahendra Prasad*, 9 I. C. (C.) 698.

(15) *Ramkrishna*, 7 B. L. R. 446, 16 W. R. (Cr.) 27.

(16) *Parameshar Datt*, 8 A. 201; *Subramanya* v. *Somasundaram*, 21 M. 428; *Mahendra Prasad*, 9 I. C. (C.) 698.

(17) *Nizamuddin*, 28 C. 344.

definition of the word would be complete. It may, however, be said that all persons having to discharge delegated functions of administration of State are public servants.[18] The duty imposed upon such public servant may be ever so exalted or menial, but, as long as he is discharging the public duty, he is a public servant. It matters little that there is some flaw in his appointment, as long as he has in fact " taken the duties and responsibilities belonging to the position of a public servant and he performs those duties, and accepts those responsibilities, and is recognized as filling the position of a public servant."[19]

137. Public servants known to the law are those statutory and those mentioned in this section. The local or special laws have declared certain functionaries as public servants for the purposes of the Penal Code. (§ 131). As they owe their status to some Statute, they are designated Statutory public servants and in their case, it is not necessary to refer to the section, though they must necessarily fulfil its requirements. But they have been so declared in order to place their status beyond contest. A person may be declared to be a public servant by a statute, but such declaration would not necessarily make him a public servant within the meaning of this section, unless he possesses any of the qualifications therein described, though he will, of course, be a public servant for other purposes in accordance with the provisions of the Statute.

138. Another point important to note is that a public servant need not necessarily be appointed by Government.[20] This is obvious from the explanation and from illustration[21] in which a Municipal Commissioner is declared to be a public servant, though he is elected by the suffrage of his constituency subject only to the approval of or confirmation by the Government.

139. In determining whether a person is a public servant or not, the first thing to see is whether he is servant. Then enquiry should turn to whether he is not a statutory public servant. It is only then that the section need be referred to, and as the section is of last resort, attention must be paid to its clauses, with a view to see if the case in point is covered by any of the eleven clauses here enumerated. On referring to them it will sometimes be found that a given case is covered by more than one clause which is quite possible, for the clauses are not mutually exclusive and exhaustive, and only a casual reference to them is sufficient to show that a case might conceivably fall within two or more clauses at the same time. Thus, for instance,a covenanted servant of the Queen may be also a Judge, an officer of a Court of Justice, a juryman, an arbitrator and the rest. But the fact that he may be one or more does not affect his status, if it is once so established. But in order to apply the test here prescribed, it is necessary to grasp with precision the meaning of each clause, for they are by no means free from difficulty.

Tests.

140. Statutory Public Servants.—A list of the Statutes defining such servants has been given elsewhere (§ 131). An illustrative enumeration may, perhaps, make the subject further clear. Bailiffs and appraisers of the Presidency Courts of Small Causes,[22] Census officers,[23] Coroner of Presidency Town,[24] Emigration officers,[25] Managers of encumbered estates,[1] Factory Inspectors,[2] Forest officers.[3] Servants and officers of the Indian Museum,[4] Certain officers appointed under the Merchant Shipping Act, 1860.[5] Officers executing

(18) *Cf.* 55 and 56 Vict., c. 61.
(19) *Per* Straight, J., in *Parmeshar Datt*, 8 A. 201 (*vide* Expl. 2 to this section).
(20) Expl. 1.
(21) *Ill.* to " eleventh " clause.
(22) S. 52, Act XV of 1882.
(23) S. 4, Act XIV of 1880.
(24) S. 5, Act IV of 1871.
(25) S. 14, Act VII of 1871 ; s. 5, Act III of 1876 ; s. 50, Act V. of 1877 s. 3, Mad. Act V. of 1866.

(1) Local Encumbered Estates Acts, s. 21 ; Act VI of 1876 (Chutia Nagpur) ; s. 22, Act XXIV of 1870 (Taluqdars of Oudh); s. 33, Reg. IV of 1872 (Taluqdars, Thakurs and Jagirdars in Ajmere) ; s. 33, Act XXI of 1881 (Broach and Kaira Thakurs, etc.); s. 33, Act XX of 1881 (Sindh).
(2) S. 3, Act XV of 1881.
(3) S. 72, Act VII of 1878.
(4) S. 14, Act XXII of 1876.
(5) S. 50, Act VII of 1880.

warrants of Marine Courts,[6] Municipal Commissioners and servants,[7] Officers and servants of local and district boards,[8] Canal officers appointed under the Pegu and Setang Canal Act,[9] Embankment officers,[10] Delegates of Parsi Matrimonial Court,[11] Patwaris and Kanungoes,[12] Pound Keepers,[13] Railway servants,[14] Telegraph officers of private company,[15] Registering officer,[16] Rangoon Port Commissioners, their officers and servants,[17] Sanitary Inspectors,[18] Special Judge under Jhansi Encumbered Estates Act,[19] Judges and Assessors of Courts of Survey and Ship Surveyors,[20] Heads of village for purposes of Madras Abkari Laws Amendment Act,[21] Clerks appointed under the Broach Thakurs Relief Act, whose duty it was to receive rents and execute revenue processes,[22] are all statutory public servants and so declared by the several Acts relating to them.

141. Covenanted Servants of the Queen.—And first, it is provided that every covenanted servant of the Queen is a public servant.

Clause 1.

The term "covenanted servants" has now all but passed out of the vocabulary of the Indian Government. But at one time it was the officially recognized mode of expression as applied to members of the Indian Civil Service. The term originated at the time of the East India Company to which superior servants were recruited in England by the Board of Directors under a covenant by which they bound themselves not to trade or to receive presents, to subscribe for pensions and so forth. This practice has since continued and the members of the Indian Civil Service are required to subscribe to a similar declaration. But the covenant is now signed as a matter of form. It has ceased to have any practical utility. The term "covenanted servant" therefore now exactly corresponds with the members of the Indian Civil Service.[23]

142. Persons recruited for what is called the minor civil services, *e.g.*, 'Education, Forest, Police, Geological Survey' and the like, are not included in the term, for they are not covenanted servants of the King, though their selection and mode of appointment is identical.

143. The terminology of this clause was objected to on the ground that it might include covenanters with Government by Charter-party. But as to this the Indian Law Commissioners replied that "considering the positive sense that the term 'covenanted servant' bears in the Company's territories, we deem it to be most unlikely."[24]

144. Officers of the Army, Navy and Air Force.—Commissioned officers of the Army, Navy and Air Force are those to whom commissions for command over officers and men of the regular forces have been duly issued.

Clause 2.

145. As the regular Army, Navy and Air Force of the Empire are under the command of the Crown, the military rank and powers of command of their officers depend solely on commissions from the Crown issued in accordance with the provisions of 25 and 26 Vict., c. 4[25] entitled "an Act to enable Her Majesty to

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(6) S. 15, Act IV of 1875.

(7) *See* Local Municipal Acts and s. 25, Act XV of 1873; s. 22, Act VIII of 1874; s. 56, Mad. Act V of 1878; s. 51, Bom. Act III of 1872; s. 15, Bom Act VI of 1873.

(8) *See* Local Acts; *Tiruvenguda*, 21 M. 428.

(9) S. 14, Act II of 1881.

(10) S. 23, Act XV of 1865.

(11) S. 35, Act XIX of 1873; s. 8, Act XIII of 1882.

(12) S. 6, Act I of 1871.

(13) S. 27, Act IV of 1879.

(14) S. 18, Act I of 1876.

(15) S. 84, Act II of 1877.

(16) S. 64, Act XV of 1879.

(17) S. 29, Act XVI of 1882.

(18) S. 12 of Bengal Food Adulteration Act, 1884,—*Shailesh*, 59 C. 234.

(19) S. 50, Act VII of 1880.

(20) S. 24 (*c*), Mad. Act V of 1879.

(21) S. 17, Act XV of 1872; *Isub Musa*, B. U. C. 117.

(22) *Dina Nath Gangooly*, 8 B. L. R. App. 58; 17 W. R. (Cr.) 12.

(23) The term "Covenanted servant" is nowhere defined in the Statutes. It has been, however, used in the sense of the text in s. 57, (1793) 33 Geo. III, c. 52, which lays down a scheme for the administration of India. The term is treated synonymously with the Indian Civil Service in the Indian Civil Service Act, 1861, s. 2 (24 & 25 Vict., c. 54).

(24) First Report, § 77.

(25) (1862) Army, Marines, Militia and Volunteers Act.

issue Commissions to the officers of Her Majesty's land Forces and Royal Marines, and to Adjutants and Quarter-masters of the Militia and Volunteer Forces without affixing Her Royal Sign Manual thereto." That Act provides for the issue of commissions under the signatures of the Commander-in-Chief and one of Her Majesty's Principal Secretaries of State, and in the case of Royal Marines, of the Lords Commissioners of the Admiralty, and in the case of Military Chaplains Commissariat and store officers, and of the Adjutants and Quarter-masters in the Militia and Volunteer Forces, of one of Her Majesty's said Principal Secretaries, and that every such commission issued and signed in pursuance of such order in Council shall be conclusive evidence that the officer named in any such Commission had been appointed or promoted by Her Majesty to the rank or office named therein.

146. It will, however, be observed that all persons included in this definition are not public servants within the meaning of this section. For, in the first place, they must be commissioned officers, that is to say, an officer holding commission such as above set out. A " superior officer " is not a commissioned officer, but only a warrant officer.[1] But an officer holding an honorary commission is included in the term.

147. But the commission must be held in the Military and Naval Forces of the King. These words would appear to include forces other than the regular forces, *e.g.*, the auxiliary forces, the volunteers, and volunteer forces, and the militia.[2] A commissioned officer, whether in the regular or reserve forces, stipendiary or volunteer, is a public servant. But the officer must be " serving under the Government of India or any Government."[3] That is to say, officers on active duty alone are public servants. Those superannuated or retired on leave or under suspension are excluded, because they do not then perform the functions which identify them with the Government from which they derive their delegated authority. And since the " Government" they must be serving under must be British, their service in a Native State would not be such service as is contemplated by the section.

Clause 3.

148. Every Judge is a Public Servant.—A Judge is defined in section 19, and it is then simple to see what persons fall into this category.

Clause 4.

149. Officers of Court of Justice.—This clause for the first time introduces the term " officer " without defining it. It is again used in clauses 8 to 10. It is omitted in clause 7 where the use of the term might have been equally apposite. But at the same time if close attention is paid to the several clauses, it will be perceived that the term has been used in a definite sense, and that it is not used as merely a substitute for the word " person ". An officer may then be defined to be a person, employed to exercise, to some extent, and in certain circumstances a delegated function of Government. He is either himself armed with some authority of a representative character, or his duties are immediately auxiliary to those of some one who is so armed.[4] In this sense, it may include a person in the position of a peon,[5] but not a carter,[6] or the lessee of a village,[7] though *Deshmukhs* and *Deshpandes* would be sufficiently within the meaning of the term, as they are appointed to perform for the State a portion of its functions, or to aid those who are its active representatives.[8]

150. Now, understanding the term " officer " in this sense, the clause is intended to include all ministerial officers attached to the Courts of Justice. Clerks of Courts are, as such, required to report on any matter of " law or fact " as whether a plaint, petition or memorandum of appeal is, or is not, within time, and whether

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(1) (1881) 44 & 45 Vict., c. 58, s. 190 (4).

(2) S. 170 (7), 44 & 45 Vict., c. 58.

(3) *Ib.*, s. 190 (12), (13) & (14).

(4) *Per* West, J., in *Ramjirav*, 12 B. H. C. R. 1 ; *Nazamuddin*, 28 C. 344.

(5) *Ramkrishna*, 7 B. L. R. 446 ; 16 W. R. (Cr.) 27; *Nizamuddin*, 28 C. 344.

(6) *Nachimuttu*, 7 M. 18.

(7) *Ramjirav*, 12 B. H. C. R. 1.

(8) *See* Clause Ninth, *post* ; *Ramjirav*, 12 B H. C. R 1.

it has been presented by a duly authorized person. A Record Keeper[9] is a person entrusted with the custody of records of disposed of cases, while the Sheristadar or Peshkar is entrusted with the custody of pending proceedings. The Nazir is the custodian of Court exhibits and property in suit, while process-servers are entrusted with the duty of executing judicial processes.[10] Notaries Public are, as a rule, appointed to administer oaths, while officers variously described are entrusted with the duty of preserving order in Court. These are the persons ordinarily so employed, but the last clause widens the scope of the rule, for it clothes any person specially authorized by a Court to discharge any of the foregoing functions with the status of public servant.

151. A Court Ameen employed to prepare a plan, to inspect a site, or to effect a partition, would thus fall within the last provision, as a person specially authorized by a Court of Justice. A Commissioner appointed by Court to examine a witness would appear to share the same privilege.

Specially authorized.

152. The words "specially authorized" obviously imply that the delegation of authority is (*a*) legal, (*b*) by a person who himself possesses the authority to authorize another, and (*c*) by a person who is a ministerial officer as against a judicial officer.[11] Again, the authorization must be express, though in certain cases, it may even be implied.[12] The question whether the authority is or is not properly exercised is immaterial so long as it is clothed with the legality necessary to afford protection to the public servant.[13] Impropriety in the exercise of the authority ought to be distinguished from illegality which totally deprives a person of the privilege given to the public servant.

Clause 5.

153. Juror, Assessor and Panch.—Jurors, assessors and panches while on duty, that is, actually engaged in the discharge of their duties, are public servants. This is evident, for they are in the position of Judges and, therefore, possess the Judge's privilege and immunities. Even when assisting a public servant other than a Judge, they are entitled to the same privilege and protection as the public servant whom they have come to assist.

Clause 6.

154. Arbitrators and Commissioners.—Arbitrators and Commissioners or other assistants of Courts are public servants whose intervention becomes sometimes necessary, and is not infrequently salutary. But the privilege extends only to persons acting on the motion of the Court or a public servant. It does not extend to officious intermeddlers with public proceedings, or to persons to whose arbitrament the disputing parties may have submitted their cause, with or without the approval of the Court. For, unless the person is made the referee of the Court,[14] or unless some "cause or matter" is referred to him "for decision or report"[15] he is not invested with the immunity which the Court possesses.

155. The persons typified in this section are really persons who fill more or less judicial character, and for the limited purpose for which they are appointed

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(9) "It is questioned by one officer whether *Jawabnavises, Gomashtas*, and other servants of the class come under any of the descriptions in this clause so as to be subject to the provisions of cl. 138 (now s. 161). It seems to us that as servants whose duty it is 'to make' or 'keep documents' they fall under the 5th, 10th or 11th description, according to the Department in which they may be employed."—Indian Commissioners' First Report, s. 79.

(10) *Bhagai Dafadar*, 2 B. L. R. (F.B.) 21, in which resistance was held to be criminally punishable—and rightly so.

(11) *Per* Pollock, C.B., in *Walsh* v. *Southworth*, L. R. 6 Exch. 150.

(12) *Dharam Chand*, 22 C. 596, followed in *Sheo Progas* v. *Bhup Narain*, 22 C. 759; *Abdul Karim* v. *Bullen*, 6 A. 385, Court Fees Act, s. 22 (Act VII of 1870). This view is supported by *Walsh* v. *Southworth*, L. R. 6 Exch. 150.

(13) *Abdul Ghafur*, 23 C. 896; *Satischandra* v. *Jadu Nandan*, 3 C. W. N. 741; *Coville* v. *Kristo Kishore*, 26 C. 746; *Durga Charan* v. *Nobin Chandra*, 25 C. 274.

(14) *Sundar Majhi*, 30 C. 1084,

(15) *Per* Edge, C.J., and Oldfield, J., in *Debi Din*, (1886) A. W. N. 295.

they become as it were the *alter ego* of the persons appointing them. Of course, in all such cases, only the fact of appointment is material, its propriety being irrelevant.

156. Policemen, Jailors.—Policemen are persons empowered to *place* any person in confinement, while Jailors are persons empowered to *keep* persons in confinement. They are both, therefore, public servants. The test under this head being that the person should have the authority to take or keep another person in confinement, a person so empowered would be a public servant, though he may himself be in confinement. Where, for instance, a convict warder is empowered to keep persons in confinement, he becomes a public servant, though he is himself kept in confinement by another, who, again, is on that account a public servant.[16] The authorization here contemplated must, however, be legal; that is to say, the persons empowered to place and keep persons in confinement must have been so empowered by a competent authority, and as a part of his official duty. The authority must then be general, and not special or relating to any individual case. Where, for instance, a Magistrate orders a person to arrest a runaway offender,[17] the latter does not thereby becomes a public servant, because the arrest made was not made by virtue of any office which he held. The power to arrest or detain arrested persons must be inherent in his office. It must be a part of his ordinary duties. But it need not be a power unqualified or unlimited. For no one possesses such a power. A Forest officer detecting a person committing an offence against the Forest Act may take him into custody.[18] He is, therefore, a public servant under this clause, though he is also declared to be a public servant under the Forest Act.[19] The power may be conferred upon a person either generally by Statute or Rules and Regulations made thereunder, or it may be conferred by or implied in an appointment to an office duly made. A person so appointed would, then, become a public servant if, by virtue of his office, he has the power to confine any person. If he has the power otherwise than by virtue of his office, he is not a public servant. For example, any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence,[20] but all persons are not, therefore, public servants.

Clause 7.

157. Peace Officers.—Similarly, persons holding office by virtue of which it is their duty to (*a*) prevent offences, (*b*) to give information of offences, (*c*) to bring offenders to justice, or (*d*) to protect the public health, safety or convenience are declared to be public servants. Police-men, Village watchmen,[21] Revenue and Police Patels in Bombay,[22] fall into this class, which, however, is large enough to include even Judges and Magistrates whose duty is as much to prevent offences[23] as to punish for them. And the clause would include Forest officers, officers of the Salt, Excise or Opium department, or indeed, of any department whose duty it is to protect the interest of their department by preventing the commission of offences against it.

Clause 8.

158. Officers appointed to give information of offences may, again, be Policemen, Village chowkidars, or members of the Criminal Investigation Department, such as detectives or the like. Mere informers and secret agents are not, however, included in the term, because they are not "officers of Government whose duty it is as such officers" to give information of offences.

159. Officers appointed to bring offenders to justice are again Policemen, Judges, Magistrates, Public Prosecutors and persons generally or specially charged with the duty of conducting prosecutions. A person appointed by the Government Solicitor with the approval of Government and under an arrangement made by the Governor-General in Council to act as prosecutor in a Police Court is thus a public

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(16) *Kallachand*, 7 W. R. (Cr.) 99; *Muhammada*, (1908) P. R. (Cr.) No. 22.
(17) *E.g.* under s. 65, Cr. P. C.
(18) S. 51, Forest Act (V of 1882).
(19) *Ib.*, s. 60.
(20) S. 59, Cr. P. C.
(21) *Siddhut*, 26 A. 542; *Appaji*, 21 B. 517.
(22) *Appaji*, 21 B. 517.
(23) *See* Part IV "Prevention of offences" (ss. 106-126), Cr. P. C.

servant.[24] Similarly, officers of the Society for the Prevention of Cruelty to Animals[25] appointed under the Police Act are public servants,[1] because their duty leads them to bring offenders under that Act to justice.

160. Lastly, Health Officers, Sanitary Inspectors, Bazar Masters, Hackney Carriage Examiners, Engineers of the Public Works and Irrigation Departments, Postal Officials, Street Overseers, and, indeed, all persons having similar duties to perform by virtue of their office are public servants. But Inn-keepers and Dak Bungalow cooks are not persons engaged to *protect* public convenience, though their duties are subservient thereto.

Clause 9.

161. Miscellaneous Officers of Government.—The ninth clause is really the *otta podrida* of the section, and it includes within its comprehensive grasp a large mixed class of non-descript officers who could not be specially provided for. Generally speaking, this class includes officers who receive or disburse money on behalf of Government, such as Treasurers, Cashiers, Opium and Stamp vendors employed in the Government Treasuries. But a Stamp vendor employed not under the Stamp Act, but under an agreement with the Collector was held not to be a public servant.[2]

162. Persons whose duty it is to make survey on behalf of Government are members of the Geological and Topographical Survey of India, officers connected with State Railways, Canal and Irrigation departments and the Department of Settlement and Agriculture. As belonging to this department may be mentioned patwaris,[3] and other minor officials, who prepare maps and plans of rural areas for the purpose of assessment. A surveyor preparing a map of water-course of a *khas mahal* under the orders of the Collector is a public servant, for " the Collector acting in the management of a *khas mahal*, the property of the Government, is as much the Government within the meaning of section 17 of the Indian Penal Code as when he is exercising any other of the duties of his official position.[4]

163. Officers who make contracts on behalf of Government are those belonging to the Commissariat and Public Works Department. Officers in charge of Excise, Opium, Ganja and Salt have also to make contracts on behalf of Government for their sale, but as these officers are usually Civil Officers of the district, they fall not only into this, but also other clauses of the section.

164. Persons who execute judicial process have been declared to be public servants in clause 4. Following that analogy, Revenue process-servants and others assisting the Revenue officers are here declared to fall into the same class. For like judicial subordinates they, too, are exposed to the same temptations and are, therefore, equally amenable to the same rules. Peons, whether permanent or supernumerary, attached to the Collector's office, and whether in receipt of fixed pay or fees, are within the rule,[5] and so is a peon in the service and pay of Government but attached to office of the Superintendent of the Salt Department, though his duties were probably generally to obey the orders of his superior.[6] But such a menial can scarcely be designated an " officer " in the sense in which that word is used in common parlance. The term must then be understood as merely connoting one who is appointed to some office for the performance of some public duty.[7]

165. Persons empowered to investigate or to report on any matter affecting the pecuniary interests of Government are scattered over almost every department of Government. As such, they become public servants, though they may not be otherwise so qualified. Tax collectors and Tahsil officials are amongst those falling into this class.

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(24) *Butto Kristo Doss*, 3 C. 497.
(25) Act XI of 1890.
(1) *Upendra Kumar Ghose*, 3 C. L. J. 475; *Nataraja*, 46 M. 90.
(2) *Kalyanray*, B. U. C., P. 36.
(3) *Mudsuddeen*, 2 N. W. P. H. C. R. 148.
(4) *Bajoo Singh*, 26 C. 158.
(5) *Ramakrishna Das*, 7 B. L. R. 446.
(6) *Nizamuddin*, 28 C. 344.
(7) *Nizamuddin*, 28 C. 344; *Ramajirav*, 12 B. H. C. R. 1 (Cr.).

166. Persons who " make, authenticate or keep any document relating to the pecuniary interests of Government " similarly form a numerous class. Revenue Inspectors and Patwaris stand on the lowest rung of the ladder amongst officials of the Department of Survey and Settlements who make documents relating to the pecuniary interests of Government, namely, the land-revenue. Revenue record-keepers and the like are persons who keep such documents.

167. Persons who prevent the infraction of any law for the protection of the pecuniary interests of Government are men like customs officials, and those engaged to detect contraband trade against the monopoly of Government. Excise Inspectors are, for instance, employed to prevent the manufacture of illicit liquor or the importation of foreign opium or ganja. Consequently, they become public servants under the rule.

168. Every officer in the service or pay of Government, is, apart from other considerations, a public servant. But, of course, an officer holding a mere sinecure cannot be called a public servant for there can, then, be no reason for applying to him the exceptional provisions specially enacted for them in the Code. The clause must, therefore, mean a person who holds an office to which some public duty is attached, and which he may be called upon to perform. Consequently, an unpaid apprentice in the office of a Sub-Registrar in Bengal is not a public servant even though his services be reimbursed by the Sub-Registrar out of his allowance.[8] Such was also held to be the case of a Quarter-master's clerk.[9] On the other hand, a Police Sub-Inspector attached to the Finger Print Bureau as an expert, and called as such is a public servant and a bribe offered to him would be punishable under section 161.[10]

169. Officers of Local Bodies.—This clause compendiously states what is more elaborately stated in the last preceding clause in respect of officers of Government. *Mutatis mutandis*, similar officers, though in the service of Town or Urban Municipalities,[11] Local Boards, District Councils, Sanitary Boards or other similar bodies are public servants. Persons who are in charge of religious as distinguished from secular public benevolence, are, however, not public servants.

Clause 10.

170. Municipal Engineers who receive money from the Municipality and pay it out to contractors are, thus, within the definition,[12] though an Engineer who is merely empowered to sign a bill or cheque upon which a different official pays the money might be conceivably classed otherwise, on the ground that he does not " expend any property " of the Municipality.[13] Municipal or Local Board overseers, octroi and cattle-pounds moharirs, cess collectors,[14] goods clerks,[15] or union karmans[16] are persons who take o· receive money for their Municipality or Local Boards as the case may be. They are, therefore, public servants. But a Local Board Sircar who merely supervises road work is not a public servant.[17]

171. A Municipal Commissioner individually may be a nonentity, but he is declared to be a public servant by the illustration, but for which he might not have fallen within that class.

172. Not Public Servants.—It was held in a Calcutta case that there was nothing in the Calcutta Municipal Corporation Act[18] to suggest that it was a " public servant."[19] It was, however, conceded that it could be a public servant under clause 10 of the section. But that clause speaks of an " officer " and not a person, and an officer cannot be a juridical person such as a corporation must necessarily be. Indeed, there is scarcely any room for doubt that even the term person as used

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(8) *Mahendra*, 9 I. C. (C.) 698 ; *Bhagwati Sahai*, 32 C. 664 ; but Cf. *Fula Bhana*, (1888) B. U. C 38.

(9) *Ahad Shah*, (1918) P. R. (Cr.) 18 ; 45 I. C 150.

(10) *Karam Chand*, 69 I. C. (L.) 445.

(11) *Ezekiel*, 6 Bom. L. R. 54 (under the City of Bombay Municipal Act) (Bom. Act III of 1888) ; *Ramasami*, 13 M. 131 (under the Madras District Municipalities Act).

(12) *Naufawram*, 6 B. H. C. R. 64.

(13) *Per* Gibbes, J., in *Naufawram*, 6 B. H. C. R. 64.

(14) *Babulal*, 33 B. 213.

(15) *Zakaria*, 9 P. R. 1893.

(16) 1 Weir 128.

(17) *Addaita* v. *Kali Dass*, 12 C. W. N. 96.

(18) Act IV of 1877.

(19) Municipal Corporation, 3 C. 758.

in clause 8 is used there in its strictly narrower sense as denoting a human being (§ 101). The section does not appear to contemplate the possibility of including artificial persons within its comprehension.

173. Then, again, it appears almost superfluous to add that servants in private employ are not public servants within the meaning of the section. But such a contention was once made in a case in which the cashier of the Bank of Bengal carrying on the treasury business of the Government had received illegal gratification from the manager of a Court of Wards on deposit of a certain sum on behalf of Government. The cashier was proceeded against for receiving illegal gratification as a public servant, his *status* as such being supported on the ground that he was "an officer whose duty it is, as such officer, to take any property on behalf of Government."[20] But the Court held that the money received by the cashier was for the Bank and not for the Government, and that, therefore, he could not be deemed to be a public servant.[21] But the manager of the Court of Wards, though not a servant of Government, is yet a public servant, inasmuch as the Court of Wards, being the Government, his duty to receive moneys for the Court of Wards is really a receipt "on behalf of Government."[22] But this case is in conflict with a Madras case in which a peon employed by the manager of an estate in charge of the Court of Wards was held not to be a public servant.[23] Assuming that the peon was a servant of the Court of Wards, he could not but be a public servant if the manager in the Allahabad case was a public servant, for both persons performed the same duties and it is, therefore, submitted that the Madras case was not correctly decided. The correct view was taken by Ainslie and Paul, JJ., in a Calcutta case in which they held a peon of the Collector's Court who received no fixed pay from the Government but was remunerated by fee whenever employed to serve any process and was placed on the Register of Supernumerary peons to be a public servant.[24] So a peon in the service and pay of Government and attached to the office of a Superintendent of the Salt Department is a public servant, though his duties were only to carry out the orders of his official superior, himself a public servant. Of course, labourers and menial servants employed to do work or labour on account of the Government are not "officers" and do not fall within the definition of "public servants" here given.[25]

174. A carter temporarily employed by the Public Works Department could not arrogate to himself that status,[1] though a Lascar can do, as in Madras.[2] But the Receiver of an estate appointed *pendente lite* is not a public servant,[3] for his position is that of a guardian of the estate for the protection of which he is appointed. So a clerk appointed by a Sub-Registrar and paid out of an allowance given to him is not a public servant as his appointment is not contemplated by the Indian Registration Act, though it empowers the Registering officers to keep a proper establishment. But that alone would scarcely convert every employee under that provision into a public servant.[4] So, while Municipal officers may be, and ordinarily are classed as public servants, it does not follow that all servants of the municipality are also public servants. A municipal water-rate collector is thus held not to be a public servant: *et hoc genus omne*.[5] Similarly, a goods clerk of a Railway Company,[6] or a Quartermaster's clerk,[7] stand outside the category of public servants. So is the lessee of

(20) Clause 9.
(21) *Modun Mohun*, 4 C. 376.
(22) *Mathura Prasad*, 21 A. 127; This case was decided under the N. W. P. Act, which does not contain any declaration as to a manager being a public servant, which, however, is expressly provided in the C. P. Court of Wards Act, S. 12 (ii), Act XVII of 1885.
(23) *Arrayi*, 7 M. 17; dissented from in *Nizamuddin*, 28 C. 348.
(24) *Ram Krishna Das*, 7 B. L. R. 44. This case, too, was dissented from in *Nizamuddin*, 28 C. 348.
(25) *Nachimuttu*, 7 M. 8.
(1) *Ib.*
(2) *Public Prosecutor* v. *Annan Naidu*, 48 M. 867.
(3) *Ebrahim*, 29 C. 236.
(4) *Bhagawat Sahai*, 32 C. 664.
(5) *Gulab*, 1 A. L. J. 125, refers to Municipal Act (Act I of 1900) s. 51.
(6) *Zakaria*, (1898) P. R. No. 9.
(7) *Ahad Shah*, (1918) P. R. (Cr.) 18; 45 I. C 150.

a village from Government though he be under obligation to keep an account of the forest revenues and pay it a proportion thereof.[8] A villager assisting a headman in the discharge of his public duties is no more a public servant than a person whom a Magistrate may require to assist him in the discharge of his public duties.[9] Such is also the *malguzar* holding an enquiry in the matter of damage done to a Government forest, though it may be his duty under the Forest Act to assist Government.[10] A person employed by parties to settle a dispute, though approved by the Court is not necessarily to be treated as appointed by it so as to clothe him with the character of a public servant.[11] A person nominated by the Collector under s. 89 of the Bengal Tenancy Act is not a public servant because he does not perform any of the duties of a public servant.[12] So, again, a public servant would cease to be so on his suspension from duty.[13] A corporation, though a juridical person, is not a natural person so as to be a public servant within the meaning of the section.[14]

"Moveable property."

22. The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

175. Analogous Law.—The term "moveable property," here defined, differs, on the one hand, from its definition in the Larceny Act[15] as well as from its numerous definitions in the other Acts of the Indian Legislature.[16] In the English Acts, all intangible rights in property are included in the term and such is the case in the Transfer of Property Act, and other Acts of the Indian Legislature. But in this section, the term is limited to corporeal property, that is to say, tangible moveable property as distinguished from intangible rights which law regards as property and clothes the holder with rights of ownership therein. The definition, thus, excludes all incorporeal objects such as legal relations and rights which are included in the term in civil law. In other words, it takes no account of rights or interest in things apart from the things themselves.

176. Under English Law, which borrows its terminology from the Roman Law, property is divided into (*a*) corporeal or (*b*) incorporeal, sometimes spoken of as tangible or intangible property. Corporeal property is such as can be perceived by the senses, such as land or a coat, while incorporeal property consists merely of legal relations and rights including legal obligations and rights of action.

177. Principle.—Since intangible rights in property are not visible, the Penal Code excludes them from the definition of moveable property. Again, things permanently attached to the earth are also excluded from the definition of moveable property in this section; but in civil law, their character would be determined, not by the mere fact of attachment but by its degree. By excluding intangible rights and including things not permanently attached to the earth, the Code makes that definition at once wider and narrower than what obtains in civil law. It does so to eschew conflict and complications, which were sure to arise in the working of the Code, if a more comprehensive definition were adopted. This would be clear from the sequel.

178. Meaning of Words.—"*Corporeal property*" is property which may be perceived by the senses in contradistinction to incorporeal rights which are not so perceivable, such as obligations of all kinds. "*Except land*": Land, being immoveable property, could not have been included in the term "moveable property." It should be noted that the words used in one place is "land" and in another place "earth". The two words are used in senses apart, as will be explained in the

(8) *Ramjirav*, 12 B. H. C. R. 1.
(9) *Nga Pow*, (1917) 38 I. C. (U. B.) 735.
(10) *Meharban*, 9 I. C. (A.) 669.
(11) *Sunder Mahji*, 30 C. 1084 (1087).
(12) *Chattar Lal* v. *Thacoor Pershad*, 18 C. 518.
(13) *Dinanath*, 8 B. L. R. App. 58.
(14) *Municipal Corporation*, 3 C. 758 (764).
(15) 24 & 25 Vict., c. 96, s. 1.
(16) *Cf.* S. 2 (6) of the General Clauses Act, (Act I of 1868); S. 3 (34) of the General Clauses Act (Act X of 1897); S. 3 of the Indian Registration Act (Act III of 1877); Cl. (9) of S. 2 of Act XVI of 1908; S. 44 of the Indian Companies Act (Act VI of 1882) as amended by Act VII of 1913; S. 3 of the Transfer of Property Act (Act IV of 1882).

sequel (§§ 167- 169). "*Things attached to the earth*": *See* the definition of this phrase as given in the Transfer of Property Act. "*Or permanently fastened, etc.,*" which is included in the phrase "attached to the earth."[17]

179. Moveable Property.—The term "moveable property" has been defined here for the special purpose of the Code. As such, its definition is much narrower as compared with its definitions elsewhere. For while incorporeal rights are usually classed as moveables, the Code excludes them from the definition of "moveable property," as it may give rise to conflict and complications which would not be conducive to the easy working of the Code.

180. The term "moveable property" then means only visible or tangible things. It does not, of course, include land which is immoveable property. Nor does it include things, such as trees and buildings attached to the earth. But, earth attached to *the* earth is a part of it only so long as it is so attached. If it is removed from "the earth" or "land" it becomes moveable property, and as such, the subject of theft. So it is provided in section 378 that "a thing so long as it is attached to the earth, not being moveable property, is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth."[18] Thus, stones so long as they are imbedded in the earth are immoveable property, being a part of the earth, but as soon as they are quarried and carried away, they become moveable property, and, therefore, the subject of theft.[19] So where a swamp had been taken possession of by the Government, and the accused gathered salt, which had spontaneously formed on it, it was held that the removal of salt from the swamp converted it into moveable property, so that the accused were rightly convicted of its theft. "We cannot distinguish this case," observed the Court, "from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not ; yet things immoveable become moveable by severance, and this would apply to severed parts of the soil, *e.g.*, stone quarried minerals, iron, or salt collected, as well as to timber which has grown, or edifices which have been raised on the land."[20] So in another case where the accused were charged with stealing 100 cart-loads of earth from the complainant's land, the Court upheld their conviction for theft observing : "It appears to us that earth when dug or ploughed up, so as to be in a state in which it can be put into a cart and taken away, ceases to be 'land' or a thing 'attached to the earth within the meaning of section 22 of the Indian Penal Code. By the process of digging or ploughing, earth may become severed from 'the earth' or from 'any land' to which it was attached ; and may become 'moveable property' within the definition contained in that section."[21] Earth, that is soil, and all the component parts of the soil, inclusive of minerals and stones, when severed from the earth, become moveable property, by the fact of severance alone from the earth, and regain their immoveable character as soon as they are deposited therein.

181. So standing crops growing on land, are immoveable property so long as they stand unsevered from the earth upon which they grow, but as soon as they are severed, they become moveable property, and, therefore, capable of theft.[22] In view of this consideration much of the value of the distinction made between things that should be regarded as "attached" or not attached to the earth loses its significance. But in so far as there may be still theft of things that lie in juxtaposition to the earth, but are not attached thereto, the question what things should be considered as attached to the earth has still to be considered. It is not, however, proposed to exhaust the subject here, for the subject has received ample treatment in another work to which reference should be made, if necessary.[23]

182. What is "Land."—Land and things attached to the earth are here excepted from the category of moveable property. In fact, "land and things attached

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(17) S. 3, cl. (*c*), Act IV of 1882 ; "attached to the earth."

(18) Exp. 1.

(19) *Suri Venkatappayya* v. *Madula*, 27 M. 531, F.B, overruling *Kotayya*, 10 M. 255 ; and following *Tamma Ghantayya*, 4 M. 228 ; *Shivram*, 15 B. 702.

(20) *Tamma Ghantayya*, 4 M. 228.

(21) *Shivram*, 15 B. 702.

(22) S. 378, ill (*a*) *post*.

(23) 1 Gour's Law of Transfer (6th Ed.), §§ 84-98.

to the earth, or permanently fastened to anything attached to the earth " are also immoveable property under the General Clauses Act.[24] Land, as such, is immoveable property. Land is the solid part of the surface of the earth, as opposed to water as constituting a part of such surface. So in section 145 of the Code of Criminal Procedure—a section referring to " Disputes as to immoveable property,"—it is spoken as " land or water," and in clause 2 the expression is for the purpose of that section declared to " include buildings, markets, fisheries, crops, or other produce of land, and the rents or profits or any such property.[25] Of course, the term " land " has been used here in a much restricted sense as connoting only the crust of the earth. In ancient times, however, the term had even a more restricted meaning, for it was used to signify " whatsoever may be ploughed " and " nothing but arable land."[1] But this sense has long since been abandoned, and the word is now used to comprise any ground, soil, or earth whatsoever[2] and whatsoever right therein held whether proprietary or leasehold.[3]

183. But land in civil law comprises not only the surface of the ground, but also everything on or over or under it, for *cujus est solum ejus est usque ad cœlum et ad inferos.*[4] So land includes mines.[5] And so now under the English Conveyancing Act[6] " unless a contrary intention appears, land includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land.[7] But here, the meaning attached to the word is not so large. It is used here merely to denote the surface of the earth, whether dry or covered with water. For land is " not the less land for being covered with water."[8]

184. Things attached to the Earth.—Besides water the term " land " " includes also things attached to the earth." It is used here in the same sense, that is, it means things (*a*) rooted in the earth, as in the case of trees and shrubs, or (*b*) things *imbedded* in the earth, as in the case of walls or buildings, or (*c*) things attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. The term " attached " does not always mean physically fastened ; it may also mean, superincumbent upon, as, for example, heavy machinery kept *in situ* by its own weight.[9] So trade-fixture are now usually regarded as attached to the earth, though at one time they were not.[10]

185. Permanently Fastened to Things Attached.—Things *permanently* fastened either to land or to things attached to the earth are not moveable property. Now the question whether a thing is to be so regarded depends upon the degree and nature of the annexation and the purpose for which it was made. Thus doors and windows being attached to buildings for their permanent beneficial enjoyment are regarded as permanently fastened to them. On the other hand, window blinds, window sashes, shutters, fastenings, hangings, tapestry and pier glasses whether nailed or not, beds fastened to the walls or ceilings, fixed tables, water tubs, cup-

(24) S. 2 (5), Act I of 1868 ; see now s. 3 (25), Act X of 1897.

(25) Co. Litt., 49.

(1) Shep. Touch, 91.

(2) *Doe* v. *Ludlam*, 7 Bing 275.

(3) *Swift* v. *Swift*, 29 L. J. Ch. 121 ; *Wilson* v. *Eden*, 11 Beav. 237 ; *Prescott* v. *Barker*, 43 L. J. Ch. 498 ; *Butler* v. *Butler*, 28 Ch. D. 66. In the English clause consolidation statutes of 1845, the word " Lands " extends to ' messuages, lands, tenements and hereditaments of any tenure " (8 Vict., cc. 16, 18 and 20.

(4) Co. Litt., 49 ; Shep. Touch. 91, 2 Black., 18, " whoever has the land, to him alone belong even to the firmament, and to the centre of the earth."

(5) *Per* Lord Cairus, C., in *Smith* v. *Great Western Railway*, 3 App. Cas. 180 ; *Holliday* v. *Wakefield*, (1891) A. C. 81.

(6) (1881) s. 2 (*ii*).

(7) For an exhaustive discourse on these words, *vide* 1 Gour's Law of Transfer (6th Ed.) §§ 84-98.

(8) *Per* Patterson, J., in *R.* v. *Leeds* and *Liverpool Navigation Co.*, 7 A. & E. 685 ; *Regents Canal Co.*, 6 B. & C. 720 ; *New Port Dock Co.*, 31 L. J. M. C. 266 ; *Birmingham Water Works Co.*, 1 B. & S. 84 ; *Southwark and Vauxhall Water Works Co.* v. *Hampton*, (1899) 1 Q. 273 O. A. sub-nom *Hampton* v. *Southwark, &c., Co.*, (1900) A. C. 3.

(9) *Per* Esher, M R., in *Tyne Boiler Works Co.* v. *Longhenton*, 56 L. J. M. C. 12 ; *Laing* v. *Bishopswearmouth*, 3 Q. B. D. 299.

(10) 1 Gour's Law of Transfer (6th Ed.) § 94.

boards, book cases screwed to the walls, clock cases, iron ovens, grates, ranges and stoves although fixed in brick work, iron back to chimneys, pumps and all articles of domestic utility or convenience being not annexed for the permanent beneficial enjoyment to that to which they are attached, are regarded as only moveable property.''

"Wrongful Gain."

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

"Gaining wrongfully": "Losing wrongfully."

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

186. Analogous Law.—"The terms 'maliciously,' 'wrongfully' and 'injure' are words all of which have accurate meanings well known to the law, but which also have a popular and less practical signification. An 'intent' to injure, in strictness, means more than an intent to harm. It connotes an intent to do *wrongful* harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its turn the infringement of some rights."[12] And if there be no infringement, there can be no actionable wrong, however vile the motive.[13] The terms 'wrongful gain' and 'wrongful loss' do not, however, occur in English law, where their place is taken by 'malicious act,' which is an act done illegally and unreasonably and not in the exercise of a *bona fide* right.[14] So Lord Blackburn observed: "Where any person wilfully does an act injurious to another without lawful excuse" he does it maliciously.[15] In the language of the Code such an act would be said to have been done dishonestly.[16]

187. Principle.—Criminal law takes no note of what is morally wrong, for social morality varies with race and locality. It is to a great extent dependent upon the customs and habits of a people. If law were to punish social transgressions howmuchsoever loss they may cause to society, it would be as uncertain as often incapable of elucidation. Even treachery, envy and jealousy, though universally condemned by the moralist, are not under the bane of law—for they, too, are uncertain in their operation and are difficult of proof. The standard, therefore, which criminal law sets before itself is the standard of legal right and wrong. It does not take cognizance of *mala in se* but of only *mala prohibita*. It is true that not a few *mala in se* are also *mala prohibita*, but cognizance is taken of them because there are *mala prohibita* and not because they are *mala in se*. This section is the exponent of this rule. For it lays down that the test of wrongfulness is unlawfulness. Now a thing may be unlawful in two senses: (*a*) as unenforceable by law, (*b*) as punishable by law; for example, an agreement for sexual immorality which is unlawful in the first sense, is not so in the second.[17] Here the term has, therefore, been used in the second sense.

188. Meaning of Words.—"*Unlawful means*," i.e., by illegal means as defined in section 43.[18] A person may employ unlawful means for a lawful object as where one commits violence for recovery of his own property: "*Wrongful loss is the loss*": which implies total deprivation of the property. If, therefore, the pledgee of goods used them, and thereby caused their deterioration, and not depri-

(11) 1 Gour's Law of Transfer (6th Ed.) § 94.

(12) *Per* Bowen, L.J., in *Mogul Co.* v. *McGregor*, 32 Q. B. D. 598, O. A. (1892) A. C. 25 cited with the approval *per* Lord Watson, in *Allen* v. *Flood*, (1898) A. C. 1.

(13) *Allen* v. *Flood*, (1898) A. C. 1.

(14) *Jenner*, 7 L. J. (O. S.) M. C. 79.

(15) *Pembliton*, L. R. 122; *Welch*, 1 Q. B. D. 23.

(16) S. 24, *post* (*q.v.*).

(17) *Per* Bramwell, B., in *Cowan* v. *Milbourn*, L. R. 2 Ex. 230 (236).

(18) The Code defines "illegal" in s. 43, but it does not define "unlawful," but the two concepts bear an identical meaning as is explained by the Law Commissioners. First Report, § 658.

vation, it is not wrongful loss.[19] It may be added that the wrongful loss here means loss of the specific property and not loss generally.[20] "*Gain wrongfully*": A person retaining wrongfully cannot be distinguished from one who has acquired wrongfully: for example, one who having received stolen property innocently, retains it after he knows it to be stolen is as much a criminal as one who had received it with guilty knowledge *ab initio*.

189. Wrongful Gain.—Two things are essential to constitute wrongful gain, and its correlative wrongful loss, namely,—(*a*) use of unlawful means, and (*b*) unlawful acquisition. The existence of one without the other is not sufficient. As before observed, the term "unlawful" has a double meaning but the word as used in criminal jurisprudence is limited to convey an act which is both prohibited as well as punishable by law. An act may be merely prohibited without being punishable, as, for instance, immoral acts and contracts which are unlawful because they are prohibited, but which are, however, not punishable. If, therefore, a person hire a house for an immoral purpose, he gains the house by unlawful means,[21] but he does not thereby acquire the house "dishonestly" within the meaning of the next section, nor can it be said that he does not thereby become legally entitled to its possession. For if his possession is illegal, can he be summarily ejected? And even if such were the case, how is the definition material to the Code in which such an act is not punishable as a crime? But this sense of the word "unlawful" is not preserved throughout the Code. For there are sections in which the word has been used *ejusdem generis* with "immoral" as in sections 372 and 373, where the phrase used is "unlawful and immoral purpose."[22] Here the sense of the word may be said to have been modified by its association with another word, and the general context. But it is sufficient to put one on one's guard against regarding the meaning of even a law term as always rigidly inflexible. (For a further commentary *see* s. 43.)

190. The word "gain" means, as has been subsequently explained, not only acquisition, but also retention. But it must be something more than a mere detention. In other words, it must be an acquisition or retention with the *intention* of appropriation. Where, therefore, the accused, the pledgee of a turban, was convicted of criminal breach of trust for using it, the Court set aside the conviction on the ground that the wrongful beneficial use of property by him was not a gain to him, nor was it a wrongful loss to the real owner. "For either wrongful loss or gain, the property must be lost to the owner, or the owner must be wrongfully kept out of it."[23] So where a person maliciously impounded another's cattle with a view to cause him expense, inconvenience and annoyance, there being neither wrongful gain nor wrongful loss of the property, he could not be convicted of theft.[24] So, in another case, where a servant being wrongfully piqued at being wrongly suspected of the theft of a box, removed it and concealed it in a cowshed to give a lesson to his master, the question arose whether his act caused wrongful gain to him, or wrongful loss to his master, so as to justify his conviction for theft. And it was held that as there was no wrongful gain or loss, the accused could not be so convicted. "Of course," the Court remarked, "when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense."[25] But it is submitted that this is a case in which "intention" must be distinguished from "motive", for the two are not the same. For, if they were, and if the view of the

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(19) 3 M. H. C. R. (App.), 6; *Nabi Baksh* v. *Ali Baksh*, 25 C. 416.

(20) *Aradhun* v. *Myan Khan*, 24 W. R. 7 (8).

(21) *Cowan* v. *Milbourn*, L. R. 2 Ex. 230 (236).

(22) *Narayan*, (1889) B. U. C. 440.

(23) 3 M. H. C. R. (App.) 6.

(24) *Aradhun* v. *Myan Khan*, 24 W. R. (Cr.) 7 (8).

(25) *Nabi Baksh*, 25 C. 416.

Calcutta Court were correct, then what should we say of the case in which the creditor forcibly seized his debtor's goods and detained them with the sole intention of coercing him to pay up his just debts ? Here, too, the same reasoning should have exonerated the accused, but it did not.[1]

191. But apart from the policy of the rule, the principle is clear. In forcibly taking wrongful possession of his debtor's goods, the creditor had certainly the *intention* of causing his debtor loss by unlawful means, but his *motive* was not to appropriate them but to use them as a screw to compel his debtor to pay up. "Wrongful gain" is not necessarily "dishonest gain," for a person may acquire property by wrongful means without *intending* to be dishonest. The case of the servant screening his master's box was, it is submitted, wrongful, though it was not dishonest.[2]

192. A person is not guilty of causing wrongful gain to himself if he cuts down the trees standing on his tenancy land, though in doing so he may have committed a civil wrong entitling his landlord to recover damages.[3] The doing of every unauthorized act is not necessarily unlawful, nor is the doing of every unlawful act dishonest so as to expose the doer to the severities of penal law.

193. Meaning of "Gain".—The word "gain" here then means acquisition of the specific property in respect of which he causes wrongful loss to another. If, therefore, a person maliciously impounds another's cattle with a view to put him to expense, the latter would be put to pecuniary loss generally, but not of the property in question, and, therefore, the person impounding his cattle cannot be, as stated before, proceeded against for their theft.[4] The term "property" as used here means anything which not only may be, but is the subject of ownership. Where, for instance, a student forged one certificate to get another so as to secure his admission to a higher class, the certificate which he so procured was held to be property within the meaning of this section.[5]

194. On the other hand, a bull dedicated and set at large at the *shradh* of a Hindu in accordance with religious usage, ceases to be the property of its former owner, so that a person capturing and killing it could not be said to cause "wrongful loss" of any property to any one.[6] So Straight, J., in one case, remarked: "It was not only not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose; it was, therefore, *nullius proprietas* and as incapable of larceny being committed in respect of it as if it had been *ferae naturae*."[7] The fact that the bull was given rice by the dedicator's family and their permission was taken by the villagers using it for breeding purposes would not convert it into the property of the family.[8]

195. Of course, it is no function of the Criminal Code to define what is and what is not property. Its legitimate function is to protect what is admitted property, and if it be a matter of doubt what things are the subjects of a certain right, in whom that right resides, and to what that right extends, it must also be a matter of doubt whether that right has or has not been violated. For example, *A* without *Z's* permission, shoots snipe on *Z's* ground and carries them away; here, if the law of civil rights grants the property in such birds to any person who can catch them, *A* has not, by killing them and carrying them away, invaded *Z's* right of property. If, on the other hand, the law of civil right declares such birds

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(1) *Sumeshar*, (1888) A. W. N. 96; *Agha Muhammad Yusuf*, 18 A. 88; *Madaree*, 5 W. R. 68; *Preonath*, 3 W. R. 2; *Tarinee Prasad*, 18 W. R. 8; *Sri Churn Chungo*, 22 C. 1017, F. B.; overruling *contra* in *Prosonno Kumar* v. *Udoy Saut*, 22 C. 669 (676).

(2) *Per* Pigot, J., in *Sri Churn Chungo*, 22 C. 1017, F. B.

(3) *Reddi Yerranna*, 25 I. C. (M.) 338.

(4) *Aradhun* v. *Myan Khan*, 24 W.R. (Cr.) 7 (8).

(5) *Soshi Bhushan*, 15 A. 210.

(6) *Bandu*, 8 A. 51; *Nihal*, 9 A. 348; *Romesh Chander* v. *Hiru*, 17 C. 852; *Sita*, 18 B. 212.

(7) *Bandhu*, 8 A. 51.

(8) *Romesh Chunder* v. *Hiru Mondul*, 17 C. 852.

the property of the person on whose lands they are, *A* has invaded *Z's* right of property. If it be a matter of doubt what the state of the civil law on the subject actually is, it must also be a matter of doubt whether *A* has wronged *Z* or not.

196. A person may wrongfully gain property to which he is not legally entitled, even though it be his joint property. For a person having no right to exclusive possession of property is in principle not to be differentiated from one who had no right to any possession.[9] The wrongful gain and wrongful loss here spoken of mean, of course, material gain and loss, that is to say, some pecuniary gain or loss as distinguished from a mere sentimental gain or loss as, for instance, of honour, dignity or the like. So where a person presented a forged *sanad* to a Settlement Officer with a view to obtain his recognition to his pretension to bear the title of Loskur, it was held that the accused's conduct was not dishonest, as it did not involve any wrongful gain or loss as understood in the Code.[10]

197. Wrongful Loss.—As the word "property" has the limited significance above set out, it is apparent that "wrongful loss" is the antithesis of wrongful gain. But it would not have been otherwise so. For as in the case of the sacred bull, though its acquisition by the accused would certainly be a gain to him, it did not imply any corresponding loss to any one.

198. But in the sense in which the word is used in the Code the two words are correlated and if one has gained the other must have necessarily lost, and the reason is evident. The Penal Code has been enacted to protect private rights and, therefore, it uses its phraseology in the sense subservient to its object. A person who loses his property by unlawful means is said to suffer wrongful loss. If, therefore, he be in possession of property to which he is not legally entitled, he cannot suffer wrongful loss in respect of it, even though the means employed to deprive him of it be unlawful. Such a case may be supposed of a person in possession of stolen goods, which the rightful owner may regain by the right of re-capture.[11] So where the accused was sold rice by a Famine Relief Officer at 16 seers per rupee on condition that he should sell it at the rate of 15 seers, instead of which he was discovered having sold it at the rate of 12 seers, the question was if his act amounted to a crime, and it was held that it did not, the reason given for the finding being, that as the property on sale became vested in him, it could not be said that his sale at otherwise than the stipulated rate caused wrongful loss to the Relief Superintendent, nor was there a gain on the part of the accused by unlawful means, for the rice having been sold to him and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit.[12]

199. Such a case is, however, easily distinguishable from one in which the servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it he was to receive a certain quantity for himself, and he was to account for the remainder to his master with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he adulterated the liquor with water and sold it at the rate of unadulterated liquor, appropriating the profit thus made to his own use. Here he obtained property by unlawful means (namely, adulteration) to which the customer was legally entitled, and as his intention was apparent, he was rightly convicted of criminal breach of trust.[13] It will be observed that this case differs from that cited last of the grain contractor in that while in the former the property in liquor was not in the seller, in the case of the grain contractor, it had become vested in him. So a milkman who sold adulterated milk could not be convicted of any offence under the Code, for he had caused no wrongful loss to his customers.[14] So where *A*, a horse dealer, showed *B* a telegram purporting to be from his principal refusing *B's* offer for purchase of a mare whereupon *B* raised the price for which *A* sold the animal, *B* subsequently charging him for cheating, the Court threw out the case on *B's* admission that the mare was worth the money

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(9) *Cf.* s. 425, expl. 2, and ill. (*g*).
(10) *Jan Mahomed*, 10 C. 584.
(11) S. 105, *post* and comm.
(12) *Lal Mahomed*, 22 W. R. 82.
(13) *Jamsetji*, (1888) B. U. C. 395.
(14) *Hiri*, 1888 B. U. C. 367.

he paid for it, holding that the false inducement by *A* had caused *B* no wrongful loss.[15] A loss is not wrongful when a person has no legal right to a thing.[16]

200. It would also appear that the "wrongful loss" occasioned by the act of a person must be the proximate cause of that act. If the loss was too remote, it could not be attributed to the unlawful means employed. So, in one case, it was held that the mere permitting of cattle by the accused to stray does not establish his intention to cause, or knowledge that he was likely to cause, wrongful loss or damage to the public or any person.[17]

201. Wrongful Retention or Deprivation.—Of course, as before remarked, a wrongful act *ab initio* is not to be distinguished from a wrongful act *ex post facto*. Thus a person may acquire a thing innocently and afterwards retain it wrongfully and in their result the two acts are the same as if he had initially intended to do wrong.

Clause 3.

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

"Dishonestly."

202. Analogous Law.—It is said that the term "dishonestly," as here defined, is equivalent to "fraudulently" defined in the next section.[18] But as will appear from the next section the two terms are not used in the same sense, nor have they the same legal incidents.

203. Principle.—The word "dishonestly" is here used in a technical sense, which is at variance with its popular significance as implying deviation from probity. The term is here used in connection with property, and it has nothing to do with probity. If a person causes wrongful gain or loss with that intention, he is dishonest. In other words, where a person intending to gain by unlawful means gains by unlawful means property to which he is not legally entitled, his act is dishonest within the meaning of the section. Three essential ingredients must, thus, be present to constitute dishonesty in law, namely,—(*a*) intention, (*b*) employment of unlawful means, and (*c*) acquisition of property to which one has no right. As has been pointed out in discussion under the last section the presence of the second and third elements constitutes wrongful gain or loss, but not dishonestly in which there must exist the *intention* to cause wrongful gain or loss which is the essence of dishonesty in this[19] and the ensuing section.

204. Meaning of Words.—"*With intent*": The word "intent" by its etymology seems to have metaphorical allusion to archery and implies "aim" and thus connotes not a casual or merely possible result—foreseen perhaps not as an improbable incident, but not desired—but rather connotes the one object for which the effort is made and this has reference to what has been called the dominant motive.[20] "*Wrongful gain*" means material gain.[21] (§§ 188-192).

205. Constitution of Legal Dishonesty.—As has been before observed, nothing is dishonest under the Act, which is not *intended* to be dishonest. But nothing can be said to have been intended by a person, unless it was his immediate and probable intention: or in other words, unless it was his dominant motive (§ 190). But as "intention" is a psychological act, the only means by which the Court can judge of it is by inference from the external acts and conduct of a party. So Sir James Stephen wrote: "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time of the natural consequence of his conduct."[22] The test to be applied is not the test of a hypothetical reasonable man—but of the person whose intention is to be read. The Court must then put

Intention.

(15) *Dick*, 12 A. L. J. 1258.
(16) *Tun Aung*, (1907) 4 B. R. 149; 7 Cr. L. J. 448.
(17) *Toorebai Khan*, B. U. C. 11.
(18) *Lal Mahomed*, 22 W. R. 82 (83); but this view is erroneous. *Kedar Nath*, 5 C. W. N. 897.
(19) *Durmadas Lilaram*, (1932) S. 169.
(20) *Per* Batty, J., in *Bhagwant* v. *Kedari*, 25 B. 202 (226); *Girdhari*, 8 A. 653.
(21) *Nga Ba Thein*, (1925) R. 9.
(22) 2 History of the Criminal Law, p. 111.

itself as far as possible in his situation for the purpose of seeing what must have been his intention. His habit of life, manner of thought, associations and belief may have influenced him in his action. It is, therefore, essential to take all these elements into consideration. For, in a criminal case, there is no golden rule of conjectural test. The sole test is what was the intention of the accused at the time of the act complained of, and for which purpose it was said that only the primary and not the more remote intention of the accused must be looked at.[23]

206. So where an accountant fraudulently paid away money to *B*, held in deposit for payment to *A*, who pressed for its payment, whereupon the accused made false reports to the effect that *A's* money, held as a revenue deposit, was to be transferred to the Civil Court upon which a cheque for making the transfer was drawn up, which the accused altered to conceal his previous fraud, it was held that the accused's immediate intention being merely to conceal his previous fraud, he could not be convicted of forgery, though he could be convicted of making a false record.[24] So a candidate gaining admission to an examination by presenting a forged certificate which he knew to be forged, was held not to have acted "dishonestly" within the meaning of this section, inasmuch as his primary intention was to gain admission, and not to cause wrongful loss to the university.[25] This case was, however, dissented from in Allahabad on the ground that the certificate was certainly used with intent to support a claim within the meaning of section 463 of the Code,[1] and it has since been overruled.[2] But neither in the Full Bench nor in the Allahabad case was the view of the Calcutta Divisional Bench on the meaning of intention combated, but it was rather conceded. Indeed, it may be now regarded as settled that in judging of a man's intention regard must be had only to his primary and immediate intention, and not to his secondary or more remote intention—if intention it may be called—for in reality it is the motive, which law ignores in judging of a man's criminality (§ 216). So where a person fabricated receipts in lieu of genuine ones which had been lost, he could not be convicted under section 471 of the Code for dishonestly using forged documents.[3]

207. The same principle runs through the case in which the accused's brother felled certain trees without a license, thereupon the accused fearing detection took the Government marking hammer from the watchman's baggage, marked the trees in order to make it appear that they had been marked with the Forest officer's permission, and then replaced the hammer, on which it was held that as the accused did not intend to keep the hammer or deprive the watchman of it, there was no dishonest taking within the meaning of this section, and, therefore, no theft.[4] So again, since "intent to commit an offence" is the cardinal ingredient of criminal trespass,[5] a person who enters upon property in the possession of another may produce those feelings in the mind of the possessor, but if he did not do with that intention, the result produced is immaterial in determining his criminal liability.[6]

208. The same text determines the criminal responsibility of a person charged with cheating. Suppose the case of a person purchasing, say wool, with delivery of possession, from a firm, agreeing to pay the price on the next day, which he did not, and who, moreover, pledged the wool to another and raised money thereon which he himself appropriated, could he be convicted of cheating? It was held not, because there was nothing to shew that at the time of purchase he had no intention to pay.[7]

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(23) *Girdhari Lal*, 8 A. 653; *Haradhan*, 19 C. 380.

(24) *Girdhari Lal*, 8 A. 653; *Annasami*, 1 Weir 554; *Sabapathy*, 1 Weir 549, but see *Rash Behari Das*, 35 C. 450; *Balakrishna*, 37 B. 666.

(25) *Haradhan*, 19 C. 380; *contra* in *Soshi Bhushan*, 15 A. 210; *Srinivasan*, 25 M. 726.

(1) *Soshi Bhushan*, 15 A. 210.

(2) *Abbas Ali*, 25 C. 512, F. B.; following *Toshack*, 4 Cox. 38.

(3) *Sheodayal*, 7 A. 450.

(4) *Budhu*, (1887) P. R. No. 1.

(5) S. 441, *post*.

(6) *Sivaratri*, (1885) Weir (3rd Ed.), 329; *Rayapadayachi*, 19 M. 240; *Po Kin*, (1902) 1 L. B. R. 355; *Vujeer*, (1868) B. U. C. 10.

(7) *Fazul*, (1886) B. U. C. 312.

209. It is not necessary that the intention of the person must be to cause wrongful gain or loss to any person in particular. Indeed, in many cases, *e.g.*, of arson or mischief, it would be impossible to trace precisely the victim of the accused's malice. In England, therefore, it has been expressly provided that in case of arson or forgery it is unnecessary to state or prove that the accused had any intention to injure or defraud any particular person.[8] But these are statutory exemptions which modify the rule.

210. Proof of Intention.—But as regards the proof of intention, it is not in every case that direct evidence is available or necessary. For while it is true that intent must be proved, it is also true that where a person commits an unlawful act, unaccompanied by any circumstance justify its commission, it is presumed that he has acted advisedly, and with an intent to produce the natural consequences of such an act.[9] If, for instance, a man is proved to have wilfully set a house on fire, it was held that no further proof of intention to injure was necessary.[10] So Blackburn, J., in another case, observed: "I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property."[11] These cases may be defended upon the principle of *res ipsa loquitur*;[12] for, in all such cases, the intention is palpably criminal, and no further proof of its criminality is required. These cases are not, therefore, exceptions to the rule, but are rather illustrations of it. For the question is always one of fact and never one of law, and the decision must, therefore, depend upon the circumstances of each case.[13]

211. But while it is true that sometimes it is supererogatory to adduce evidence of intent, it is also true that cases sometimes arise when the facts are so nicely balanced that any inference as to "intent" becomes a matter of difficulty. Take, for instance, the case of a creditor who takes possession of his debtor's goods with a view to compel him to pay up his just debts. Now, here it cannot be said that the primary intention of the accused was to deprive his debtor of his property—for that was not his intention. Was he, therefore, guilty of theft which he would be if his intention was dishonest, and which, again, means that his primary object was to acquire his debtor's property. At one time, it was held that as that was not his intention, the creditor could not be held guilty of theft.[14] But this view did not long prevail, for the consensus of authorities is, now, in favour of the view that the creditor, in such a case, would be guilty of theft, and it is, indeed, so provided in the Code.[15] And this view may be defended on the ground that the creditor's primary intention was certainly to cause wrongful loss (*i.e.*, loss unauthorized by law), though he did not intend to make wrongful gain. In other words, if a person causes wrongful loss to another, his action may be dishonest, though he does not intend to make any wrongful gain for himself. This is sufficiently clear from the use of the word "*or*" in the section, which shows that it suffices to constitute dishonesty that either wrongful gain or wrongful loss should have been intended. It is not even necessary that wrongful gain and loss should have been actually caused, for if it were so, an attempted burglary would be no crime. The section gives prominence to the intention, making all else subordinate thereto.

212. The presence or absence of intention is, therefore, the crux in all offences of which dishonesty is an element. And this may be illustrated by many cases from the Reports. Thus, where the manager of a joint Hindu family including

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(8) Arson, 12 Geo. 3, c. 24, s. 60; Forgery, 36 and 37 Vict., c. 32, s. 49.

(9) *Lakshman*, 26 B. 558; *Sarsar Singh*, (1934) A. 711.

(10) *Farrington*, Russ. & Ry. 207; *Ali Kasim*, 10 I. C. (L. B.) 929.

(11) *Ward*, L. R. 1 C. C. R. 356.

(12) "The thing speaks for itself."

(13) *Farnborough*, (1895) 2 Q. B. 484.

(14) *Longhurst*, (1858) Mad. unrep. *cited per Curiam* in *Baburam*, 32 C. 775 (780); *Soshee Bhushun Roy*, 4 Shome 14; *Prosunno Kumar* v. *Udoy Sant*, 22 C. 669; overruled in *Sri Churn Chungo*, 22 C. 1017, F. B. To the same effect, *Madaree*, 3 W. R. 2; *Preonath*, 5 W. R. 68; *Gridharee*, 10 W.R. 35; *Tarinee*, 18 W. R. 8; *Nagappa*, 15 B. 344; *Prayag* v. *Arju Mian*, 22 C. 139.

(15) S. 378, ill. (*l*), *post*.

some minors applied to the Collector for payment to him of money due to the joint family, and was, thereupon, told to produce a power-of-attorney or to produce the minors to admit his authority to sign the receipt on their behalf, whereupon he produced some persons to falsely personate the minors and thus secured the money, it was held that inasmuch as he had been authorized to receive the money, his act, in producing wrong persons, could not be construed to be dishonest, as he had caused no wrongful gain or loss as required by the last section, nor was it his intention.[16] In another similar case, where one Koomaree who had agreed to sell land, set out to register the conveyance but fell ill on the way and sent in the accused, who, by personating her, had the deed registered in her name, it was held that, though the accused had committed an offence under the Registration Act, she could not be convicted of cheating, as there was nothing to show that she intended to defraud or injure any one in personating Koomaree, and doing an act which Koomaree doubtless would have done had she not been prevented by illness from going to the office in person.[17] This principle was, however, somewhat unduly strained in the case of an accused who had applied for the duplicate of a university certificate to the Registrar in the name of another person qualified to receive it. The Court acquitted him holding that his act was neither dishonest nor fraudulent[18] which unquestionably it was, as was pointed out in a later case of the same Court.[19] And so where the accused being anxious to obtain a recognition of his title to "Loskur" which presumably carried no emolument, presented a forged *sanad* to the Settlement Officer, it was held that as the accused's sole object was to secure official recognition to a title of dignity, there was no intent to defraud within the meaning of this section.[20] These cases are sufficient to show that the fact that the conduct of the accused has been dishonest in fact does not support an inference that it is dishonest in law, though, as will be seen presently, not a few of the cases above cited present apt illustrations of what is fraudulent without being dishonest—a distinction which appears not to have been considered in them (§ 190).

213. Indeed, there may be cases where the accused may be guilty of an offence under a local Act, but his conduct may not be criminal under the Code. Such a case is presented by a person illegally seizing and impounding cattle with the malicious intent of subjecting the owner to the additional expense, inconvenience and annoyance of rescuing them.[21] Here, the conduct of the accused was culpable but not criminal under the Code. But it would have been so, if his intention had been to support a claim for damages against the owner. Where the accused improperly obtained possession of a person's account book and retained it with the intention of using it in a judicial inquiry as evidence against the person to whom it belonged, it was held that the accused had committed no theft, as such temporary retention could not cause wrongful loss to the owner within the meaning of the Code.[22] But there is no difference in principle between this case and the case of a creditor seizing his debtor's goods with a view to compel him to repay his loan. And, if the test of the Code, as above indicated, be applied, it will be seen that the case was doubtless one of theft and would probably be now so considered. The dishonest intention of a person may be manifested in a variety of ways, but the test, in each case, is the same —what was his immediate intention, and was there a wrongful gain or loss as expounded elsewhere (§§ 193-195). In one case, the accused had seized a boat of the complainant while conveying passengers across a creek which flowed into a river at a point within three miles from a public ferry, his intention being to compel persons who had to cross the creek to use his ferry in the absence of the complainant's boat, and so to increase his income, and it was held that he had committed theft, for though

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(16) *Baburam*, 35 C. 775.
(17) *Luthi Bewa*, 2 B. L. R. (A. C. Cr.) 25.
(18) *Srinivasan*, 25 M. 726.
(19) *Kotamaraju*, 28 M. 90. To the same effect *Appasami*, 12 M. 151; *Soshi Bhusan*, 15 A. 210; *Ali Hasan*, 28 A. 358; *Abbas Ali*, 25 C. 512, F. B.; *Causeley*, 43 C. 421.
(20) *Jan Mahomed*, 10 C. 584.
(21) *Aradhun* v. *Myan Khan*, 24 W. R. 7.
(22) *Soshee Bhushun Roy*, 4 Shome 14.

it was not his intention to convert the boat to his own use, or to deprive the complainant permanently of its possession, still inasmuch as he had caused wrongful loss to the complainant and had profited by it, he was guilty of theft.[23] In such a case, the English rule would probably be different. For there it has been held that where a thief takes away the owner's horse to assist him in carrying off the booty and where he rode it for some distance and then turned it loose, he could not be convicted of horse-stealing, as he did not intend to appropriate it.[24] So, in another case, where a lover took away his sweet-heart's bonnet and carried it to a haymow of his own with the view to induce the girl to go there where she had been seduced before, the jury thought that the prisoner intended to induce the girl to go again to the haymow, but that he did not intend to deprive her of the bonnet, and that, therefore, he was not guilty of larceny.[25] It is needless to add that such a lover in this country would have a very different verdict to his credit.

Claim of Right.

214. The question of dishonest intention, again, plays a prominent part in cases of theft in which the accused asserts a claim of right. In such cases, too, it is the duty of the Criminal Court to determine what was the intention of the alleged offender, and, if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming, of course, that the other facts are established which constitute the offence.[1] It is, sometimes, said that the mere assertion of a claim of right is enough, even though that right may be ever so ill-founded.[2] But this is scarcely correct, and if it were, it would be a golden rule for all offenders. There is a manifest difference between a mere assertion of a claim of property or right, and a *bona fide* belief in such a claim. The mere assertion of a claim of right is never in itself a sufficient plea.[3] There must be a claim, though it may not be a good one, but, nevertheless, it must be good enough to be plausible. Where, therefore, a person removes a tree under an honest belief that it belongs to him, but, in doing so, he betrays want of due care and attention, that is, good faith; in ascertaining the ownership of the same, he would be guilty of theft.[4] Good faith, therefore, is another element in determining intention.

215. Analysis of Mental Process in Criminality.—The process of normal mental activity culminating in acts and consequences may be thus described. The initial stage is the rise of some desire in the mind. This desire is accompanied by the idealization of some movement as bringing about its consummation. The recognition of the casual relation of the action to the result involves a germ of belief in the attainability of the object of desire, or in the efficacy of the action. The action, thus idealized, has now to be carried into effect. Its preparatory stage is reached by volition, which is the exercise of the will leading up to fruition of the desire. Thus, then, in voluntary action, the desire of the end is the cause of the desire of the means. The former is the motive and the latter the intention. It is the " solicitation of the motive " or the mere prompting of the mind as yet not followed by action.[5] Next, we have the direction of the active impulse involved in the state of desire into the definite channel of action suggested. This stage of the process of volition is known as the *act*. The impression it produces on the external world is spoken of as its consequence. And, since motive involves the anticipation of the final realisation, this consummation is spoken of as the object, purpose or end of the action, and co-relatively the action as the means of gaining or realizing the object or desire. These terms are frequently used in criminal jurisprudence, but a reference to the existing case-law would appear to show that their true significance is not always kept in view, and

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(23) *Nagappa*, 15 B. 344.

(24) *Crump*, 1 C. & P. 658. To the same effect, *Phillips*, 2 East P. C. 662; but *contra Trebilok*, Dears & B. C. C. 453; *Peat*, 2 East P. C. 557.

(25) *Dickenson*, Russ. & Ry. 420.

(1) *Budh Singh*, 2 A. 101; *Rahmatulla* v. *Rahimulla*, 27 C. 501.

(2) *Bhicajee*, (1869) B. U. C. 22; *Khetter Nath* v. *Indro*, 16 W. R. 78; *Algara*, 28 M. 304; *Chaitan* v. *Kalachand*, 10 C. W. N. 233*n*.

(3) *Sabalsang*, 4 Bom. L. R. 936; s. 52, *post*.

(4) *Sabalsang*, 4 Bom. L. R. 936; *Nasib* v. *Nannoo*, 15 W. R. 47; *Ajodhya*, 54 I. C. (Pat.) 992.

(5) 11 Volkmann, s. 147; Waits, s. 41; Bain's Emotions and the Will, Pt. II, Ch. viii.

to that cause may be safely ascribed the somewhat unsatisfactory decisions to which the Courts have, in several cases, committed themselves. Take, for instance, the case of the creditor coercing his debtor to pay up. The debtor owes him a debt. It furnishes the creditor with a *motive* to see himself repaid. That motive impels him to take forcible possession of his debtor's property. He thus truly *intends* to take possession of it. That he does so unlawfully is manifest. His taking possession of the property is the act, and the consequence or effect of which is the wrongful deprivation of its possession by the debtor. All the elements of dishonesty are thus fully present, and yet the *motive* of the creditor was not criminal, and may have been even righteous. But law does not deal with man's motives. It confines itself to his intentions. And it is, therefore, that the difference between the two should be clearly appreciated.

216. Intention and Motive Dintinguished.—A distinction, therefore, exists and must be made between a man's intention and motive. A person may act from laudable motive, but if his intention causes wrongful loss, his crime is complete irrespective of his motive. Where, for instance, a Hindu acting under a strong religious impulse seized some cows which a Mahomedan was taking to kill, his motive from the standpoint of a person of his own religion was virtuous, but his intention, being to deprive the lawful owner of the possession of his property, and the means employed being unlawful, he was held guilty of theft.[6] The motive, object or design of a person should never be confused with his intention. The motive of the creditor seizing his debtors' goods to coerce him to pay up his debt was certainly not to cause permanent loss of the goods to the debtor—but he did cause him loss, however temporarily, and he did so intentionally. He was, therefore, held guilty of theft. Criminal law regards only a man's intentions and not his motives.[7] To permit a person who has committed an injury to set up his motives as defence or excuse, and to allege that he did the injury from virtuous motives or from a wrongful impression of the law or the fact, would frequently produce a defect in justice, and allow offenders to escape. So the Law Commissioners wrote : " We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply, as defence or excuse under a criminal charge. We hold with the English Criminal Law Commissioners that ' to allow any man to substitute for Law his own notions of right would be in effect to subvert the Law. To investigate the real motive, in each case, would be impracticable, and even if that could be done, a man's private opinion could not possibly be allowed to weigh against the authority of Law."[8] It is, therefore, never a complete defence to say that though the intention of a person was criminal, his motive was righteous. So, in England, good motive is no justification of a libel.[9] As Lord Blackburn remarked : " No one can cast about firebrands and cause death, and then escape from being responsible by saying he was in sport."[9]

217. Legal v. Popular Dishonesty.—As observed before, (§ 203) dishonesty in law is, at times, different from the dishonesty of the market-place. Unless a person employs *unlawful* means, his conduct is not dishonest within the meaning assigned to that word in the Code, however reprehensible his conduct may be, when judged according to the standard of popular morality. So a person may divert the flow of his underground water so as to deprive his neighbour of it ; and his right is the same whatever his motive may be, whether *bona fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out : " This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he

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(6) *Ram Baram*, 15 A. 299 ; *Parichat*, 5 N. L. R. 17 ; *contra* in *Raghunath*, 15 A. 22 distinguished on the ground that an intention to cause wrongful loss was according to the finding of the Court below absent in that case.

(7) *Balok Khan*, 4 S. L. R. 38 ; *Vithoo* 7 N. L. R. 185 ; *Waris Ali*, 7 N. L. R. 180.

(8) First Report, s. 114. *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94 (112); *Bowan* v. *Hall*, 6 Q. B. D. 333 (343).

(9) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741 (772).

would have no right to do it. Motives and intentions, in such a question as is now before your Lordships, seem to be absolutely irrelevant."[10] So trusts and trade combines are ruinous to the petty trade and they tend to secure a trade monopoly, but as they are not illegal, they may appear dishonest to the layman, but they are not so in the eye of the law. And it is recognized a fair game to exclude a rival trader from competition, or to ruin him by underselling.[11]

"Fraudulently." **25. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.**

218. Analogous Law.—The Code does not define what it is to "defraud." As Sir James Stephen writes: "There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime: namely, *first*, deceit or an intention to deceive or, in some cases, mere secrecy; and *secondly*, either actual injury or possible injury or an intent to expose some person either to actual injury, or to a risk of possible injury, by means of that deceit or secrecy. The intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object, in nearly every case, is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and, if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."[12]

219. Though the term "intend to defraud" has not been defined in the Code, the word "fraud" is defined in the Indian Contract Act[13] for the purpose of that Act, and that definition is, therefore, much wider than this section. Fraud is really protean in its form, and its definition can never be complete or general. In English law, no attempt has been made at its definition, but it has been understood to mean "something dishonest and morally wrong."[14] But this is its meaning in the civil law, but it is not its sense in the Code, where, however, it appears to have been used in the ordinary acceptation of the word,[15] as denoting the misleading of another by falsehood spoken or acted. According to Le Blanche, J., "By fraud is meant an intention to deceive, may it be from any expectation of advantage to the party himself, or from ill-will towards the other, the fact is immaterial."[16] But though deception is of the essence of fraud, the two terms are, by no means, interchangeable, since deception may be equally innocent as well as fraudulent.[17] Fraud involves two conceptions, namely, deceit and injury to the person deceived; that is, the infringement of some legal right possessed by one, though it may not necessarily

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(10) *Per* Lord Halsbury, L.C., in *Mayor &c., of Bradford* v. *Pickles*, (1895) A. C. 587 (594), affirming O. A. (1894) 3 Ch. 53; (1895) 1 Ch. 145; following *Chasemore* v. *Richards*, 7 H. L. C. 349; but the underground channel must be irregular and indefinite. *Grand Junction Canal Co.* v. *Shngar*, L. R. 6 Ch. 483.

(11) *Mogul Steamship Co.* v. *McGregor Gow & Co.*, 23 Q. B. D. 598 O. A., (1892) A. C. 25 (49).

(12) 2 History of Criminal Law, p. 121; cited *per* Banerji, J., in *Mhd. Saeed Khan*, 21 A. 113 (115); *Surendra Nath Ghose*, 38 C. 75 (90); *Balkrishna*, 37 B. 666.

(13) Act IX of 1872, s. 17.

(14) *Per* Willes, J., in *ex parte Watson*, 21 Q. B. D. 301.

(15) *Baburam*, 32 C. 775; *Balkrishna*, 37 B. 666.

(16) In *Haycraft* v. *Creasy*, 2 East 92 (108), followed in *Vithal*, 13 B. 515*n*.; *Khandu Singh*, 22 B. 768; *Lalit Mohan*, 22 C. 313 (322); *Rash Behari*, 35 C. 450; *Balkrishna*, 37 B. 666.

(17) *Baburam*, 32 C. 775.

involve deprivation ofproperty.[18] The word has nothing to do with wrongful gain or wrongful loss of property, for fraud operates on the mind, and thus produces results which the perpetrator of fraud had contemplated.

220. Principle.—This section does not define or describe "fraudulently." On the other hand, it is enacted to limit its sense for the purpose of the Code. As ordinarily understood, fraud is a term which enters largely in the law of contracts and it has there received a meaning much too extensive for the purpose of the Code. This section, therefore, enacts that there can be no fraud unless there was an *intention to defraud*. In other words, the Code eliminates from its consideration all constructive frauds and only confines use of the term to deception planned and practised.

221. Meaning of Words.—"*Fraudulently*": The choice of an adverb for definition is due to its use, as such, in the Code, and it can only refer to a state of mind as distinguished from the character of the deed. "*To do a thing*," which includes words merely spoken.[19] "*With intent to defraud*," which may or may not imply deprivation of property actual or intended.[20] The word "defraud" has, at least, three meanings: (*i*) To deprive one of right, either by obtaining something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner;[21] (*ii*) to withhold wrongfully from another what is due to him, or to wrongfully prevent one from detaining what he may justly claim; and (*iii*) to defeat or frustrate wrongfully. Here the term is used rather in the first, than in the second or third sense. But the three senses together do not convey the precise meaning of the word, which is here used to imply the misleading of one's mind by causing one to believe what is false, or to disbelieve what is true. "*But not otherwise*": But for the doing of a thing with the intention to defraud there is no fraud, as understood in the Code.

222. "Intent to Defraud."—There can be no fraud, unless there was an intention to defraud. Usually that intention is directed to defraud some one in particular,[22] but it is not necessary that it should have been invariably so directed.[23] A person may gild a brass ring and throw it on the road to cheat passers-by, the object being to make the finder pay a share of its supposed value to the cheat. Here there was clearly an intention to cheat some one though no one in particular. The finder may believe in the genuineness of the ring and sell it to another who may purchase it without scrutiny. Here, though the purchaser has been "defrauded," the seller had no "intention" to defraud him, and he is, therefore, not guilty of cheating. On the other hand, there may have been an intention to defraud, but no fraud is, in fact, committed, in which case it may be said that a man cannot be punished merely for his criminal intention. He must do something, and having done it, intent to "defraud" another. Now, what is to "defraud" a person? The word has not been used elsewhere in the Code. But it must mean something different from what is implied in "dishonestly" described in the last section.

223. In a Full Bench case, the Calcutta Judges remarked: "The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation (of property), and as it is not defined in the Code, and is not, so far as we are aware, to be found in the Code except in section 25, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is used. The word 'fraudulently' is used in sections 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that 'fraudulently' implies deprivation, either actual or intended, then, apparently, that word would perform no function which would not have been fully discharged by the word 'dishonestly,' and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the

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(18) *Surendra Nath Ghosh*, 14 C. W. N. 1066; *Dhunum Kazee*, 9 C. 53 (60); *Ram Chand Gurvala*, (1926) L. 385; *Sivananda*, (1926) M. 1072.

(19) *See* s. 415, *ill.* (*a*); s. 416, *ills.* (*a*) and (*b*).

(20) *Baburam*, 32 C. 775.

(21) *Harajivan Walji*, 50 B. 174 (185); *Sanjiv Ratnappa*, 56 B. 488 (494).

(22) S. 415, *ills.*

(23) S. 471, *post.*

view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part."[24] So where a person forged a certificate of competency as an Engine-room First Tindal, and produced it before an officer to obtain another certificate from him entitling him to present himself for an examination as engine-driver of ocean-going steamers, it was held that the certificate was produced fraudulently, though not dishonestly, as it was produced to deceive the officer, and that he was, therefore, rightly convicted under sections 465 and 471 of the Code.[25] This case was followed in the case of a European lad who had purchased three revolvers giving in the certificates of purchase names not his own, whereupon the Court held him guilty of forgery in that his conduct, though not dishonest, was unquestionably fraudulent.[1] The same view has been taken in the Punjab where the meaning of a false certificate with intent to procure employment in a public department on its strength has been held to be "fraudulent," as its immediate object was to deceive a public officer into a belief that the person holding the certificate possessed a guarantee of efficiency which he did not really possess, and so induced him to grant employment which he might otherwise not have done.[2] But, of course, the same reasoning would not apply to a *sanad* forged to support a barren title, unconnected with any material advantage,[3] though if regard be had to the language of section 471 it is immaterial whether the document used had or had not anything to do with property.

224. However, apart from the applicability of section 471, the question whether mere words, falsely uttered and erroneously believed in and acted upon, could be said to constitute cheating came up for decision in an Allahabad case and was decided in the negative.[4] There a person had secured his enlistment in the Police by falsely describing himself as being not a resident of a prescribed district. "Fraud or dishonesty" was, it was said, absent from these circumstances. But it was not stated why fraud was absent. A person may deceive, and thereby secure for himself an advantage, whether measurable in money or not, but if he does deceive, his act is fraudulent, though, as such, it may not be criminal.

225. Intent: Primary and Secondary.—Where a person uses a forged document[5] or alters a document[6] to support a just claim, it may be a question whether it is fraudulent because the claimant intends to commit a fraud on the Court by making it believe that the document produced is genuine and that he is entitled to recover money upon its basis. In such and similar cases, the Court not infrequently discriminates between what it calls the primary and the secondary intention. That these have a definite place in mental psychology will be apparent if regard is had to cases in which a person forges receipts to replace the genuine ones lost[7] or fabricates an account to conceal his previous misappropriation,[8] or, in short, where his real or primary intention is to save himself, the subterfuges adopted being merely means to attain that end. So in a case of trespass into the house of another with intent to have illicit intercourse, the Court regards the secondary intention as sufficient to justify a conviction for trespass.[9] The duality of sense in interpreting the word "intent" is, therefore, clear, and since the primary intent ordinarily corresponds with what may be regarded as the "motive" it is often a question of some nicety whether the intent is sufficient to charge one with the responsibility of a crime.

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(24) *Abbas Ali*, 25 C. 512 (521), F. B.

(25) *Ib.*

(1) *Causley*, 43 C. 421 : following *Toshack*, 1 Den. C. C. R. 492; *Dhunum Kazee*, 9 C. 53; *Abbas Ali*, 25 C. 512, F. B.

(2) *Abdul Razak*, (1895) P. R. No. 2.

(3) *Jan Mahomed*, 10 C. 584.

(4) *Dwarka Prasad*, 6 A. 97.

(5) *Lalit Mohan*, 22 C. 313 ; *Dhunum*, 9 C. 53 ; *Kedar Nath*, 5 C. W. N. 897 ; contra, *Sheodayal*, 7 A. 459, dissented from.

(6) *Gobindo Mal*, (1895) P. R. No. 21 ; *See* also *Babu Ram Rai*, 32 C. 775 (779, 780)—to deceive one is not to defraud one.

(7) *Sheodayal*, 7 A. 459.

(8) *Lal Gumul*, (1870) N. W. P. H. C. R. 11; *Jageshur*, (1874) N. W. P. H. C. R. 56; *Jiwnand*, 5 A. 221 ; *Girdhari Lal*, 8 A. 653; *Jyotish Chandra*, 36 C. 955.

(9) *Laksman*, 26 B. 558; *Ram Saran*, (1906) P. R. 12 ; followed in *Preman*, 11 L. 238 ; *Jiwan Singh*, (1908) P. R. 17.

226. Immaterial Elements.—It is to be observed that while, in calculating wrongful gain or loss under the last section, it is necessary to see as to what particular person has suffered by the dishonesty, it is not necessary that the intention to defraud must be to defraud anyone in particular. In other words, a general intention to defraud without the intention of causing wrongful gain to one person and wrongful loss to another, is sufficient for the purpose of the definition.[10] It is not, moreover, necessary that the purpose intended should have been achieved. As Maule, J., said : " There may be intention to defraud without the power or the opportunity to defraud.[11] ... It is not necessary that any person should be in a situation to be defrauded."[12] The question, then, that the fraud was fruitless or unnecessary is immaterial. Where, therefore, a person having otherwise a good title, forged a will to support his title though there was no necessity for it, still its user was nevertheless held to be fraudulent. So Norris, J., observed : " Let a person's title to property be ever so good, yet, if, in the course of an action brought against him to gain possession of the property, he uses, by way of supporting his title, though there may be no necessity for the use of it, a forged document such as is this *hiba*, I am clearly of opinion that he uses it fraudulently."[13] It is, thus, the intention and not the effect that determines the character of the act. A person forging the name of another who has sufficient funds in Bank, to a cheque with his consent merely to try his credit or to imitate his handwriting does not *intend* to defraud, though there might be persons who might be defrauded. His conduct cannot, therefore, be condemned as fraudulent within the meaning of the section. On the other hand, in the case supposed, the person had no account in Bank which the forger only supposed he had, and on that supposition forged his name, an intention to defraud would be presumed, although no person might or could be defrauded.[14]

26. A person is said to have " reason to believe " a thing if he has sufficient cause to believe that thing, but not otherwise.

" Reason to believe."

227. Analogous Law.—The phrase " reason to believe " is used in sections 411-414 relating to receipt of stolen property. A person who has reason to believe must be put upon inquiry and have grounds for his belief ; otherwise he has no such reason.

228. Principle.—No man can be condemned as receiver of stolen property, unless it is at least shown that there existed circumstances sufficient to convince him that the property with which he was dealing was stolen property. A man cannot be punished for so infamous a crime without at least so much precaution ; for otherwise a careless or a thoughtless man might be convicted if only he did not make sufficient inquiry to ascertain whether the property he was purchasing had been honestly acquired.[15]

229. Meaning of Words.—" *If he has sufficient cause,*" *i.e.*, if the facts and circumstances are such as should probably have brought home to him the knowledge of a fact or from which he could not but have drawn an inference that the fact existed. The words used are " if *he has* sufficient cause to believe " and not " if there *is* sufficient cause to believe " which shows that the mere existence of a sufficient cause is not enough, if it was not brought to his knowledge. Sufficient cause must, then, exist and he must know of its existence, otherwise, he has no " reason to believe a thing."

230. Knowledge and Reason to Believe.—This phrase introduces into Criminal Law the *presumption* of guilt arising from facts which are, in themselves, insufficient to prove the crime itself. As an accessory to a crime he is as great a danger to society as the criminal himself, and as an accessory works in greater secrecy and with circumspection, it is necessary, on the one hand, that he should not be immune for want of direct evidence. On the other hand, as being charged for

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(10) *Dhunum Kazee*, 9 C. 53 (60); *Surendra Nath Ghosh*, 14 C. W. N. 1076.
(11) *Nash*, 2 Dears, C. C. R. 493 (500).
(12) *Ib.*, p. 503.
(13) *Dhunum Kazee*, 9 C. 53.
(14) *Nash*, 2 Dears C. C. R. 493 (499).
(15) *Rango Timaji*, 6 B. 402 (403) ; *Gulhad Shah*, (1888) P. R. No. 37.

a nefarious act, it is also necessary that he should not be hastily concluded to be guilty, unless there is a sufficient cause for it.

231. What is a sufficient cause in a given case so as to justify the presumption, is a matter upon which no general statement can be made. For it must depend upon the facts and circumstances of each case, upon education, intelligence, knowledge, and opportunity for knowledge, and habits of thought of the receiver, the time, place and his manner of receiving the property, and, indeed, a host of other circumstances from which men usually judge of the intention of others. Where, for instance, a Rajput[16] allowed his female child after the mother's death, to gradually languish away and die from want of proper sustenance, and it was shown that he had persistently ignored the wants of the child, although repeatedly warned by the Police of its condition and the consequences of his neglect of it, and there was nothing to show that the prisoner was not in a position to support the child, it was held that the offence of the prisoner was murder and not merely culpable homicide.[17] In this case the word "know" as used in section 300 was taken to mean the same thing as "reason to believe". These two terms are distinguishable in common parlance, but they appear to express the same idea in law. For, in law a person "knows" a thing not only when he has precise knowledge of it, but also when he is in possession of circumstances leading to the conclusion that the thing exists.[18]

232. In other words, "guilty knowledge" or *mens rea* does not necessarily imply sensual perception, but belief, founded on facts and circumstances, is tantamount to knowledge in its narrower sense. An examination of the Code would appear to support this view. For while there are sections[19] in which the word "know" alone occurs, it cannot be said that in those sections, the only state of mind postulated is that concerned with direct perception, as distinguished from a mind in which there is conviction from information and belief. Indeed, in some cases, sensual perception is immaterial, as in the case of sale of adulterated drugs[20] by the servant of a chemist who is with his master equally liable; in other cases, it is impossible, as in the case of homicide and murder.[21] For how can a man *know* otherwise than by inference that he is likely by a certain act to cause death, without which there can be no culpable homicide or murder.[22] That this appears to be the sense in which the expression is used in the Code, is made further manifest by the language employed in the other sections.[23] Where the phrase is varied, as in section 301, in which the words used are "knows to be likely to cause death," or section 418 in which cheating is spoken of "with the knowledge that he is likely thereby to cause wrongful loss," etc., in which certainty born of direct knowledge is rendered unnecessary. Therefore, a person may know that a certain consequence is inevitable or that the existence of a certain fact is undoubted, but it is not necessary that his knowledge must be direct or sensual, and not indirect or inferential.

233. At the same time it cannot, for all time, be assumed that the degree of knowledge in one who "knows" is the same as in one who has "reason to believe." Indeed, the use of the word singly in some sections and the collocation of the two in other sections[24] suggests a distinction which must be present in the mind of the Legislature. The word "know" is certainly much stronger than "reason to believe,"

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(16) Rajputs being proud of their high lineage do not welcome the advent of daughters who are supposed to lower their dignity by having to find for them husbands whom they have to acknowledge as their superior—a superstition which accounted for the infanticide of other days. The other reason which led to this crime was that daughters did not make bread winners and could not fight—a distinct disadvantage to a soldierly people.

(17) *Gunga Singh*, 5 N. W. P. H. C. R. 44.

(18) *National Bank of Australasia* v. *Morris*, (1892) A. C. 287 (291).

(19) *E.g.* ss. 200, 231, 232, 255, 259, 263-A, 271, 275, 276, 299, 300.

(20) Ss. 275, 276.

(21) *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 A. C. 857; *Hotchin* v. *Hindmarsh*, (1891) 2 Q. B. 180.

(22) Ss. 299, 300, *fourthly*.

(23) *E.g.*, ss. 301, 418.

(24) *E.g.*, ss. 201, 202, 203, 258, 411, 414.

as the latter is stronger than "suspect."[25] But the three postulate the same kind of knowledge, though they differ in the degree of proof required in each case. But the evidence required is invariably of the same kind, and the facts and circumstances to be proved are similar, though the amount of conviction which their knowledge may produce may differ, and on that difference will depend the culpability or innocence of the accused. Where, therefore, knowledge is essential to constitute an offence, it is insufficient if the facts adduced fall short of that proof. On the other hand, *knowingly* ought not to be read into a statutory offence, unless it is clear that the Legislature intended some such qualification.[1] At one time, it was commonly held that guilty knowledge was the essence of a crime: *Actus non facit reum, nisi mens sit rea.*[2] But this rule has, of course, no application to this country, and it has generally ceased to have any extended application, owing to the greater precision of modern Statutes.[3] *Mens rea* or guilty knowledge is still essential to prove all guilt, but while in certain Statutes this is expressly provided by the insertion of words, such as "knowingly, wilfully, fraudulently, negligently," or the like, in others reference to the state of a man's mind is omitted. But *mens rea* is, nevertheless, necessary in both cases—with, however, this difference that while, in the one case, it must be proved by the prosecution, in the other, it need not be so proved but will be presumed, unless its absence is established by the defence.[4]

234. In other words, the only effect of the presence or absence of words implying *scienter* or guilty knowledge is to shift the burden of proof. So in a colonial appeal the Privy Council remarked: "It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens rea* did not exist. That is a proposition which their Lordships do not desire to dispute; but the question whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases where the Statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act, charged against him, innocent."[5] But while this rule applies to all criminal offences, such as are described in the Code, it is not a rule without exceptions which fall into three classes, namely:—(*i*) acts which are not really criminal, but which are in the public interest prohibited under a penalty, *e.g.*, offences against the Revenue or those under the Adulteration Acts or Games Laws, etc.[6]; (*ii*) public nuisances[7]; (*iii*) cases in which although the proceeding is criminal in form, it is only a summary mode of enforcing a civil right.[8] For the purpose of the Code, all then that is necessary to see is the degree of knowledge and state of mind essential to constitute a given offence, and the evidence required is commensurate therewith. What evidence is required in each case cannot, of course, be discussed here, for it will have to be discussed under the various sections concerned.

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(25) *Rango Timaji*, 6 B. 402.

(1) *Betts* v. *Armstead*, 20 Q. B. D. 771.

(2) "The act itself does not make a man guilty, unless his intention were so."

(3) *Prince*, L. R. 2 C. C. R. 154; *Bishop*, 5 Q. B. D. 259; *Cundy* v. *Le Cocq*, 13 Q. B. D. 207 (210).

(4) *Sherras* v. *De Rutzen*, (1895) 1 Q. B. 918 (921); *Osborne* v. *Chocqueel* (1896) 2 Q. B. 109 (111), (case of dog-bite).

(5) *Bank of New South Wales* v. *Piper*, (1897) A. C. 383 (389, 390).

(6) *Betts* v. *Armstead*, 20 Q. B. D. 771 (773); *Attorney-General* v. *Lockwood*, 9 M. & W. 378; *Woodrow*, 15 M. & W. 404; *Fitzpatrick* v. *Kelly*, L. R. 8 Q. B. 337; *Roberts* v. *Egerton*, L. R. 9 Q. B. 494; *Marsh*, 2 B. & C. 747; *Davis* v. *Harvey*, L. R. 9 Q. B. 433; *Bishop*, 5 Q. B. D. 259; *Mullins* v. *Collins*, L. R. 9 Q. B. 292; *Cundy* v. *Le Cocq*, 13 Q. B. D. 207.

(7) *Stephens*, L. R. 1 Q. B. 702; *Medley*, 6 C. & P. 292; *Barnes* v. *Akroyd*, L. R. 7 Q. B. 474.

(8) *Morden* v. *Porter*, 7 C. B. (N.S.) 641; *Lee* v. *Simpson*, 3 C. B. 871; *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582.

Property in possession of wife, clerk or servant.

27. When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—**A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.**

235. Analogous Law.—The section was clauses 17-19 as originally framed, which ran thus :—

"17. When property is put into the possession of a person's wife or servant, in trust for that person, it is put into that person's possession if it was not before in his possession, and continues in his possession if it was before in his possession.

"18. Property in the possession of a child under 12 years of age, of a lunatic, or of an idiot, if such child, lunatic or idiot, be in the keeping of a guardian or guardians, is in the possession of such guardian or guardians.

"19. Property is not said to be in the possession of any party other than a person."

236. The appropriateness of these clauses was the subject of exhaustive comment[9] on the ground that it was "both arbitrary and inconsistent to attribute possession to *cestui que trusts*, and to guardians of those things which are put into a wife's or servant's possession in trust for the husband or master, or into an idiot's possession, as, for instance, without the consent or knowledge of the husband, master or guardian. The three clauses were consequently altered and simplified as enacted in the section, which does away with the distinction recognized in English law between "possession" and "custody."

237. The term "clerk or servant" is borrowed from the English Law and has been used in other sections of the Code where it will be found explained (s. 381).

238. The explanation is, however, in accordance with English Law where the word "'servant' includes any person acting as a servant for any particular purpose or occasion."[10]

239. English View of "Possession."—In English Criminal Law "possession" is distinguished from "custody,"[11] possession being used in respect of the owner while custody being used to "mean such a relation towards the thing as would constitute possession if the person having custody had it on his own account.... If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession, as distinguished from the custody of it until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing. If a servant receives anything belonging to his master from a fellow servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant delivers it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master. If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so received it, and not in his custody merely. A moveable thing is in the possession of the husband of any woman or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure."[12]

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(9) *See* Commissioners' First Report, ss. 83, 84.

(10) Stephen's Cr. L. 210; *Smith* v. *Webb*, 12 T. L. R. 450.

(11) Stephen's Cr. L., 210, 211.

(12) *Ib.*, *cf.* Pollock and Wright on Possession, 10 Encyclopædia of the Laws of England, 228, 237.

240. Principle.—This section eliminates the somewhat subtle distinction observed in the English Criminal Law between " possession " and " custody " so that what amounts to a mere custody in England would be deemed to be possession under the Code. The section does not deal with the possession of a trustee, but it is evident that, as the Code recognizes constructive possession only in the cases referred to in this section, the possession of a person in other cases would be his own possession, and not of another for whom he may be holding it in trust.

241. Meaning of Words.—" *Person's wife* " means during the continuance of conjugal relationship. If there has been a separation, the possession of property by a person's wife cannot be deemed to be his possession. This is evident from the clause " *on account of that person,*" which means that there must be recognition, express or implied, that the property is held by the other merely as its custodian. So the use by a servant of his master's premises as his private residence is his possession and not the possession of his master.[13] The word " wife " here has been used in its wide sense as signifying a man's spouse, not necessarily lawfully married, or married at all.[14] A Hindu wife in possession of her *stridhana* or ornaments gifted to her by her husband cannot be said to be in possession of them on account of her husband. Moreover, the doctrine of possession cannot be extended to illegal possession of things on her own account, *e.g.*, possession of cocaine,[15] or a pistol without a license.[16]

242. Limits of Constructive Possession.—This section defines the limits of constructive possession recognized in the Code. It does not define possession as such, which it leaves to the determination of civil law. But what it aims at is to embody a rule and an exception ; the rule being that possession, wherever referred to, in the Code must be actual, physical and real and not merely figurative, symbolical or constructive, or that through a trustee, the only exception being the possession of a person's wife, clerk or servant, *on account of that person*, that is to say, that it must appear or be proved by those relying upon such possession that those relations were holding the property in trust for him. If the property was held by any other relation, *e.g.*, a son or a brother in trust for him, that is on his account, it would not be deemed to be in his possession by virtue of the rule, since the section prescribes the limit beyond which it cannot stretch the degree of constructive possession. But, if such relations live with him as members of a joint family, and an article is found in the house in such place or places, as they or the other persons living in the house may have access to, there is no presumption of law, though the Court may presume, as a fact, that the article was in possession of the head of the house.[17] But it is only a presumption which might be rebutted by proving that some other person was, in fact, in possession of it.[18]

243. The question how a person's, wife's, clerk's or servant's possession is to be proved as being on account of him must depend upon the nature of property and the use to which it is put. In the case of personal dress and ornaments, it cannot be said that the things are held on account of the house-master. Even in the case of the wife, her possession must not be readily assumed to be his or on his account, since this fact, at least, must be proved by those who impute to one possession of a thing not found in his physical custody or control. The section merely raises a presumption which will vary according to the nature of the article concerned and the degree of control exercised over it by the husband or the master, as the case may be, and the party found in actual possession of it. Such presumption would fail in a case where it appears that a party may well

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(13) *Margam Aiyar* v. *Mercer*, 23 I.C. (M.) 177.

(14) *Banwarilal*, 22 I.C. (L.) 748, (1914) P. R. No. 20.

(15) *Ib.*

(16) *Choostey*, 69 I.C. (A.) 457.

(17) *Sangam Lal*, 15 A. 129 ; *Dula Singh*, 9 L. 531.

(18) But *contra* in *Banwarilal*, 22 I.C. (L.) 748, (1914) P. R. No. 20 (Cr.) the term " wife " held to include a permanent mistress.

have held possession of an article, *e.g.*, cocaine[19] without the knowledge of the husband or the master, as the case may be. On the other hand, where the property in question is the house, such presumption would arise and continue even in his absence therefrom.[20]

244. Indeed, possession is, sometimes, determined by control. The possession of a person's wife, clerk or servant is his possession, because the things in their possession are at his beck and call. The "wife" he has delivered possession to, may be his mistress, but so long as he has control over her, he has also possession of the things she holds on his account.[21] So a person may employ a clerk or servant only for a temporary purpose or a limited period, but, if the possession was made over to or taken over by them *on his account*, that possession continues though the relationship may cease.

245. The section only requires that if possession is once held by a person's wife or servant for him, he retains it till he recovers it by physical delivery. A person merely acting, though not employed as a clerk or servant, is a servant *pro confesso* within the meaning of this section.

"Counterfeit."

28. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—**It is not essential to counterfeiting that the imitation should be exact.**[22]

Explanation 2.—**When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.**[22]

246. Analogous Law.—The section provides a definition for a word used in Chapter XII in describing offences relating to coin and Government stamps.[23]

247. Principle.—Dishonesty and Fraud are not the essential prerequisites of counterfeiting. Intention to practise deception or knowledge that deception is likely to be thereby practised are alone sufficient. That intention may now, since the enactment of 1889,[24] be presumed if the resemblance is such that deception may, in fact, be produced.[25]

248. Meaning of Words.—"*Causes one thing to resemble another*," that one thing may be in itself a coin. A person may, for instance, gild a half-pice, a four-anna silver piece to resemble a half-sovereign. One who *causes* one thing to resemble another is a false coiner, but one who palms off a false coin is a cheat. "*Intending..... to practise deception*": It is not necessary that deception should, in fact, have been practised. Deception is imposition, the causing one to believe what is false, or disbelieve what is true. Here the word is used to connote the belief by a person that the counterfeit article is the genuine article. This deception must be the result of resemblance and not any extraneous information supplied. "*That a person might be deceived thereby*," which is not a pure question of fact, for it depends upon the inference to be drawn from the closeness of resemblance.

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(19) *Banwarilal*, 22 I. C. (L.) 748.
(20) *Anant Ram*, 59 I. C. (L.) 550.
(21) *Bisweswar Sing* v. *Bhola*, 15 Cr. L. J. 172; *Margam* v. *Mercer*, 23 I. C. 177: *Anant Ram*, (1821) P. W. R. 8; 59 I. C. 550.
(22) These Explanations were substituted for the original Explanations by the Metal Tokens Act (Act I of 1889) s. 9.
(23) Ss. 230, 263-A.
(24) Metal Tokens Act (I of 1889), s. 9; *Quadir Bakhsh*, 4 A. L. J. 776.
(25) *Amrit Sonar*, 51 I. C. (Pat.) 263; *Nil Money Nag* v. *Durga*, 30 I. C. (C.) 1007; *Abdul Sovan* v. *Jitendranath Datt*, (1933) C. 445.

249. Counterfeit Coin.—This description of counterfeit makes two things clear: *First*, that the *value* of the counterfeit is immaterial. It may, in fact, possess a greater intrinsic value than the genuine article, but it is, nevertheless, a false token because it is *not* the genuine article which it is made to imitate. *Secondly*, there can be no counterfeit, unless there is some resemblance. It need not be exact, but it must none the less be close enough to suggest that the one was intended to be an imitation of the other.[1] That intention may be gathered in two ways—(*a*) By a legal presumption arising under explanation 2, from the closeness of resemblance, and (*b*) by proof *aliunde*, which need only be given if the case is not one for legal presumption. As regards the evidence to be adduced in such cases, a person counterfeiting may either *intend* to practise deception, or he may *know* that deception is likely to be thereby practised. A person who intends to practise deception is, of course, a professional coiner or forger, but one who does not intend but knows that his handiwork may be turned to that purpose may be wholly innocent of guilty knowledge, but he is a counterfeiter all the same, because, though not intending it, he knows of the crimes that may be committed thereby. A person who strikes off cheap imitation sovereigns, or currency notes or stamps, not for passing them current, but for the purpose of ornament or adorn an album, would thus be within the description. A thing may be an exact *replica* of another, but if there is anything thereon to show that it is not the genuine thing, there is no counterfeiting. A currency note marked "specimen" across it in bold letters would, thus, cease to be a counterfeit within the meaning of the rule. On the other hand, an used stamp altered to resemble an unused stamp may amount to counterfeiting if it is passed off as such.[2]

250. Of course, since counterfeiting, here spoken of, is the manufacture of spurious articles in imitation of genuine articles, it follows that a person who palms off a one anna stamp for a rupee stamp, does not counterfeit a rupee stamp,[3] though he may thereby commit the offence of cheating.

"Document."

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—**It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.**

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-Attorney is a document.

A map or plan which is intended to be used or which may be used as evidence is a document.

A writing containing directions or instructions is a document.

Explanation 2.—**Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.**

Illustration.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

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(1) *Nilmoney* v. *Durga*, 19 C. W. N. 957.
(2) *Ram Lal*, 60 I. C. 785.
(3) *Shuroop Chunder*, 2 W. R. 65.

251. Analogous Law.—The term "document" has been also defined in two other Acts of the Indian Legislature.[4] The definition of "document" here given differs from the definition of "writing" in the English Criminal Law. The English word applies to the *material* on which words are written, whereas it applies here not to the material but to the *matter* written.[5]

25*2*. **Meaning of Words.**—"*Matter described*" means matter delineated, *e.g.*, a map or plan, or a picture *upon any substance*, *e.g.*, stone, tree or clay.[6] "*Letters, figures, or marks*," *i.e.*, whether in language, numbers, pictures or symbols.

253. What is a Document.—The definition above set out and the description given in the section, make it clear that the word "document" is used in law to denote not the substance upon which human ideas are delineated, but the ideas themselves, as expressed in conventional signs addressed to the eye. But the mere expression of ideas does not convert writing into a document unless the writing was "intended to be used or which may be used as evidence of that matter." So a draft complaint purporting to have been written by a fictitious person charging a certain Raja with the murder of a Fakir, the object of the writer being to levy a black-mail, was a "document" though the writer was apprehended in the act of preparing the draft which, of course, was not to be used as evidence. But the Court held that, though the writing was merely a draft, still, since it *might* have been used as evidence, it was a document within the meaning of the Code, and as it was a false document, it was a forgery.[7] But in England, it has been held that an avouchment or declaration, whether written or printed, of the character or quality of a chattel, is not a document, which, if false, would be a forgery. So it is said that the writing of a false signature of an artist's name to a picture to pass it off as a work of the artist[8] or the imitation of a trade-mark on a wrapper enclosing spurious goods[9] would not be documents which, if false, would be forgeries. But, if so, English Law must differ from the law of this country, for, in both cases, they would be documents within the meaning of the section, since in the one case, the signature and in the other case, the pictorial device were *intended* to be used as evidence of the matter, inasmuch as the signature was intended to be the signature of the artist—which it was not—and the wrapper was intended to be that of the firm which used it for the sale of genuine goods. The term "evidence" is not here used in the sense of admissible or legal evidence as defined in the Indian Evidence Act.[10] It is rather used in its larger sense as denoting matter which is a written memorial of certain ideas to which reference might be made to recall them.

"Valuable security."

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

254. Analogous Law.—The term "document" has been defined in the last section. A document creating or extinguishing legal rights is a valuable security. That document must be the original and not merely a copy, for it must of itself

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(4) *Cf.* S. 3 (16) of the General Clauses Act (Act X of 1897). (The earlier General Clauses Act (Act I of 1868) did not define this term) and S. 3 of the Indian Evidence Act (Act I of 1872).

(5) Law Commissioners' First Report, s. 88.

(6) *Krishtappa*, 27 Bom. L. R. 599; 87 I. C. 838.

(7) *Shifait Ali*, 2 B. L. R. (A. Cr.), 12; *Ramaswami*, 41 M. 589.

(8) *Cross*, Dears & B. 460.

(9) *Smith*, 27 L. J. M. C. 225.

(10) Act I of 1872, s. 2.

create or extinguish legal rights.[11] Consequently, it must not be a spent or cancelled document. So the Law Commissioners wrote : " Sir H. Seaton asks, would not a cancelled instrument be a valuable security under this clause ? We think not ; for an instrument available for the purpose for which it was made is clearly what the clause intended ; a cancelled instrument, therefore, though by the cancelling of it a legal right may be extinguished, inasmuch as the instrument upon which such right depended is thereby voided, does not fall within its scope."[12]

The term " valuable security " has been made use of in sections 329-331, 347, 348, 420, 467 and 477 of the Code.

255. Meaning of Words.—"*Or purports to be*" : An unstamped deed is, therefore, a valuable security, though, being unstamped, it may not be admissible in evidence.[13]

256. Characteristics of a Valuable Security.—A valuable security is a document of value, that is to say, a document which of itself creates or extinguishes legal rights, or at least *purports* to create or extinguish them. If, therefore, the document is executed by a minor[14] or is unstamped, or contains blanks, or does not specify the name of the executee or the date or place of execution,[15] or is infected with any other form of invalidity[16] it is, nevertheless, a valuable security, because " it purports to be one."[17] So the fact that it is incomplete, or contains blanks to be filled in is said to be immaterial, provided it is intended to be used as a valuable security. Certain signatures were forged on each of two printed forms, one intended to be used as a promissory note, and the other as a receipt. One anna stamp was affixed on the top of each paper, but the stamps were neither signed across nor cancelled in any way. They both contained blank spaces left for entering particulars of the amount, the name of the person in whose favour the document was to have been executed, the date and place of execution, and the rate of interest. It was contended that the documents could not be said to " purport to be " valuable securities, but the contention was overruled on the strength of cases[18] which, however, did not cover the point raised. It appears that an incomplete document like the last could scarcely be designated a valuable security, nor could it be held " to purport to be one " for its very incompleteness. These words do not refer to an incomplete document but rather to a completed document which, though intended to, has not in law the effect of a valuable security.

257. So a rough account containing figures only with no particulars and unstamped, though signed by the obligor, is a valuable security, because it purported to create a legal obligation on the part of the obligor, and, as such, it satisfied the requirements of the section.[19] Indeed, in such a case, the document would still have been a valuable security even if it had not been signed by the debtor, since it is not invariably necessary that the document should create or convey any right of itself, it being sufficient if it evidences an obligation upon which the right follows.[20] If, therefore, it is a mere statement of account containing no promise to pay and not even the signature of the obligor, it is still a valuable security.[21] Such is the counterfoil of a paying-in slip which purports to be an acknowledgment of the sum paid into the Bank.[22] A title page of an account book of a firm containing the names of the several partners and showing the capital contributed by each, if signed by the partners, may amount to a valuable security.[23] So a document the registration of which was refused does not, on that account, cease to be a valuabl esecurity, for it

(11) *Khushal Hiraman*, 4 B. H. C. R. 28 ; *Naro Gopal*, 5 B. H C. R. 66.
(12) First Report, s. 89.
(13) 7 M. H. C. R. (App.) 26 ; *Ramasami*, 12 M. 148.
(14) *Ram Narain Shahu*, (1933) Pat. 601.
(15) *Jawahir*, 38 A. 430.
(16) *Ram Harakh*, 90 I. C. (A.) 913.
(17) *Ramasami*, 12 M. 148 ; *Kashi Nath Naek*, 25 C. 207 ; *Jawahir*, 38 A. 430.
(18) *Reference*, 7 M. H. C. R. 27 ; *Ramasami*, 12 M. 148 ; followed in *Jawahir*, 38 A. 430.
(19) *Ramasami*, 12 M. 148 ; *Idu Jolha*, 46 I. C. (Pat.) 293. To the same effect *per* Aldersen, B., in *Boardman*, 2 M. & Rob. 147.
(20) *Kahalavaya*, 2 M. H. C. R. 247 ; *Idu Jolha*, 46 I. C. (Pat.) 293.
(21) *Ib.*
(22) *Turner*, 89 I. C. (C.) 248.
(23) *Hari Charan*, 38 C. 68.

purports to continue a valuable security.[24] So is a forest pass though only its duplicate is used to transport forest produce.[25]

258. A deed of divorce is a valuable security because it extinguishes a legal right of the parties.[1] A *kabuliat* is, for the same reason, a valuable security.[2] But a copy of a lease cannot be so regarded[3] because it, of itself, does not purport to be a document affecting legal rights. But the counterpart of a document is, of course, not a copy and would, therefore, be a valuable security.

259. No Security.—Now, what is a legal right? It is a right of a civil nature recognized by law, that is to say, a right the infraction of which gives rise to a cause of action. For instance, the grant of an easement is the conferral of a legal right, for such a grant may be made the subject of a suit. But a claim to a mere office of dignity, as to the title of *Loskur*, is not a legal right, and a *sanad* forged to support that title does not, therefore, amount to the forgery of a valuable security.[4] An acknowledgment of receipt of an insured parcel is not a valuable security inasmuch as it is merely evidence of its delivery and does not operate as a discharge of any liability.[5] An administrative order of the Superintendent of the Court of Sessions addressed to the *Nazir* directing him to release the accused on bail is not a valuable security.[6]

"A will."

31. The words "a will" denote any testamentary document.

260. Analogous Law.—The term "will" has been defined in the Indian Succession Act[7] as "the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death."[8] The General Clauses Act defines it to "include a codicil and every writing making a voluntarily posthumous distribution of property."[9]

261. A will is really a wish of a person as to the disposal of his property after his death, and, as such, it is revocable by him at pleasure, and, if not revoked, it takes effect only after his death. So it is said in an old book: "A Testament is the true declaration of our last will of that we would to be done after our death."[10] "Will means the whole testamentary instruments including codicils."[11] The term has been used in sections 467 and 477 of the Code.

Words referring to acts include illegal omissions.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

[***Illegal omission***—S. 43, *post*.]

262. Act and Omission.—An act is, properly speaking, a determination of the will, producing an effect in the sensible world. It means something voluntarily done by a human being, as, for example, walking, speaking or writing. It involves an operation of the mind as well as of the body. But, as understood in the Code, the term may only signify an operation of the mind, for it includes also illegal omissions, or bodily inaction. But this meaning has only been adopted for compendiousness of expression. The illegal omission, here spoken of, must, no doubt, be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred.[12] It need not be the result itself nor need it be its logical or proximate cause. For instance, a policeman tortures a person for the purpose of extorting a confession. Another policeman

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(24) *Kashi Nath Naek* 25 C. 207.
(25) *Doulat Ram*, 59 C. 1233.
(1) *Azimooddeen*, 11 W. R. 15.
(2) 6 W. R. (Cr.) 2; *Nasiruddin*, (1883) A. W. N. 59; *Ismail Panju*, 88 I. C. (Nag.) 283.
(3) *Per* Couch, C. J., *arguendo* in *Kushal Hiraman*, 4 B. H. C. R. 28; *per* Warden, J. *arguendo* in *Naro Gopal*, 5 B. H. C. R, 56.
(4) *Jan Mahamed*, 10 C. 584.
(5) *Sadholal*, 17 Cr. L. J. 272; *Arura*, (1913) P. R. No. 10; 20 I. C. 596.
(6) *Sher Alam Khan*, (1933) B 494.
(7) Act X of 1865.
(8) *Ib.*, s. 3.
(9) Act X of 1897, s. 3 (57).
(10) Terms de la Ley.
(11) *Pigot* v. *Wilder*, 26 Bea. 92.
(12) *Thornotti*, 1 Weir 495.

stands by and watches it unmoved. Now, since it is the duty of every policeman to prevent tortures, his omission to perform his legal duty is an illegal omission, the result of which is the same as if he had abetted the first policeman in using the torture.[13] And if his duty was clear, it was no defence that the torturing policeman was his superior officer, or that the torturer had been ordered by his superior to commit the crime.[14] Nor would it be any defence to say that he was not present at the time of the torture if its commission was facilitated by his absence, or if he had absented himself from the company of the prisoner, when it was his duty to be present, which gave his torturer the chance.[15]

263. As a similar duty is cast upon the Magistrates, a Magistrate who was present while certain police constables were wrongfully confining and causing hurt to a villager with a view to extorting a confession, was similarly convicted of abetment.[16] In both these cases there was an omission, and it was illegal within the meaning assigned to that term by section 43. Whether an omission to do a thing is or is not illegal must, then, be judged by the terms of that section. For instance, in the examples above cited, the duty of the Magistrate and the policeman to prevent the commission of a crime was a matter of legal obligation, the failure of which constituted an illegal omission within the meaning of this section. If, therefore, the same offence had been committed in the presence of another person, say a village chowkidar[17] not charged with the same duty, he could not have been charged with abetment because his omission was not illegal.[18]

264. Not Illegal.—While this section makes an illegal omission tantamount to an act, it draws a line at illegality. A neglect, however gross, does not have that effect unless it is expressly penalized; *e.g.*, in ss. 279, 289, 304, 304A, 337 and 338. The fact is that gross neglect is never criminal unless it is also "illegal" which it is declared by the Code in the sections quoted, as also by ss. 102 and 128 of the Railways Act.[19]

33. The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omissions as a single omission.

"Act": "Omission."

265. Analogous Law.—This section is dictated by the same principle as the last section, both sections being enacted to simplify the language of the Code.

266. Principle.—The combined effect of the last section and this is that the word "act" alone is sufficient to signify both a series of acts as well as a series of omissions. But though an "act" and an "omission" include a series of acts and omissions, it does not follow that a number of acts and omissions would, in that sense, constitute only one offence. For whether the acts and omissions constitute one or more offences depends upon other considerations which are not overriden by the section.[20]

34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.[21]

Acts done by several persons in furtherance of common intention.

267. Analogous Law.—The words "in furtherance of the common intention of all" did not exist in the original Code, and were added by the amending Act of 1870.[22] They make all the difference between the old section and the new, for without those words the Code would be widely at variance with the English law where a person not cognizant of the intention of his companions to commit, say,

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(13) *Latifkhan*, 20 B. 394.
(14) *Behary Singh*, 7 W. R. 3; *Sonoo* ,10 W. R. 48.
(15) *Kali Churn*, 21 W. R. 11.
(16) *Krishna Shetti*, 1 Weir 50; *Appannee Hegade*, 1 Weir 52.
(17) *Gopal Chunder* v. *Foolmoni*, 8 C. 728; *Lakshmi*, B. U. R. 303; *Khajah Noorul Hoosein* v. *Fabre Tonnerre*, 24 W. R. 26; *Khadin Sheikh*, 4 B. L. R. (A. Cr.) 7.
(18) *Ibid.*
(19) *F. C. Woodward*, (1925) S. 233.
(20) S. 235, Cr. P. C.
(21) This section was substituted for the original by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870) s. 1.
(22) Act XXVII of 1870, s. 1.

murder was never held liable, though he may have joined their company to commit an unlawful act.[23]

268. This view was adopted by the Courts in India, even before the section had been formally amended.[24]

269. This and the following sections (ss. 34-38) enunciate the general doctrine of joint liability in crime. As such, they form a class apart and do not really belong to the chapter dealing merely with the interpretation of terms. As for this section it is framed to meet a case in which it may be difficult to distinguish between the acts of the individual members of a party, or to prove precisely the part taken by each individual.[25] The reason why all are deemed guilty in such cases is, that the presence of accomplices affords encouragement, protection and support to the persons actually engaged in committing the crime.

270. Cognate Sections Distinguished.—It should be observed that the words used here are " in furtherance of the common intention of all," whereas in section 149 describing a similar community of intention and design of an unlawful assembly, the words used are " in prosecution of the common object of that assembly," which cannot mean the same thing as the words used here.[1] What they do mean will, however, be clear by a comparison between the two sections : *First*, This section is wider as regards the complicity of criminals, since it affects them regardless of number, whereas s. 149 limits it to persons whose number is not less than five ; *secondly*, while the common object under this section is undefined, that under s. 149 is limited by s. 141 ; *thirdly*, a conviction under this section involves co-operative criminal act,[2] whereas under s. 149 all members of an unlawful assembly become constructively liable for an offence committed by one or more of them. In the one case, there must be proof of the criminal *act*, while, in the other, liability would arise from a mere criminal intention or knowledge.

271. This section is, again, wider than s. 114 which is, however, merely evidentiary and deals with only one aspect of abetment. The one creates liability in one for an act done by the other, whereas s. 114 and the other sections dealing with abetment deal with a closer association of one criminal with another.

272. Comparing this section with that defining abetment,[3] it will be seen that, while the latter punishes an *instigator simpliciter*, this section demands his closer association in the actual act of crime. Generally speaking, an abetment is complete, though the act abetted may or may not be committed[4] ; *secondly*, the person abetted may or may not be one capable by law of committing an offence[5] ; *thirdly*, the person abetted may or may not have the same guilty intention or knowledge as that of the abettor[6] ; *fourthly*, the abettor's presence may or may not be necessary at the scene of the offence,[7] — all of which are the prerequisites of one's liability under this section.

273. Turning, now, to the distinction between this section, s. 149 and s.120-A, which defines criminal conspiracy, it would be observed that the last named section is wider than this section or s. 149 in that a mere agreement between two or more persons, followed by an overt act by any of them in pursuance of the agreement, amounts to criminal conspiracy, though the act in itself may not amount to an offence, though, under this section, that act must in itself be criminal. In practice, the three sections may, at times, overlap one another, but the main distinction between them lies in the fact that, while under this section criminality ensues from the doing of a criminal act in furtherance of the common intention, criminal liability

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(23) *Duffey's case*, (1830) 1 Lewin C. C. 194.
(24) *Gorachand Gope*, B .L. R. (Sup. Vol.), 443, F. B. It is this judgment which influenced the amendment of 1870.
(25) *Nga Po Sein*, (1902) 9 Bur. L. R. 16.
(1) *Per* Jackson, J., in *Sabed Ali*, 11 B. L. R. 347, F. B. approved in *Barendra K. Ghose*, 52 C. 197 (212) P. C., followed in *Bhondu Das*, 7 Pat. 758 ; *Mahaddi*, 5 C. 871 (873).
(2) *Fazoo Khan* v. *Jatoo*, (1931) C. 643.
(3) S. 107.
(4) S. 108, Exp. (2).
(5) S. 108, Exp. (3).
(6) *Ib*.
(7) *Ib*.

under s. 120-A only ensues from the moment two or more persons agree, which confines *mens rea* within narrower limits, though, if there may be an agreement, the act need not be criminal, while under this section there need be no proof of agreement, since a mere common intention would suffice; but in that case, the act itself must be criminaland proved to have been done in furtherance of common intention. Section 149 assumes the presence of at least five participants in the crime, which, again, may or may not be the case covered by this section or s. 120-A. But the elements constituting the *mens rea* are there wider in that, as required by this section, there need be no common intention, nor common agreement as required by s. 120-A, but merely common object, or, failing this, even knowledge on the part of any member that the object of that assembly was to commit any of the acts enumerated in s. 141, though he may himself have had neither the intention to commit that act nor have agreed to do so. Summing up the three sections, it would be seen that the evidence of criminality under the three sections varies according to the degree of the criminal intent or criminal act, though under s. 149 there is a further condition that the offenders must, at least, be five in number. Where the intention is criminal, the act need not be proved to be criminal; but where the intention is not necessarily criminal, the act itself must be criminal to furnish evidence of criminal intention. In short, there must be criminality either disclosed in the act or in the intention.

274. Take an example: *A* plans a dacoity and invites *B*, *C* and *D* to join him. They agree to commit dacoity at *P's* house. Here *A* has abetted the offence of dacoity by *B*, *C*, and *D* and all the four become members of a criminal conspiracy and would be liable to punishment under s. 120-B. They are, of course, not yet liable under s. 34, 114 or 149. Now *A* says to *B*, *C* and *D* "I am an old man and will only keep a watch outside *P's* house" which he does; *B*, *C* and *D* enter *P's* house and rob *P*. Here *A* becomes liable under s. 114 for the dacoity to the same extent as if he had actually joined in robbing *P*. Now, if while proceeding to *P*'s house, *A*, *B*, *C* and *D* meet *E* and ask him to join them in the dacoity and he refuses, *A*, *B*, *C* and *D* all become liable as abettors under s. 115. Now, suppose *E* agrees and joins the four, the five become an unlawful assembly under s. 141; and suppose *E* gets hurt, while crossing a ditch and remains behind, while the remaining four proceed to rob *P*, *A* is, nevertheless, liable with the four by reason of s. 149, but s. 34 has not yet come into play. But suppose when *E* joined he warned his companions that while he was for dacoity he was not for shedding blood. But *A* and *B* were enemies of *P* and had previously decided to kill him. Here the common intention of *A* and *B* was to kill *P*, though the common object of all the five was to dacoit *P*. Section 34 begins to function. Now, suppose after the dacoity is over, *B* gives *P* a fatal stroke, *B*'s stroke would be treated as *A*'s stroke as well, by reason of s. 34, though *C*, *D* and *E* would not be liable for the murder of *P*. Now, suppose in committing dacoity one of them, *C*, is seized by *P* to rescue whom *B*, *C* and *D* strike *P* with lathis of which *P* dies—here *B* had intended to kill *P* in any case, and he, with *A*, must share the consequence of *B*'s act, while the common *object* of the assembly being to dacoit *P* in prosecution of which *B*, *C* and *D* kill *P*, therefore, by reason of s. 149 all five become *prima facie* liable for the murder of *P*.

275. Now, since all the five have the same intention and the same object, namely, of committing dacoity, it follows that the *mens rea* of this section and that of s. 149 overlap and if all the five were armed with lethal weapons, the second condition in s. 149 is also present, and, so far as *A* is concerned, his previous abetment and his presence at the crime makes him liable for dacoity under s. 114 and for murder under s. 396 and for conspiracy under s. 120-A and all alike would be equally guilty of that offence by the application of other principle, *e.g.*, that stated in s. 149. It will, thus, be seen that since all these sections are intended to penalize participation in the crime with diverse intentions and objects and at its various stages, they cannot be regarded as mutually exclusive, and at some stage and in some cases all of them may become equally applicable.

276. Principle.—This section merely prescribes a measure of criminal liability in one aspect of complicity in a crime, that is, that in which several persons

participate in design and in action while other sections, already referred to, deal with other aspects of complicity. They all deal with what is known in English law as accession before the fact.

277. Procedure and Practice.—No person can be convicted under this section, unless he is specifically charged with it.[8] This section provides not only for liability to punishment, but also for subjection to another jurisdiction. Thus, if a foreigner in a foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was committed.[9]

278. Charge.—This section as well as ss. 120-B and 149 all deal with constructive liability which must be specifically charged.[10] But, as such, one might be convicted, though the rest are acquitted.[11]

279. The charge under this section should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——had formed a common intention with *B*, *C* and *D* to commit an offence, namely——in furtherance of which you did the following criminal act, to wit——(*here state the act*) resulting in the death of——,an offence punishable under s. 302 ; and I, therefore, hereby charge you of the said offence under s. 302 read with s. 34 of the I. P. C.

280. Meaning of Words.—"*A criminal act is done by several persons*": This does not mean that the several persons do the *same* act which is physically impossible. It can only mean that several persons do *separate* acts which might be similar or diverse.[12] "*In furtherance of the common intention of all*": This means that all the persons charged must have consented to the commission of the crime committed. The intention must be actual intention,[13] and the common intention of all must be the commission of a criminal act which *is done*. That is to say, the act *done* must be the act contemplated by *all* : otherwise all the co-conspirators are not guilty of *the* offence committed.[14] These words are much stricter than the words "in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object" of section 149. The term "intention" implies a resolution of the mind while the term "object" means the purpose for which that resolution was made. Offenders may differ in their intentions and object. The two sections, therefore, prescribe different conditions for their joint liability. Under s. 149 the offence *committed* need not have been the offence *intended*. It will suffice if it was considered *likely*. A reckless man may chance a likelihood without intending it. "*By several persons*" why not "by one or several persons" which would include by several persons as well.[15] These words have remained as they were originally enacted, but their alteration would improve the sense intended. As it is, the sentence will not bear a too literal construction, for, if so construed, it would read thus : "When a criminal act is committed by several persons in furtherance of the common intention of the several persons, each of such several persons is liable, etc.," which is not what the section means. There is, of course, no limit to the number of persons acting in pursuance of a common intention.[16] "*Each of such persons is liable for that act*": "That act" here means *not* the individual act or acts of the several persons, but the final act being the cumulative result of all the acts.[17]

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(8) *Cheda Singh*, (1924) P. C. 183.
(9) *Chhotalal*, 14 Bom. L. R. 147.
(10) *Kattoora*, (1924) M. 584; *Profulla Kumar*, 50 C. 41 ; *Dastarali*, 58 C. 822.
(11) *Dastarali*, 58 C. 822.
(12) *Barendra Kumar Ghose*, (1924) C. 257 F. B. O. A. 52 C. 197 P. C.
(13) *Satrughan*, 50 I. C. (C.) 337.
(14) *Nga Tun Baw*, 7 Cr. L. J. 205 ; *Jamarudi*, 16 C. W. N. 909 ; *Dhian Singh*, 9 A.L.J. 180; *Hari Bijal*, 17 Bom. L. R. 906 ; *Suleman*, (1933) N. 134.
(15) S. 2, *ante* ; *Barendra K. Ghose*, 52 C. 197 (206) P. C. overruling *Nirmal Kanta Roy*, 41 C. 1072 in which Stephen, J., held that the act must be done by several persons only and conjointly.
(16) *Nibaran*, 11 C. W. N. 1085.
(17) *Barendra Kumar Ghose*, (1924) C. 257 F. B. O. A. 52 C. 197 P. C.

281. Common Intention.—This section lays down a rule of presumption in matters relating to criminal responsibility. It makes the existence of a "common intention" one test of joint responsibility.[18] But what is common intention and how is it to be proved? It seems clear that common intention implies concert and planned action. The fact that two or more persons possess the same intention and take similar action does not make them jointly liable for the combined effect of their action under this section, though they might be liable under the next section. Take an example: the accused, a notorious debauchee well-known for his misdeeds in the neighbourhood, entered the house of a married girl at dead of night and began to ravish her by force. She screamed and shouted "Thief, Thief," whereupon several villagers armed with sticks ran up to her rescue. Finding the miscreant *flagrante delicto* one body lightened their sticks upon him, he bolted, but found another party in the verandah who did likewise. He escaped in the courtyard where he found another lot whose blows killed him outright. The parties were animated by the same intention to disable the culprit and to seize his body, but they did not act in furtherance of a "common intention." Hence they were all acquitted of culpable homicide and of an offence under s. 148.[19]

282. Next, how is a common intention to be proved? The simplest method of proving it is, of course, by direct evidence of conspiracy. But such evidence is not always procurable, nor, if procured, is it invariably reliable, for the only evidence thus obtained would be the evidence of approvers or accomplices which the Courts consider it unsafe to rely upon unless it is corroborated in material particulars.[20] Failing this evidence or its material corroboration, resort must be had to other circumstances evidencing community of interest. This is sometimes sought to be proved from the presence of the accused at the time of the commission of the crime. But this alone is never sufficient.[21] For persons present do not necessarily possess the same intention which is the fact to be decided. Nor can it be held that a person, who, being present, does not prevent the commission of a crime or fails to apprehend the criminal, must be himself one.[22] But if several policemen go out together for the purpose of apprehending a man, and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, then the Court might properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design.[23] As already observed, the question, therefore, whether a person was inspired by common intention to take part or be present at the commission of a crime cannot be answered by reference to any general principle. It is a question of fact dependent upon the circumstances of each case.[24]

283. But the inference to be drawn from a set of given facts is one upon which the leading precedents shed a flood of light. Thus, in one case,[25] a number of men armed with clubs went out to enforce a right or supposed right by the use of those clubs. Ainslie, J.,[1] inferred their intention to be homicidal because of their number,

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(18) *Barendra K. Ghosh*, 52 C. 197 P. C.; *Harihar Singh*, 90 I. C. (Pat.) 154; *Jhakri*, 17 I. C. (C.) 1001; *Dhian Singh*, 14 I. C. (A.) 649, dissented from in *Hamman*, 35 A. 560; *Pholo*, (1933) S. 407; *Sadhu Singh*, (1933) L. 865; *Sharif*, (1933) L. 315.

(19) *Jhakri Chamar*, 17 I. C. (C.) 1001.

(20) S. 114 (*b*), Indian Evidence Act, I of 1872, but *see ib.*, s. 133, which would appear to be in conflict with the earlier clause. But it is not. The one lays down a rule of practice, the other the rule of law.

(21) Jardine, J., in *Magan Lal*, 14 B. 115: *Gorachand Gope*, B. L. R. (Sup. Vol.), 443, F. B.

(22) *Gorachand Gope*, B. L. R. (Sup. Vol.) 443, F. B.

(23) *Gorachand Gope*, B. L. R. (Sup. Vol.) 443, F. B.

(24) *Irshadullah*, 55 A. 607, followed in *Haider*, (1935) A. 504; *Nan E.*, 9 R. 612; *Heramba* v. *Kali Prasanna*, 1 C. W. N. 465; *Faizulla*, 61 I. C. 522; *Mianjan*, 73 I. C. 81; *Adam Ali*, 31 C. W. N. 314 (a case where s. 34 applied to s. 304, Part 2; *Tara Singh*, (1932) L. 189, following *Barendra K. Ghose*, 52 C. 197 P. C., contra *Aniruddha*, 86 I. C. (C.) 475, (1925) C. 913.

(25) *Sabed Ali*, 11 B. L. R. 347 F. B.

(1) *Per* Ainslie, J., *dissentient* in *Sabed Ali*, 11 B. L. R., 347, F. B.; *Jailal*, 64 I. C. 838.

the strength of the opposing force, and the unlikelihood of self-control in a moment of passion. But it seems that the learned Judge failed to see that it is one thing to suppose what persons sallying out for the vindication of their rights by show of force should think. It is quite another thing to hold that what some or a few of them might or should have thought all must have *intended*.

284. In short, as remarked before, to think what is likely is not the same thing as to intend it. And this appears to have been the view of the majority of the Full Bench who overruled Ainslie, J.[2] So where a policeman arrested a thief, whereupon the latter shouted for help hearing which his relations and castemen ran up with sticks to rescue him, and in rescuing him two of them grievously hurt the constable, the Magistrate convicted all the four of grievous hurt, but on appeal Mahmud, J., held that some discrimination should be made between the case of the two assailants and the remaining accused, for while the common intention of the four accused was merely to rescue their comrade, the intention to inflict grievous hurt could not be imputed to those who took no part in it.[3]

285. A mere presentiment of a possible danger does not, therefore, constitute an intention to court it. It must be foreseen, foreknown and premeditated. If, therefore, the assembly understood and realized that a certain offence would be committed or was likely to be necessary for the common object, it would bring a case under section 149 though not under this section.[4] It will fall under neither section where though all the accused were agreed as to and joined in the beating, there was no evidence to show that the common intention of them all was to cause grievous hurt, in which case, they could not all be convicted of that offence.[5]

286. Proof of Common Intention.—A common intention may, however, be safely inferred from participating in the crime. The question whether the accused, in a given case, were acting in concert and, if so, upto what point, is a question of fact, which must, to a large extent, depend upon the circumstances of each case.[6] Apart from conspiracy, which needs proof of its own, the question of common intention must be found inferentially from the facts of each case and the acts of each accused. It is a simple case, if the motive or intention of the accused is to commit a particular crime, and that motive or intention can be proved by direct evidence. But the difficulty arises when the intention has to be deduced from the acts of the accused. Take, for example, the following cases : *A* had entered a house for the purpose of committing adultery. On an alarm being raised, some neighbours, including one *P*, turned him out and gave him a beating. He was afterwards prosecuted and sentenced to a month's imprisonment. On his release he, along with his two brothers, *B* and *C*, waylaid *P* and on meeting him immediately beat him mercilessly with *lathis*. On his falling down, they continued to beat him and only ran away when the villagers appeared upon the scene to remonstrate with them. *P* died the same night. His skull was found to have been fractured in four places. These injuries left no doubt in the mind of the Court as to what the assailant's intention was, and they were all convicted of murder.[7] Now take another case. Some four years before the assault upon him, one *P* had broken the leg of one *A* for which he had been imprisoned. It led to two factions. On a certain day *P* passed by *A's* village, whereupon *A*, with his four brothers and cousins, set upon *P* and brutally assaulted him inflicting countless injuries with clubs. Both his legs were fractured in one or two places, but there was no injury to the head and, though the trunk was bruised no bones were broken, but *P* died of haemorrhage. The Court held *A* and his party guilty of culpable homicide and not of murder.[8] Now take a third case. The four accused who were related and were co-sharers entered *P's* field, three armed with sticks and one *B* with a loaded gun and wanted to turn him out by

(2) *Per* Couch, C.J., in *Sabed Ali*, 11 B. L. R. 347, F. B.; approved in *Barendra K. Ghose*, 52 C. 197 (212), P. C.; to the same effect, *Shwe*, 10 L. B. R. 117 ; 57 I. C. 918.

(3) *Dharam Rai*, (1887) A. W. N. 236.

(4) *Sabed Ali*, 11 B. L. R. 347, F. B.

(5) *Dhian Singh*, 14 I. C. (A.) 649; *Jhakri Chamar*, 17 I. C. (C.) 1001.

(6) *Barendra Kumar Ghose*, (1924) C. 257 F. B. O. A. 52 C. 197 P. C.

(7) *Ram Newaz*, 35 A. 506.

(8) *Inder Singh*, 10 L. 477.

overawing him with their numbers. As *P* refused *A* and his three companions started beating him, but *P* with the assistance of another defended himself and finding themselves worsted *B* fired and killed *P*. The question was what offence the four accused had committed. The question had to be referred to a Full Bench of five judges of whom four held that the firing, being sudden and unpremeditated, must be treated as the act of B from which Ainslie, J., differed asking the majority why did *B* carry a loaded gun if not to use it, if necessary. But the majority held that since the gun was fired to ward off a counter-attack it could not be said that the assailants had started to dispossess *P* after killing him, if necessary.[9] Other cases similarly decided follow the same principle. So where two persons having conspired to procure a girl persuaded her mother to give her up which she refused to do, whereupon one of them fired a gun loaded with pebbles which set up gangrene, of which she died. It was held that he alone was guilty of murder and his confederate was acquitted of its abetment.[10]

287. Similarly, in an English case, where a party of poachers beat a keeper and left him senseless after which one of them returned and stole his money, it was held that he alone was guilty of theft.[11] But where eight poachers all armed with guns, being surprised by some keepers who went towards them for the purpose of apprehending them, formed into lines and pointing their guns at the keepers said that they would shoot them, and one of them fired a shot wounding a keeper, it was held that all were guilty of attempted murder, because they had all formed into *lines*, pointed their guns and threatened to shoot and one of them had nearly carried out the threat.[12] The same view was taken in another case in which six sailors, for reasons unknown, chased a German sailor belonging to another ship, and as the latter took refuge from their attack against a railing, he was stabbed by one of them with a knife of which be died in a few minutes. The evidence as to the hand by which the blow was given was very conflicting. But before the unfortunate man had been stabbed, he had been assaulted brutally and in a dastardly manner by all the six men, and Byles, J., told the Jury that in order to convict all the six men of murder, there must be evidence of common design, or evidence that, being present at the stabbing, they assented and manifested their assent by assisting in the offence, that is, in the use of the knife. For the men may have intended to thrash the sailor, but it did not follow that they intended to stab him as well.[13] Where, therefore, two soldiers went after closing hours to a publican's and demanded beer which he refused, whereupon they returned uttering threats. They again came up some time afterwards, and one of them rushed in, the other remaining without, and while the landlord was trying to eject the intruder he received a violent blow from a sharp instrument from the other soldier which occasioned his death. There was evidence that the two had returned with the deliberate intention of using violence in case their demand was not complied with, and they were consequently both held to be guilty of murder.[14]

288. No Joint Responsibility.—From the foregoing discussion it will be obvious that the essence of joint responsibility lies in the common intention to commit *the act* complained of. If the act complained of be murder, then all the accused held accountable for it on the strength of this rule must be shown to have joined in a plot to kill. It will not suffice that they had started to commit an assault. It is, of course, by no means necessary that all the accused should have conspired to kill at the same time, for they may become of one mind at the last moment[15] but this must be proved by legal evidence. It cannot be assumed. A stock phrase made use of indiscriminately by the Magistracy of this country—that all are presumed to intend the natural consequences of their acts—has, as has

(9) *Sabed Ali*, 11 B. L. R. 347 F. B. approved in *Barendra Kumar Ghose*, 52 C. 197 (211, 212) P. C.

(10) *Shuka*, 43 I. C. (C.) 827.

(11) *Hawkins*, 3 C. & P. 892.

(12) *Edmeads*, 3 C. & P. 390; *Warner*, 5 C. & P. 525.

(13) *Price*, 8 Cox 96; To the same effect, *Profulla Kumar*, 50 C. 41; *Barendra Kumar Ghose*, 52 C. 197 P. C.; *Mukunda Murari*, 61 C. 170; *Nga Aung Thein*, 13 R. 210 F. B.

(14) *Willoughby*, 1 East. P. C. 288; *Lal*, 99 I. C. 90; *Ngo Po Kyone*, 11 R. 354.

(15) *Ebrahim*, (1931) R. 321.

been already pointed out, no place in the criminal jurisprudence of this country. It is not a formula which can take the place of evidence; though conduct is evidence from which a legitimate inference may be validly drawn in the circumstances of each case.[16] But to fasten one's constructive liability upon a presumed intention is arguing in a vicious circle from which the records of reported cases are unfortunately not entirely free. Where, for instance, three persons *A*, *B* and *C* agreed to attack and assault *D* with a view to punishing him for the damage caused by cattle to their crop, the fact that one of them struck a deadly blow killing *D*, would not justify the punishment of all three for murder, though they might justifiably be convicted of causing grievous hurt with a deadly weapon.[17]

289. There are usually three classes of cases of fatal assault where the question of the joint responsibility of several assailants arises; *viz.* (*i*) where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (*ii*) where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow, and he can be identified; and (*iii*) where, in the case last supposed, the assailant cannot be identified. In the first case, all the assailants would ordinarily be liable for the fatal assault;[18] in the second case, the person who is shown by the evidence to have dealt the fatal blow would alone be liable; while in the third case, none of the assailants would be liable for the fatal blow.[19] The dealing of one fatal stroke by one of several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked. Take, for instance, an extreme case. *A* struck *B* with a hatchet. *B* fell down, whereupon *C* hit *B* with a stick and *B* subsequently died. Now, it is not a necessary inference, and cannot be assumed as a matter of course that *C* had a common intention with *A* to kill *B*; nor could *C* be from that fact alone convicted of the murder of *B* conjointly with *A*.[20] So again where the conspirators intended and started to kill *A* but a chance blow from one of them killed another person, *B*; but *A* escaped, all of them could not be held, apart from s. 111, jointly liable for the murder of *B*.[21]

290. When a large body of men, each of whom has a grievance against an individual on account of his misconduct, join in the assault, it may be a question of some nicety to determine whether they can all be rightly regarded as guilty of the resultant act committed in pursuance of a common object or in pursuance of a common intention. Such a case arose in Calcutta which led to a difference of opinion between two learned Judges, whereupon the case was ultimately decided on a reference to a third Judge. In this case the deceased, a man of dissolute habits, had entered the privacy of a woman and was assaulted by a number of villagers while he was in the very act of violating her. The deceased escaped out of the room into the corridor where he found himself confronted by another body of men who assaulted him. He ran to the courtyard of the house, where still another body of men beat him to death. The accused were not shown to have taken any part in the assault upon the deceased after he had escaped from the room, and come to the corridor and finally to the courtyard. It was held that the accused could not be convicted under sections 304 and 148, and that as their assault in the room was justified theywere acquitted.[22] The converse case is presented by the case of the Tinnevelly rioters who having felt aggrieved by the incarceration of a political agitator broke out into lawlessness smashing Government and Municipal property that came in their way. Here though the rioters formed

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(16) *Satrughan*, 50 I. C. (Pat.) 337; *Aydross* (1922) M. W. N. 800; *Nga Ba E*, 24 I. C. 572; *Mala Singh*, (1924) L. 61; *Dhian Singh*, 14 I. C. 649; *Kanshi*, 94 I.C. (L.) 134; *Pira*, 95 I. C. (L.) 504; *Chandan*, 94 I. C. (A.) 363; *Sheo Balak*, (1926) O. 367.

(17) *Gouridas*, 36 C. 659 (664); *Morgan*, 9 Cr. L. J. 393; *Mahabir*, 19 I. C. (O.) 497; *Nga Ba*, 15 Cr. L. J. 484; *Raja*, 50 I. C. (L.) 977; *Abdul Karim*, 58 I. C. (A.) 158; *Fatekhan*, (1930) L. 950.

(18) *Ghulam Hussain*, (1924) A. 78; *Mahabir*, 19 I. C. (O.) 497; *Kanji Samal*, 38 B. 114; *Jamiruddi*, 16 C. W. N. 909.

(19) *Gouridas*, 36 C. 659 (664); *Nga Po*, 20 I. C. (Bur.) 220; *Nga Shwe On*, 57 I. C. (Bur.) 918; *Mahabint*, 19 I. C. (O.) 497, F. B.; *Yara*, (1929) L. 456.

(20) *Vahial*, 15 I.C. (S.) 810; *Dhian Singh*, 14 I. C. (A.) 649; *Savarajulu*, 47 I. C. 445.

(21) *Po Ya*, 10 L. B. R. 99, 58 I. C. 525.

(22) *Jhakri*, 17 I. C. (C.) 1001; *Adam Ali*, 100 I. C. (C.) 718, (1927) C. 324; cf. *Jafar*, 14 A. L. J. 789; *Karan Singh*, *ib.*, 792.

separate groups, their joint trial was upheld on the ground of common intention as indicated by their conduct.[23] As this section deals with constructive liability, it is to be noted that a person cannot be held guilty of an offence under this section, and being so found guilty, his presence cannot be used for the purpose of section 149 so as to make other persons guilty of an offence under that section. Where, for instance, eight persons were concerned in a riot concerning a piece of land and the crop standing thereon, which resulted in murder, and it appeared that death was the result of the combined effect of injuries inflicted by one Jhubboo and some other person unknown, it was held that Jhubboo might be liable for murder by reason of this section, but being thus found constructively guilty of murder it may be a question whether he could be said to have committed an offence under section 149 of the Code so as to make the other prisoners by a double construction guilty of murder.[24]

291. Section Inapplicable.—The section has, of course, no application to sections which are limited by their nature to personal acts, *e.g.*, ss. 304 2nd part,[25] 307, 308,[1] 458[2] and 498.[3]

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

292. Analogous Law.—The last section dealt with an act following a joint intention, this deals with an act following not a joint but a like intention. The last section approaches criminality because of participation in the intention : this because of participation in action. The last section is limited to offences which are independent of intention or knowledge, that is, those in which intention or knowledge is presumed, this is limited to those in which intention or knowledge cannot be presumed but *must be expressly proved*. In the one case, the intention and knowledge need not be proved against each of the accused, who, however, may rebut the presumption by setting up an intention not criminal. In a case under this section the accused has nothing to rebut till the prosecution have established criminal intention or knowledge on the part of *each* accused. In other words, the measure of criminal liability under the previous section is joint intention, the measure under this section is the extent of intention or knowledge of each accused. *A* and *B* beat *C* of which he dies. If it is proved that *A* and *B* had the common intention of killing *C*, *A* and *B* would both be liable, and it does not matter to what extent *A* and *B* contributed to his death. But, if such intention cannot be proved, it is on the prosecution to prove the intention and knowledge on the part of both. It may be that *A* had intended to kill *C*, while *B* had intended to merely cause hurt and no more ; but in either case it lies on the prosecution to prove intention or knowledge.[4]

293. Principle.—The last section dealt with a case in which several persons were assumed to conspire with the common intention of committing a *crime*. This section goes further and provides that where the element of a particular knowledge or a particular intention enters in the composition of a crime, all the co-accused must be shown to possess that particular knowledge or intention in common, otherwise they cannot be held jointly liable for the crime committed by any of them.[5]

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(23) *Loganathaiyar*, 4 I. C. (M.) 700 : but did the common intention cover the act done, *Nga Thun Baw*, 7 Cr. L. J. 205.

(24) *Per* Field, J., in *Jhubboo Mahton*, 8 C. 739 ; *Reazuddi*, 15 I. C. (C.) 646.

(25) *Aniruddha*, (1925) C. 913.

(1) *Ali Mirza*, 51 C. 265 ; *Nabibux*, 52 B. 168 ; *Nga Pu*, (1926) R. 207.

(2) *Ghulam*, 4 L. 399.

(3) *Nga Pu*, (1926) R. 207 ; *Ali Mirza*, 51 C. 265.

(4) *Adam Ali*, (1927) C. 324.

(5) *Ib*.

294. Meaning of Words.—"*Act which is criminal only by reason of its being done with a criminal knowledge or intent,*" *e.g.*, collection of armed men which may or may not be a crime according to the knowledge or intention, so harbouring an offender,[6] and all offences where knowledge or intention is expressly referred to.

295. Proof of Particular Intention when Required.—The Code deals with two classes of crimes : (*i*) Those in which the proof of knowledge or intention is immaterial; and (*ii*) those for the completion of which guilty knowledge or intention must be proved. In the latter case, the act itself may be indifferent unless the intention be proved. Suppose a trickster, wishing to palm off a brass ring for gold, wants an accomplice and he goes up to another and tells him that he has got a gold ring by theft and should like to dispose of it. The two thus manage to get rid of the ring, the true nature of which is afterwards discovered and the two men are charged with having practised deception. Here the accomplice cannot be convicted of cheating, for he had not the same criminal knowledge as his companion, though his criminal intent was different.[7] So in the common case presented by a party of rioters proceeding to take forcible possession of land in which one of them commits murder. Now, if the remaining persons had joined the party with the knowledge or intention of committing murder, they will all be equally liable for murder, though only one of them had committed it. But if suppose in such a case only one accused intended the murder, another wanted only to plunder the crops, while the third had no particular intention but had joined the assembly to see the fun. Here the second and third accused could not be charged for murder, and the first accused could not be charged for robbery, for the three accused did not possess the same criminal intention. So where several soldiers, lawfully employed to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be, and having done so, some of the soldiers began to plunder, and stole some goods. The question was whether this was felony in all; and Holt, C.J., citing an old case, said : "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first : yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door ; for this reason because they knew not of such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands."[8]

296. But the particular intent here required may be proved not only by the evidence of common design, but it may also be inferred from a general resolution against all opposers, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or whether it may be reasonably collected from their number, arms, or behaviour at or before the scene of action. As Bramwell, B., in one case told the jury : "Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder."[9] The doctrine of joint liability of several persons for the guilt of some of them, applies only to such assemblies as are formed for the purpose of carrying into execution some *unlawful* purpose. For if the original purpose was lawful, the liability of persons other than those actually taking part in the crime will depend upon, and be measured by, their actual participation in the crime and not upon the fiction of constructive liability.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Effect caused partly by act and partly by omission.

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(6) S. 212, *post.*

(7) *Cf. Moore's case*, 1 Leach, 314 ; 1 Russ., Bk. I, Ch. III, pp. 161, 162.

(8) 2 Hawk, P. C., 29, s. 8 ; 1 Leach, 7 (*a*) ; 1 Russ., p. 162.

(9) *Jackson*, 7 Cox. 357 ; *Allah Ditta*, 4 A. L. J. 276.

Illustration.

A intentionally causes *Z's* death, partly by illegally omitting to give *Z* food, and partly by beating *Z*. *A* has committed murder.

297. Analogous Law.—This section would have been better placed after section 33. It follows as a necessary corollary from section 32, to which it might have been added by way of an explanation. Since an act includes an illegal omission, the result is the same whether the offence consists of one or more acts or one or more omissions, or partly of one and partly of the other. Criminal Law looks in such cases to the result and not to the means by which it has been achieved.

Co-operation by doing one of several acts constituting an offence.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations.

(*a*) *A* and *B* agree to murder *Z* by severally and at different times giving him small doses of poison. *A* and *B* administer the poison according to the agreement with intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(*b*) *A* and *B* are joint jailors, and, as such, have the charge of *Z*, a prisoner, alternately for six hours at a time. *A* and *B*, intending to cause *Z's* death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish *Z* with food supplied to them for that purpose. *Z* dies of hunger. Both *A* and *B* are guilty of the murder of *Z*.

(*c*) *A*, a jailor, has the charge of *Z*, a prisoner. *A*, intending to cause *Z's* death, illegally omits to supply *Z* with food; in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z's* death. *Z* dies of hunger. *B* is guilty of murder, but, as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

298. Analogous Law.—This is another instance of the commission of crime by conspiracy. The three illustrations amply illustrate not only this section, but section 35 of which this is a corollary.

299. Principle.—This section is an illustration of the rule that in the case of conspiracy the measure of criminality of each conspirator is the cumulative result and not the individual share in the crime. Indeed, if it were otherwise, it would be safer to conspire and distribute criminal responsibility among its members. Such a thing, even if permitted, could not be proved. But it cannot be permitted, because it will be destructive of all law and order. The section enunciates the rule of universal application. So Mr. Bishop has summed it up in the following words: "In the first place, if several, combining both in intent and in act, commit a crime jointly, each is guilty of the same as if he had done the whole alone; and so it is, if each has his particular part to do, the whole contributing to one result. In the next place, since what a man does by his agent he does by himself, if one employs another to do a criminal thing for him, he is guilty of the same as though he had done the thing himself." [10]

300. Meaning of Words.—"*Intentionally co-operates*," *i.e.*, he knows of the offence to be committed, but only takes a share in its commission, which alone does not complete the crime apart from intention. His act alone might have been innocuous and insufficient, but as his act was in pursuance of a joint intention, his liability is equally joint.

301. Liability of Contributory.—The liability of each of several persons for complicity in a joint action does not depend upon the nature and extent of his participation in the crime, but upon the community of intention. But that alone

(10) 1 Bishop's Cr. L., Vol. I, Ch. XXIII, s. 432.

is not sufficient, for, as this section shows, there must be community of action in consequence of the community of intention, or a combining of both in intent and in act. If there was community of action without community of intent, the liability will be several and not joint. Illustration (*c*) is an example. Here there was community of action between *A* and *B* but not community of intention. They were, therefore, not held jointly liable for the result. If, however, there had been the community of intention between them, the case would then have been as presented in illustration (*b*), while illustration (*a*) furnishes a normal case in which there is a combination both in intention and action. So in England, if several combine to forge an instrument and each executes by himself a distinct part of the forgery they are all principals, though they were not together when the instrument was completed. So in a case of forgery of a currency note against Bingley, Dutton, and Batkin, it appeared that Bingley and Dutton bought the paper, and cut it into pieces of the proper size at their house ; it was then taken to Batkin, who struck off in blank all the printed part of the note except the date, line and the number, and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of Bingley and Dutton, where the watermark was introduced into the paper, after which Bingley, in the presence of Dutton, impressed the date, line and number, and Dutton added the signature, in the absence of Batkin, who was, however, held equally liable with the other two.[11] So, in another case, where *A* had engraved the plate, *B* made the paper and *C* finished it, and it appeared that each acted without knowing anything about the part assigned to the other, it was held that all the three were liable as principals, it being immaterial that the co-conspirators should be mutually known.[12]

302. Where, two or more persons jointly attack another, the fact that one batters his skull with a stick while the other is content to hurl at him a heavy stone the result of which is the fracture of his skull, the case is obviously one of intentional co-operation making all the offenders conjointly equally liable for the principal offence.[13] In such a case, it is not necessary to find which injuries were caused by which of the assailants so long as the evidence showed that they were acting in concert and intended to cause bodily injury as was likely to cause death.[14]

Persons concerned in criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks *Z* under such circumstances of grave provocation that his killing of *Z* would be only culpable homicide not amounting to murder. *B* having ill-will towards *Z* and intending to kill him, and not having been subject to the provocation, assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z's* death, *B* is guilty of murder, and *A* is guilty only of culpable homicide.

303. Analogous Law.—This section is the converse of section 34. Under the latter section several persons act in furtherance of a common intention, so that their liability is joint irrespective of the nature or extent of their contribution to the crime. Under the present section several persons combine to commit a crime but not " in furtherance of a common intention." Therefore, as the intention differs, so does their criminal responsibility.

304. Principle.—As observed in the preceding article, this section assumes the *absence* of a common intention. For if there had been community of intention, the case would be governed by section 34, and the nature and proportion of the

(11) *Bingley*, R. & R. C. C. R. 446.

(12) *Kirkwood*, 1 Mood C. C. 304 (311); *Dade*, 1 Mood C. C. 307; *Bingley*, R. & R. 446.

(13) *Subbappa Chenappa*, 15 Bom. L. R. 303 ; *Ram Newaz*, 35 A. 506 ; but *see Gulab*, 40 A. 686.

(14) *Nam Newaz*, 30 A. 506, distinguishing *Duma*, 19 M. 483 ; *Gouridas*, 36 C. 659; *Dharam Rai*, (1887) A. W. N. 236 ; *Bhola Singh*, 29 A. 282; *Dhian Singh*, 9 A. L. J. 180, following *Subbappa Chenappa* 15 Bom. L. R. 303.

contributory act would be immaterial. It is only when there is an absence of a common design that there is room for the discrimination permitted by the section. Such a case would arise where, in a sudden quarrel, a person is struck down by two or more persons. So, in a case, where a quarrel arose between one Cheranjan on the one side and Indar and Bacha on the other, and Cheranjan abused Indar, whereupon the latter hit him a blow with a stick and Bacha struck him down by a blow on the head with an axe, inflicting two other wounds with the axe on other parts of the body. Any one of the three axe wounds was sufficient to cause death. The Sessions Judge convicted both under section 304 of the Code, but on appeal Oldfield, J., observed that the offences committed by Indar and Bacha could be distinguished from each other ; and while Bacha was, no doubt, guilty of the more serious offence of culpable homicide, Indar's offence was of voluntarily causing hurt. Bacha's blow alone was the cause of death, and neither the assault nor the killing was in furtherance of a common intention so as to render the one man liable for the act of the other. The case, therefore, fell under the provisions of this section, under which, while both are engaged in a criminal act, they may be liable for different offences.[15] There may be a common intention for one purpose, but not for another purpose, in which, too, the rule of the section would apply. Thus, in one case, two persons start to commit burglary and one of them encountering opposition shoots down his opponent : Here the two burglars were engaged in a criminal act, and they had a common intention so far as regards the commission of that act, but the commission of murder was neither a part of the common intention nor in pursuance of a common aim. Therefore, while the person shooting will alone be responsible for murder, his companion could only be convicted of burglary.

"Voluntarily."

39. A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, *A* may not have intended to cause death, and may even be sorry that death has been caused by his act : yet, if he knew that he was likely to cause death, he has caused death voluntarily.

305. Analogous Law.—The Code does not define the word "intentionally" though it is frequently used, and is presupposed in every crime. It, however, defines its lesser analogue "Voluntarily." The difference between the two words is one of degree. The definition of this word has been avowedly borrowed from the definition of "wilfully" as prepared by the commissioners on the Criminal Law of England, where they proposed to define it as follows :—"A hurt, damage or other evil consequence of an act shall be deemed to have been caused wilfully where the doer of the act intended such consequence to result or knew or believed that it was likely to result from his act, or where knowing or apprehending that such consequence would probably result from his act, he wilfully incurred the risk of causing it."[16] It will be observed that this definition differs from that of the Code only in having a third item absent, namely, that relating to the probable result.[17]

306. It will be noticed that the Code does not define the word with reference to volition, but rather to the causation of effects. This word frequently occurs in describing offences affecting the human body,[18] and as these form by no means the least important of offences prescribed in the Code, it is essential that the exact import of the term should be clearly understood.

307. The definition here given has been, from the commencement, the subject of hostile comment, as it overlooks the difference between "intention" and

(15) *Indar*, (1882) A. W. N. 23.
(16) Digest, Ch. 1, s. 3, Art. 2: First Report, s. 103. This definition of "wilfully" is now current in England. *Roper* v. *Knott*, (1898) 1 Q. B., 868 ; *Senior*, (1899) 11 Q. B. 283.
(17) First Report, s. 104.
(18) Ch. XVI (ss. 299-377).

" knowledge of likelihood " and tends to regard these as convertible terms. But that " intention " is distinct from " knowledge " or " knowledge of likelihood " cannot be denied and was also clearly conceded in the Indian Law Commissioners' Report,[19] but they justified their draft definition on the ground that as the penal consequence in the two cases is the same, the distinction between the two terms is a distinction without a difference, and their retention enables the Court to define more accurately the state of mind present at the time of the doing of a criminal act.[20] Let it be supposed that *A* was wilfully to mutilate the person of *B*, not intending to kill him, but only to injure him from a motive of revenge. Suppose, also that he did this, knowing that death, though not a certain result, was yet likely to result from what he did, and that, in fact, death did result, it cannot, we presume, be doubted, that the legal penalty ought to be just the same as if *A* had directly intended to kill.[21] This is, then, the sense now stereotyped in the Indian Criminal law, so that a person shall be deemed to cause an injury " voluntarily " if he either intended it to result directly from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, he incurred the risk of causing it.

308. Principle.—The word " voluntarily " has been given an artificial meaning and at variance with its ordinary sense solely for the purpose of the Code. In that sense the predicament of " voluntary offenders will include not only those who directly intend to inflict a particular injury, but also all such as wilfully and knowingly incur the hazard of causing it."[22] " The proper test of guilt in such cases is that of knowledge and consciousness on the part of the malefactor that hurt or damage is likely to result or will probably result, from what he does; his criminality consists in the wilfully incurring the risk of causing loss or suffering to others. The case of a party so misconducting himself, and so regardless of the interests of others seems to be indistinguishable in point of legal guilt and penal consequences from that of a criminal who acts with the most direct intention to execute an illegal purpose, and it seems to us that he may properly be described as the voluntary author of the mischief produced."[23]

309. Meaning of Words.—" *Causes it by means*": "Means " here signifies acts as well as omissions. " *At the time of employing those means,*" which alone determines his criminality. " *Knew or had reason to believe* ": *see* s. 26.

310. Operation of Criminal Volition.—It is by no means easy to define in language at once precise and perspicacious the exact significance of the word " voluntarily." The section defines it by applying to it the test of " intention," " knowledge " and " reasonable belief." The last has been defined before, and its meaning has been set out there. " Intention " and " knowledge " remain. Now the word " voluntary " as understood in the light of " intention " is, as Bentham pointed out, an ambiguous term,[24] for it may mean either " willing " or " uncoerced." Again, " the intention or will may regard either of two objects : (*a*) the act itself ; or (*b*) its consequences. Of these objects, that which the intention regards may be styled *intentional*. If it regards the act, then the act may be said to be intentional: if the consequences, so also, then, may the consequences. If it regards both the act and the consequences, the whole *action* may be said to be intentional, whichever of those articles is not the object of the intention, may, of course, be said to be *unintentional.*"[25] Now the act may be intentional, without the consequences, as when intending to touch a man you chance to hurt him. So the consequences of an act may be intentional without the act being intentional at every stage, as when you run against a man with a view to push him down, but a second man coming in on a sudden between you and the first man, before you can stop yourself, you run against

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(19) First Report, Note B.
(20) First Report, s. 101.
(21) English Law Commissioners' Seventh Rep., s. 25; Indian Law Commissioners' First Report, s. 107.
(22) English Law Commissioners' Seventh Rep., s. 22, approved and followed in First Report, s. 105.
(23) English Law Commissioners' Seventh Rep., s. 23, cited in First Rep., s. 106.
(24) Principles of Morals and Legislation, Vol. I, Ch. VIII, pp. 40, 41.
(25) *Ib.*, Ch. VIII, s. I.

the second man, and by him push down the first.[1] But the consequence of an act cannot be intentional, without the act being itself intentional in at least the first stage, as where the second man pushes down the first man before you have a chance to touch him.[2] The Code, therefore, adopts this test when it judges of a man's intentions by the consequences. But a consequence when it is intentional may either be directly or only collaterally intentional. It is directly intentional when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It is collaterally intentional, when, although the consequence was in contemplation, and appeared likely to ensue in case of the act being performed, yet the prospect of producing such consequence did not constitute a link in the aforesaid chain.

Presumed Intention.

311. Here the Code takes note of both intentions, direct or indirect. But it will be observed that the intention so far is real and not presumed. Presumption, no doubt, enters largely in the determination of collateral intention, but it is, the *means* by which such intention is judged. It is never taken for granted, and it is here that the Indian law presents striking divergence from the English law, in that it only takes note of actual and not presumed intention in determining criminality, though this sometimes leads to awkward consequences, as in the case[3] where the accused intending to murder his father-in-law dealt him three stunning blows felling him senseless on the ground. The accused believing that he was dead, set fire to the hut in which he fell with a view to remove all evidence of the crime. The fire so kindled killed the man, and the question arose what offence the accused has committed. In so far as he attempted to murder him by dealing him three blows, he was admittedly guilty of attempted murder under section 307 of the Code. But was he guilty of anything more? He had set the house on fire not with the intention of killing the man, but with the sole intention of destroying incriminating evidence against himself. He had not the remotest thought that his victim was still alive when he lighted the fire. At the same time it compassed his death. Under English law, such a case would present no difficulty, for it will presume an intention to kill from the fact accomplished. But this is not the test adopted in Indian jurisprudence. And hence the unsatisfactory decision of the majority of the Courts that the man could not be convicted of murder, as he did not light the fire with the *intention* of killing the deceased.[4] In another case, the accused had killed his own mother, by beating and kicking her, and the question was raised but not decided, whether the brutal treatment of an old woman by a powerful man would, in such a case, raise an inference of knowledge of the likelihood of death.

Intention: Knowledge: Negligence.

312. But the case is instructive, for it draws a distinction between intention, knowledge of likelihood and mere rashness or negligence. "Culpable rashness is acting *with* the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not; and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting *without* the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him; and that if he had, he would have had the consciousness. The imputability arises from the civil duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death."[5] Eliminating, then, the two extreme cases of intention and rashness, we have the intermediate state of mind in which the culprit "knew or had

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(1) Principles of Morals and Legislation, Vol. I. Ch. VIII, s. 4.

(2) *Ib.*, Ch. VIII, s. 5.

(3) *Khandu*, 15 B. 194, followed in *Palani Goundan*, 42 M. 545 (558) F. B. *contra* (*obiter*) in *Khubi*, (1923) A. 545; *Kallappa*, (1933) M. 798; distinguished in *Gajjan Singh*, (1931) L. 27 (28).

(4) *See* this case further commented on under s. 302, *post*.

(5) *Per* Holloway, J., in *Nidamarit*, 7 M. H. C. R. 119; *Morgan*, 9 Cr. L. J. 393.

reason" to believe that the effect produced was the effect "likely" to be produced by the means which he had employed. These words play an important part in the description of offences dealt with by sections 279, 282, 284-289 and, of course, the important section 299 defining culpable homicide and its allied sections. Under this clause if the reason existed, the Court presumes knowledge of the consequence apart from any *actual* knowledge that the accused may have possesed.[6] But even then the presumption is rebuttable and the accused may shew that though he had reason to believe, he had also other reasons against it. Suppose, for instance, a person should drive a buggy obviously along a narrow, crowded street. He might not intend to kill any one, but the fact that the lane was narrow and crowded is reason from which he might well infer that his act was likely to kill some person. In such a case, then, if he should cause death, he would be guilty of culpable homicide, and even of murder, if it should be found as a fact that he further *knew* that his act was so imminently dangerous that it must, in all probability, cause death as contemplated in clause 4 of section 300. Such an inference would be drawn, if a man should drive a buggy furiously not merely along a crowded street, but intentionally into the midst of a crowd of persons. On the other hand, though driving through a crowded street or a crowd of persons, he may show that he was making for a train to discharge an important business in a distant part of the country which he could not otherwise fulfil. In such a case, the Court will presume that his intention was not to cause death, but to save the time.[7]

313. The question whether the effect produced was premeditated or known to be probable by the author is, therefore, always a question of fact to be determined according to the particular circumstances of each case. But whatever the facts, the prosecution have to prove them with sufficient clearness so as to establish a casual relationship between the doer and the deed, for, otherwise, it may be merely a case of *post hoc ergo propter hoc* which is as great a fallacy in logic as it is in criminal jurisprudence. If, suppose, a sportsman shoots at a fowl with intent to kill and steal it, and in doing so he kills a person who was hidden behind a bush and of whose presence the sportsman had no knowledge. Here, although the death was caused by the sportsman, still as he had no reason to believe that it was likely, he could not be said to have voluntarily caused it.[8] But if suppose that, in such a case, he had sent the deceased in the bush to raise fowls, that fact would alter his criminality, for it will, then, be a reason from which he could have foreseen the result.[9] This view finds support in an English case in which the prisoner was out poaching by night with two other men. He had a gun with him lent him by his brother. The prisoner had just cocked his gun when he was pursued by the watchman. He ran for a short distance and then turned round when his gun went off, wounding the watchman on the shoulder. The prisoner was tried by Lawrence, J., who charged the jury that a man must be presumed to intend the natural consequence of his acts. The prisoner was convicted and sentenced to 18 months' imprisonment, but the court of appeal set aside the conviction, holding that the direction of the Judge to the jury was incorrect and misleading, inasmuch as as a proposition of law it was incorrect that a man must be presumed to intend the natural consequences not only of his intentional acts but also of his accidental acts."[10]

314. "Malignantly": "Wantonly."—There are sections in which the Code does not confine itself to the terminology which it has explained in this chapter. It uses, for example, the words "malignantly"[11] and "wantonly"[12] which had been nowhere defined. As their use is limited, their significance will be considered under the sections in which they occur.

315. Effect of Coercion.—The effect of coercion is stated in section 94. It does not justify a murder. Consequently, the act of a person who by threats of

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(6) *Sunku Seethaiah*, 6 I. C. 774.
(7) *Per* Peacock, C.J., in *Gorachand Gope*, B. L. R. (Sup. Vol.) 443, F. B.
(8) S. 299, ill. (*c*), *post*.
(9) S. 299, ill. (*b*), *post*.
(10) *William Davies*, (unrep.), *Times* 11th March 1913 (summarized in 7 C. W. N. 125*n*).
(11) Ss. 153, 270.
(12) S. 153.

death is induced to do an act in order to facilitate the commission of a murder is a " voluntary " act within the meaning of this section.[13]

40. Except in the chapters[14] and sections mentioned in clauses 2 and 3 of this section, the word " offence " denotes a thing made punishable by this Code.

" Offence."

In Chapter IV, [Chapter V-A] and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445 the word " offence " denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216, and 441, the word " offence " has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

[***Special Law***—S. 41, *post*. ***Local Law***—S. 42, *post*.]

316. Analogous Law.—This section as originally drafted, formed clause 27, but it has been since amended by several Acts.[14] Its terms are further enlarged by an explanatory definition added to s. 216 for the purpose of that section.[15]

317. An abetment[16] of, or an attempt[17] to commit an offence is in itself an offence within the meaning of this section. But vagabonds and habitual robbers, as such, though liable to arrest under section 55 of the Criminal Procedure Code, are not arrested for the commission of any " offence " within the definition here given. So that resistance by them cannot be punished under sections 224 or 225 of the Code.[18] The object of this and other similar sections, *e.g.*, sections 118, 144, 145 of the Procedure Code is the *prevention* and not the *punishment* of crime.[19] Consequently, there can be no " offence," for as soon as there is one, there can be, then, no prevention. So neglect to maintain a wife and children is not an offence; consequently, an order passed for maintenance under section 488 of the Procedure Code does not amount to a conviction for an offence.[20]

Other Offences, and No Offences.

318. The Code adopts the simpler but less discriminating nomenclature of " offence " to describe what would be classed in England as treason, felonies and misdemeanours. Treason itself being divided into two classes : (*i*) Grand Treason (or High Treason) and (*ii*) Petit Treason. High Treason consisted of any overt act signifying an intention to kill or destroy the King or to do him any bodily harm, tending to his death or destruction, maim or wounding, imprisonment or restraint.[21] To levy war against the King,[22] to adhere to His enemies,[23] are other cases of High Treason. *Lese majestie* or active disloyalty is also cited by Glanvil as an instance of High Treason.[24]

English Law.

319. " Petit Treason " is when a servant kills his master, a wife her husband, or when a secular or religious man kills his prelate or superior to whom he

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(13) *Killikyatara*, (1912) M. W. N. 1108 ; 19 I. C. 207.

(14) This section was substituted for the original s. 40, by the Indian Penal Code Amendment Act, 1870 (Act XXVII of 1870) s. 2 ; the words in the crotchets [ ] being added by the Indian Criminal Law Amendment Act (Act VIII of 1913) s. 2 ; the word " Chapter " was substituted for the word " chapter " by the Repealing and Amending Act, 1930 (Act VIII of 1930). The figures 64, 65, 66 and 71 were inserted by the Indian Penal Code Amendment Act, 1886 (Act X of 1886) s. 21(1).

(15) *See* amended s. 216, *post*. The term " offence " includes offences punishable under English Law also, *vide* Act VIII of 1913, s. 23.

(16) *Spier*, (1887) P. R. No. 49.

(17) *Per* Banerji, J., in *Ajudhia*, 17 A. 120.

(18) *Kandhia*, 7 A. 67 ; following *Shasti Churn Napit*, 8 C. 331.

(19) *Umbica Prasad*, 1 C. L. J. 271.

(20) *Ponnummal*, 16 M. 234 ; following *Golam Hossein*, 7 W. R. 10 ; *Thakur Ira*, 5 B. H. C. R. 81.

(21) Stephen's Criminal Law, 40.

(22) Archbold's Criminal Pleadings, 883-990 ; Stephen's Criminal Law, 40, 44 ; 4 Black., Ch. VI.

(23) *Ib.*

(24) *Glanvil Lib.*, 1 C. 2 ; 4 Black., 75.

owes " faith and obedience."[25] Petit Treason as a distinct offence has long since ceased to exist, such offences being now " deemed to be murder only, and no greater offence."[1] The word ' Treason ' is, therefore, now confined to signify High Treason merely.[2]

320. " Felony " was a term reserved by English law to designate all offences punishable with death and forfeiture. It is variously derived and described. In *Termes de la Ley* it is said of serious crimes " that they are called felonies of the ancient English word '*fell*' or ' fierce ' because they are intended to be done with cruel, bitter, fell, fierce, or mischievous minds."[3] But another writer describes the word as signifying an offence which occasions a total forfeiture of property to which captial or other punishment may be superadded according to the degree of guilt.[4] A large number of serious offences are now created felonies by Statute, and their punishment is either death or penal servitude for seven years.[5]

321. All other offences are called misdemeanours, sometimes also termed *misprisons*, and which, therefore, includes all crimes and offences not being treason and felonies, and which are punishable by either fine or imprisonment, or both.[6] It may be added that while the Penal Code has adopted the simpler mode of describing all punishable acts as " offences," the Criminal Procedure Code had to subdivide offences into warrant cases[7] and summons cases[8] the former being more in the nature of felonies, and the latter of misdemeanours.[9]

" Offence " in the Procedure Code.

322. The definition of " offence " as here given differs materially from that adopted in the companion Code,[10] where it is thus defined :

" ' Offence ' means any act or omission made punishable by any law for the time being in force.

" It also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act."

323. This definition is obviously much wider than the one given here because the Procedure Code provides for the trial of all offences under and without, the Code, while the Code has to define the terms with strict reference to its future use in the Code itself. The term as used here has, then, no reference to the Procedure Code, or English law, and a conviction under either is, then, not a conviction for an "offence" within the meaning of the Code, unless it conforms to the definition of the term as here described.[11] (§ 324).

324. Offence in the Code.—What is then an " offence " as here described ? It is said to denote " a thing made punishable by this Code." Now the word " a thing " is as vague as it is comprehensive, for it may mean either a subject or an object, the doer or the deed. But it is obviously used in the latter sense as connoting acts and omissions made penal by the Code.[12] But no legal responsibility attaches to them apart from the doer. It is he who is punishable in respect of them. The term must mean, then, acts and omissions for which a person is punishable under the Code. But the language of the section is inapt, for it speaks of " a thing made

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(25) Termes de la Ley, " Treason."

(1) 9 Geo. IV, c. 31, s. 2 ; 24 & 25 Vic., c. 100, s. 8 ; Russ., p. 644.

(2) *Per* Blackburn, C. J., in *O'Brien*, 1 Ir. R. (O. S.) 176.

(3) *See* Co. Litt., 391*a* ; 4 Black., 307 ; 1 Pollock and Maitland's History of Criminal Law, 284, 286 ; *ib.*, Vol. 2, 125, 463-468, 476-478, 509.

(4) 4 Black., 95 ; 1 Hawk., Ch. 25, s. 1 ; 1 Russ., Ch. IV, p. 186.

(5) 7 & 8 Geo. IV, c. 28, s. 8, under which transportation was the punishment provided, but it is now commuted into penal servitude, 20 & 21 Vict., c. 3, s. 2.

(6) 1 Russ., Ch. IV, p. 187 ; but the use of the term " offence " is not foreign to English Law. As Collins, J., remarked in a case, " *Prima facie* an offence is equivalent to a crime " ; *Derbyshare Coal Co.* v. *Derby*, (1896) 2 Q. B. 57, 58.

(7) S. 4 (*w*), Cr. P. C.

(8) *Ib.*, s. 4 (*v*),

(9) Warrant Cases, *ib.*, Ch. XXI (ss. 251-259) ; Summons Cases, *ib.*, Ch. XX (ss. 241-250).

(10) S. 4 (*o*), Cr. P. C.

(11) *Ganpatrao*, 19 B. 105 ; *Ganesh Khanderao*, 13 B. 506 ; *Moorga Chetty*, 5 B. 338, in which full significance of the term is set out *per* Melvill, J.

(12) *Reference*, 3 M. H. C. R. (App.) 11 ; *Moorga Chetty*, 5 B. 338 ; *Narayan Dhondev*, 6 I. C. (B.) 529 ; *Keshwar Lal* v. *Girish*, 29 C. 496 ; *Po Han*, 7 L. B. R. 63 ; *Lewis*, 38 M. 733 ; *Ganesh*, 10 I. C. (S.) 168.

punishable by the Code," which, of course, could only mean the doer punishable by the Code. But though this sense is clear, it is not inevitable and has been the subject of judicial comment.[13]

325 Rules and Byelaws.—Rules and byelaws made under a local or special law are not offences, unless they are so declared by the laws concerned.[14]

"Special Law."

41. A "special law" is a law applicable to a particular subject.

326. Analogous Law.—A particular subject is a subject dealing with an individual subject, *e.g.*, the Excise, Opium and Cattle Trespass, Income-tax, Land Acquisition, Criminal Tribes, Emigration Railways or the like. The Whipping Act[15] is not a special law within the meaning of this or the last section, inasmuch as it creates no offence,[16] but merely provides a supplementary or alternative punishment for offences already primarily punishable under the Penal Code, or, in the case of juvenile offenders, under other enactments.[17]

"Local Law."

42. A "local law" is a law applicable only to a particular part of British India.

327. Analogous Law.—As a "special law" applies to special subjects, the operation of "local law" is confined to particular localities. Such are, for example, the several Revenue Acts, Excise Acts, Court of Wards Acts, Port Trusts Acts and the like.[18]

As, however, rules made under "local laws" do not form a necessary part of such laws, but are made for their convenient working, they do not fall under the category of "local laws."[19]

"Illegal" : "Legally bound to do."

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action : and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

328. Analogous Law.—In several sections[20] the word used is "unlawfully," a concept which has been nowhere defined in the Code. Here the term defined is "illegally", but it is explained by the Law Commissioners that the terms are intended to be used in the same sense and bear the same meaning.[21]

329. Adverting now to the section itself, it will be seen that the word "illegal" has been given here a somewhat wide meaning, for it applies not only to (*a*) everything which is an offence, or (*b*) which is prohibited law, but also to (*c*) anything which furnishes ground for a civil action, *e.g.*, any actionable wrong, whether *ex contractu* or *ex delicto*.[22] "These appear wide words," said the Law Commissioners, "but we think it would be difficult to restrict them without the risk of excluding something which ought to be included. Generally we apprehend it will be found unobjectionable to designate as illegal anything done or omitted to be done by man for which he is liable to a civil action."[23]

330. "Unlawful" distinguished :—This section defines the term "illegal" but the Code frequently uses the term "unlawful" in connection with an act where it is intended to connote an act not supported by law[24] as distinct from an act which is "illegal" in the sense that it is prohibited by law. As such, the term "unlawful" is wider in its impoıt, since an act may not be illegal in that there is no law prohibiting it and it may not furnish ground for a civil action, since, in the absence of a statutory law of torts applicable to this country, the right of civil

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(13) *Moorga Chetty*, 5 B. 338 ; *Khandia*, 7 A. 67 (71) ; 3 M. H. C. R. (App.) 11.
(14) *Ma Khewet Kyi*, 6 R. 791.
(15) *Inder Sain*, 56 I. C. (L.) 210 ; *Wasudeva*, 52 M. 882 ; *Aydroos*, (1923) M. 187.
(16) Act IV of 1909.
(17) *Po Han*, 7 Bur. L.T. 99, 22 I. C. 147.
(18) *Reference*, 3 M. H. C. R. (App.) 21.
(19) *Ganda Shah*, (1894) P. R. No. 23.
(20) *E.g.*, ss. 23 and 24.
(21) First Report, § 658.
(22) *Bhagwandin*, (1929) A. 935 ; *Rahimat Ali*, 62 I. C. (B.) 401 ; *Ganpat Subras*, 58 B. 491.
(23) First Report, § 91.
(24) *Mahendranath*, 62 C. 629 (633, 634) ; *Fazlur Rahman*, 9 Pat. 725 (unlawful and illegal held identical, *sed quaere*).

action depends upon the rule of justice, equity and good conscience, which does not rule out customary usages, *e.g.*, forced labour, and slavery—now prohibited by ss. 370 and 371. The term "unlawful" is then an elastic term and its sense varies and eludes a legal definition. S. 23 of the Contract Act furnishes an apt illustration of an enactment in which the two terms have got blended, though it is easy enough to distinguish contracts which are unlawful from those that are illegal.[25] (For a further commentary, see § 187.)

331. The section classes as "illegal" everything *prohibited* by law. Now law prohibits not only illegal contracts but also those that are void. In other words, contracts may be illegal in the sense of being punishable or forbidden,[1] or they may be void in the sense of being merely unenforceable in law.[2] For instance, contracts of a wagering nature are void without being illegal, in so far as they are not prohibited, though there is a legal prohibition against their enforcement in law.[3] It is, however, apparent from the section that such contracts are not intended to be designated "illegal," for they do not furnish a ground for a civil action. The only contracts, then, that the Code recognizes as illegal are those that are described in section 23 of the Indian Contract Act. But we are dealing in the section not with contracts but with things prohibited, which means the doing of which is prohibited, though it may not be punishable by law. The latter is no doubt "illegal," but then it is also an offence. In other words, by illegal acts we should understand acts which are either penal or prohibited or tortious; as, for instance, the asking of irrelevant and indecent questions to a witness under examination, not permitted by the Indian Evidence Act,[4] or the publication of a libellous matter concerning one whose identity is thinly veiled.[5]

Acts Excluded.

332. The prohibition here referred to must be by law, and not merely under, say, departmental rules or order. So where a person in Government service was bound to make a true return of lands in his possession, falsely entered "nil" in his return and made a false statement to the same effect in a revenue enquiry before the Assistant Collector, it was held that he could not be convicted under section 177 of the Code as he was not bound under any law to make a true return.[6] In two previous cases[7] another Bench of the same Court appear to have considered even a breach of duty "illegal" within the meaning of this section, but there is no authority for it. The "law" here referred to is a legislative enactment of rules having that force, but not merely disciplinary orders, though they may be made under the sanction of law. In this view, the furnishing of false returns[8] or the preparation of a false diary,[9] though contrary to Government rules, is not contrary to law, and is, therefore, not "illegal" within the comprehension of this section.

"Injury."

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

333. **Analogous Law.**—An injury is simply an act contrary to law.[10] There can be, therefore, no "injury" unless there is an actionable wrong.[11] The

(25) *Cf.* S. 23, Contract Act ills. (*f*)-(*h*).

(1) S. 23, Indian Contract Act (IX of 1872).

(2) Indian Contract Act, ss. 24-30.

(3) *Per* Lush, J., in *Haigh* v. *Sheffield*, L. R. 10 Q. B. 102; approved by Smith, L.J., in *Strachan* v. *Universal Stock Exchange*, (1895) 2 Q. B. 697; but in English Law this difference is not always easy to observe, *Wool* v. *Hamilton*, (1898) 2 Q. B. 337. "*Illegal* has in a Statute a meaning very near to, but not the same as *void*, as where a thing is only illegal *qua* A, it is inoperative as against him and yet may be binding on B (*per* Alderson, B., in *Job* v. *Launch*, 11 Ex. 542.)

(4) *Fazlur Rahman*, 9 Pat. 725.

(5) *Rahimat Alli*, 62 I. C. (B.) 401.

(6) *Appaya*, 14 M. 484; *Contrary* in *Virasami*, 4 M. 144, dissented from.

(7) *Virasami*, 4 M. 144; *Revision case*, 6 M. H. C. R. (App.) 48.

(8) *Revision case*, 6 M. H. C. R. (App.) 48.

(9) *Virasami*, 4 M. 144.

(10) *Per* Halloway, J., in *Swami Nayudu* v. *Subramania*, 2 M. H. C. R. 158 (160).

(11) *Rickett* v. *Metropolitan Railway*, L. R. 2 H. L. 175; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; *Cowper Essex* v. *Acton*, 14 App. Cas. 153.

question whether there is an "injury" in a given case must, then, be answered with reference to the civil law.

334. Meaning of Words.—"*Any harm whatever*": The harm here contemplated may be by word or deed, *e.g.*, defamation causes injury because it "harms" a man in reputation. "*Illegally caused to any person*," not necessarily directly, for it may, then, amount to "hurt," which is also an injury but of a serious kind. An injury may be caused to a person through another as in the case of adultery, or it may be caused to one's property, as in the case of mischief or theft. "*Or property*": The property here spoken of is something in existence, *i.e.*, corporeal property. "It cannot with any propriety be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representative of a deceased person."[12] It should be noted that the "illegality" of harm is the gist of the term. It implies an illegal act or omission.[13] If the injury was not illegal it is not injury within the meaning of this section. So where the accused was entitled to prevent the smuggling of liquor his detention of the complainant was held to constitute no injury.[14]

335. Legal "Injury".—The word "injury" as here defined does not appear to possess all the attributes of "actionable wrong," for which it appears to be a substitute adopted for the purpose of the Code. In civil law, "injury" implies only such infringement of rights for which a person may obtain legal redress in compensation. Such rights, for instance, as rights of personal security, liberty, reputation, or property, and whatever is comprised therein, *e.g.*, rights of copyright, patent, and trade-mark, are all rights, the infraction of which causes "injury", both within the meaning of the Code as well as of civil law. So it has been held "that a false charge laid before the police, and never intended to be prosecuted in Court, may, obviously, subject the accused party to very substantial injury" as defined in the section.[15] In this way not only an actual harm but even the risk of a harm may constitute injury. For a false complaint made against a person may not cause any actual harm in body, mind, reputation, or property, it may not cause any mental anxiety or grief, but as it is a complaint which exposes the party accused to the risk of a prosecution, it falls within the definition of injury as understood in the Code.

336. It would seem that the term not only includes risk of harm to person, but also risk of harm to property as well. Such would appear to be the case in section 285. But is the term large enough to cover a case, say, of an injury suffered by a wife by the death of her husband? At any rate, it would cover a case of an injury suffered by the wife by the death of her husband, though in view of the unamended provisions of s. 545 (*b*) of the Criminal Procedure Code which provided for the payment of compensation out of the fine "for injury caused by the offence committed," the Court held that, as the death of the husband did not involve loss of property, the wife did not suffer any "injury" by the death of the husband within the meaning of that clause.[16] But this view has since been rectified by the amendment of clause (*b*) and by the addition therein of words 'for any loss or injury.'[17] The cases now overruled by the Legislature were animadverted upon in the previous edition of this work.[18]

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(12) *Yalla Gangulu* v. *Mamidi Dali*, 21 M. 74 (76), F. B.; *Morgan*, 36 C. 302; *Appalasami*, 1 Weir 441.

(13) *Razzack*, (1924) A. 197.

(14) *Mantripragada*, 44 I. C. (M.) 973.

(15) *Ashrof Ali*, 5 C. 281, followed in *Salik Roy*, 6 C. 582 (583); *Ramasami*, 7 M. 292; *Priyanath Gupta* v. *Sheik Beari*, 10 M. 232; *Lalji Chowkidar*, (1923) C. 590 (A threat of decree is a harm.) But a threat of excommunication which is no more than a social boycott is not a harm—*Arumuga* v. *Muthial*, (1933) M. W. N. 736 (1).

(16) *Yalla Gangulu* v. *Mamidi Dali*, 21 M. 74, F. B.; affirming *Luchmaka*, 12 M. 352; which was followed in *Abdul Rahiman*, (1895) B. U. C. 763; to the same effect, *Roop Lall Singh*, 10 W. R. 39; *Nana Sahib*, (1888) B. U. C. 373; *Amar Singh*, 5 C. P. L. R. (Cr.) 45; *Hyat*, (1890) P. R. No. 6; but *contra* in *Saif Ali*, (1898) P. R. No. 17, F. B.

(17) Criminal Law Amendment Act (Act XXXVIII of 1923) S. 152.

(18) *See* 1 Penal Law (4th Ed.) p 318.

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

"Life."

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

"Death."

47. The word "animal" denotes any living creature, other than a human being.

"Animal."

337. Analogous Law.—Sir James Stephen animadverts on the superfluity and incorrectness of this definition. He says it is wholly vague as it might include "an angel, frog-spawn, and probably a tree." Superfluous the definition is not, for it is intended to include fish, insects, and other creatures not ordinarily classed as animals. It is here equivalent to the fauna of Biology. A tree cannot by any mistake be called an animal, for, though living, it is not a "creature" but a "thing."

48. The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

"Vessel."

338. Analogous Law.—"Property" here includes live-stock or the lower animals, otherwise vessels made for the conveyance of animals would be excluded.

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

"Year."
"Month."

339. Analogous Law.—The terms "year" and "month" are defined in the same terms in the General Clauses Act.[19] The British calendar has been since the 2nd September 1752, the same as the Gregorian calendar. And so it is provided by section 25 of the Indian Law of Limitation.[20] The British calendar is now universally adopted in calculating all periods in British and Indian enactments.

340. The true measure of "year" is the period of time during which the earth describes one complete revolution in its orbit, and which is the period taken by the sun to leave either equinoctial point of either tropic, and his return to the same. This period is also called the solar or tropical year, and though it is not uniform, its mean length is about 365 days, 5 hours, 48 minutes and 51.6 seconds. To do away with the odd hours, the New Style Calendar has adopted the average length of 365 days and every fourth year of 366 days.[21] It is now settled by Statute that the increasing day in the leap-year as well as the preceding day should be counted as one day only.[22] It was enacted that the commencement of the year shall be counted from January 1st, instead of the 25th March as theretofore,[23] and it began to be so counted from that year.

341. In computing the period of sentence, a year will thus mean 12 calendar months, and a month according to the number of days comprised therein. In calculating sentences passed on prisoners, the day on which the sentence is passed is counted as a whole day,[24] so that a person sentenced to imprisonment for the space of one calendar month is entitled to be released on the day preceding the date of the previous month on which he was sentenced.[25] In other words, if a prisoner is sentenced, say, on the 26th October, then his sentence would be counted as from the midnight of the 25th, the prisoner being entitled to count the whole of the 26th as the day of imprisonment.[1]

342. In this view a sentence for one calendar month, does not imply imprisonment for a fixed number of days. It may vary according to the month in

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(19) "Month," s. 3 (33); "Year," s. 3 (59), Act X of 1897, the older Act had the same definition, s. 2 (4), Act I of 1868.

(20) Act XV of 1877; now *see* s. 25 of Act IX of 1908.

(21) It is so enacted by 24 Geo. II, c. 25.

(22) 21 Hen. III.

(23) 24 Geo. II, c. 23.

(24) Co. Litt., 255*a*; Stephen's Criminal Law, 155; hence the practice of fixing a year and a day in certain cases of crimes; *e.g.*, death to constitute murder.

(25) *Migotti* v. *Colvill*, 4 C. P. D. 233; *Combe* v. *Pitt*, 3 Burr. 1434; *Field* v. *Jones*, 9 East. 151; *Glassington* v. *Rawlins*, 3 East. 407; *Wright Mills*, 4 H. & N. 488; *Edwards*, 9 Ex. 628.

(1) *Migotti* v. *Colvill*, 4 C. P. D. 233 (236), affirmed O.A., *ib.*, 237.

which the sentence was passed. Thus, for example, if the imprisonment began on the 30th of a month it will expire at midnight of the 29th of the following month, if the following month is not February, in which case it will expire on its last day whatever be the total number of days, served by the prisoner. So if the month in which the prisoner was sentenced had 31 days, he is only entitled to be released on the 30th of the following month, though in that case he shall have spent in prison 31 and not merely 30 days. So where the prisoner was on the 31st of October sentenced to imprisonment for one calendar month, and for a second offence for a fortnight, commencing after expiration of the calendar month, it was held that the calendar month did not expire until the 30th of November so that he was not entitled to be discharged from the second term of imprisonment until the full period of 15 days computed from the first December had expired, *i.e.*, until midnight of the 14th December.[2]

"Section."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

343. Analogous Law.—As no numericals have been prefixed to sub-sections and clauses, they do not constitute sections by themselves, and cannot be referred to detached from the full sections of which they form a part.

"Oath."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of Justice or not.

344. Analogous Law.—An "oath" is a general term and includes an affirmation where it is so allowed, and an affidavit whether used in a Court of law or otherwise. An affidavit, filed before a Revenue officer assessing Income-Tax, is thus an "oath" within the meaning of the section. A mere declaration, as is used in the verification of plaints and petitions, is, however, not an oath, because it is not made before a public servant, nor is it admissible for the purpose of proof.

345. An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth.[3]

346. In acts of Parliament passed since the end of 1850, "the words 'oath,' 'swear' and 'affidavit' shall include 'affirmation,' 'declaration,' affirming and declaring the case of persons by law allowed to declare or affirm instead of swearing."[4] The same words occur in the English Interpretation Act, 1889,[5] and in the General Clauses Act.[6]

347. As to the persons allowed to affirm instead of swearing, reference must be made to the provisions of the Indian Oaths Act,[7] which substitutes affirmation for an oath in the case of Hindu and Mahomedan witnesses, interpreters and jurors; in other cases affirmation is admissible only if an oath is objected to.[8]

348. For *ex majori cautela* the same Act enacts that in sections 178 and 181 of the Code the words "or affirmation" shall be deemed to have been inserted,[9] but in view of the extensive meaning of the word here given, that addition would have been assumed as a matter of construction.

349. Meaning of "Oath".—The primary object of an oath is, of course, an invocation addressed to God as an avenger of perjury, or as a witness. The form of oath, therefore, naturally differs, and has to be accommodated to the religious persuasion of the swearer; it being vain to compel a man to swear by a God in whom he does not believe, and whom he, therefore, does not reverence.[10] The rule of law,

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(2) *Migotti* v. *Colvill*, 4 C. P. D. 233 (237).
(3) *White*, 1 Leach 430 (431).
(4) 13 & 14 Vict., c. 21, s. 4.
(5) S. 3.
(6) S. 3 (17), Act I of 1868; s. 3 (36), Act X of 1897.
(7) Act X of 1873.
(8) *Ib.*, s. 6.
(9) *Ib.*, s. 15.
(10) Puffendorf, Bk. IV, c. 2, s. 4.

therefore, is to let a man swear according to the peculiar ceremony of his religion, or in a manner as he may consider binding on his conscience.[11] So while a Christian usually swears on the Bible,[12] and a Roman Catholic with a Crucifix or a Cross placed upon it,[13] a Jew is allowed to swear upon the Pentateuch,[14] and a Mahomedan upon a Koran,[15] while a Hindu may swear on the Gita, or touching the feet of a Brahmin.[16] The oath of a Chinaman is much more elaborate. He must be provided with a China saucer which he strikes and breaks and whereupon he solemnly swears as follows: "I shall tell the truth, and the whole truth; the saucer is cracked, and if I do not tell the truth, my soul will be cracked like the saucer."[17] And there is the record of a trial for high treason in which a recalcitrant witness who was arraigned for treason having objection to be sworn was said to have complied with the law on his touching his buttons and declaring that he was sworn and was under an oath.[18] In this country where innumerable sects and creeds prevail, a witness is usually given the choice of swearing by his favourite deity, but this is by no means necessary, nor is it the law, for a Hindu and Mahomedan has the statutory right to be affirmed, and all that he should be required to do is to affirm in some such language: "The evidence that I shall give shall be the truth, the whole truth and nothing but the truth," "so help me God" being added by a witness desired to swear.

350. The provision as to the form and administration of oath is not stringent, and an omission to administer an oath or affirmation cannot be availed of by the witness as a defence in a prosecution for perjury.[19]

351. Solemn Affirmation.—A solemn affirmation is equivalent to an oath only in the case in which it is "substituted by law for an oath." It is not *per se* equivalent to an oath, but attains its solemnity by virtue of the Statute. The Indian Oaths Act[20] is, of course, the law in this country which has made that substitution.[21] The form in which an oath or an affirmation shall be made is left to be provided by the High Courts.[22]

352. Declarations.—Similarly, a declaration, merely as such, is not tantamount to an oath. But it has that effect for the purpose of the Code, if it is made (*a*) because it was required by law, or if, at any rate, it was made; (*b*) because it was *authorized* by law; and (*c*) as such, it was made to a public servant,[23] or (*d*) was legally admissible in evidence. In the case of a prosecution for making a false declaration, it is on the prosecution to show that the declaration was so made, failing which the prosecution would fail.

353. Such a declaration need not be in any set form. It is a simple affirmation of a fact, statement or belief as regards matters upon which a declaration is required. Such declarations are required in a variety of cases, such as those which relate to the revenues of customs, or income-tax[24] or excise, the post office, railways and other departments of administration. Where a declaration is made in regard to matters only, some of which are required or authorized by law to be so declared, only so much of the declaration shall fall within the definition of an "oath" the remainder being ignored. The law, here spoken of, means a legislative enactment, or, at least, rules and regulations framed under the authority of such an enactment. It does not mean a mere departmental or disciplinary order, though it may be perfectly legal, being within the competency of the executive authority. So a person could not be prosecuted under section 177 of the Code for making a false return of lands in his enjoyment, because the return was only required by a departmental order, and not by law.[25] So a policeman who had secured his enlistment by giving false information to the recruiting District Superintendent of Police could

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(11) *Miller* v. *Solomons*, 7 Ex. 534 (558).
(12) *Gilham*, 1 Esp. 285.
(13) *Love*, 5 How, S. T. 113.
(14) *Omichand* v. *Barker*, 1 Atk. 21.
(15) *Morgan*, 1 Leach 54.
(16) *Omichand* v. *Barker*, 1 Atk. 21.
(17) *Entrehman*, C. & M. 248.
(18) *Christopher Love*, 5 St. Trials 113.
(19) S. 13, Indian Oaths Act (X of 1873).
(20) Act X of 1873.
(21) *Ib*., s. 6.
(22) *Ib*., s. 7.
(23) S. 21, I. P. C.
(24) S. 52, Income Tax Act (XI of 1922).
(25) *Appayya*, 14 M. 484.

not be convicted under section 177,[1] but in so far as it was held that he could not also be convicted under section 182, the decision appears to be unsound.[2] A purchaser of a stamp paper giving a false name cannot be said to have made a false declaration, because there is no law under which he is bound to give any information.[3] So a false representation in a memorandum of appeal is not an offence as it is not required by law to be verified.[4] So a person, being now under no legal obligation to state the truth to a police-officer, cannot be convicted under either s. 177 or s. 182, for giving him false information without intending to injure anybody.[5] Similarly, a false declaration prepared and not filed before a public servant would constitute an "oath" within the meaning of the section, though there is no section in the Code to punish it. Such a declaration must be authorized to be made either before a public servant, within the meaning assigned to that term in section 21, or it may be authorized by law to be used for the purpose of proof.

52. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

"Good faith."

354. Analogous Law.—This definition of "good faith" is merely a negative one. It does not define "good faith" but rests content by stating what it is not. The positive aspect of the term is presented by the General Clauses Act,[6] in which it is thus defined :—

"3 (20). A thing shall be deemed to be done in 'good faith,' where it is in fact done honestly, whether it is done negligently or not."

This definition in General Clauses Act is the *verbatim* reproduction of the definition of the term as given in the English Bills of Exchange Act, 1882,[7] and the Sale of Goods Act, 1893.[8]

355. Principle.—"Good faith" plays an important part in the law of crimes, and its presence is ordinarily a sufficient answer to a charge of criminality in many cases. The definition here given is, therefore, the key-note of all sections in which "good faith" enters. Its precise significance is, therefore, necessary.

356. It will be observed that the section defines good faith by exclusion. It says that an act done without due care and attention shall not be deemed to have been done in good faith. The section makes no reference to the moral elements of honesty and right motive which are involved in the popular signification of "good faith," which are prominent in the positive definition enacted in other Acts of the Legislature. It, therefore, follows that while an honest blunderer acts in "good faith" within the meaning of the General Clauses Act, an "honest blunderer" can never act in good faith within the meaning of the Code, for, being "negligent," he has not acted with due care and attention." It will, thus, be seen that the two definitions approach the question from two different standpoints, and there is nothing common between them. For while the general definition condones negligence and carelessness, if only there was honesty, the Code regards honesty as immaterial, and the presence of "care and attention" as all in all. In this respect, the definition would appear to closely correspond with the English notion of "reasonable and probable cause" or "reasonable and justifiable cause" as used in criminal jurisprudence.

357. In this sense, the question of "good faith" is always a question of fact to be determined in accordance with the proved facts and circumstances of each

(1) *Dwarka Prasad*, 6 A. 97.

(2) See *Muhammad Khalil*, 10 A. 49; *Ganesh Khanderao*, 13 B. 506; *Budha*, (1880) P. R. No. 14, in which it was held that he would be guilty under s. 182, F. P. In *Jaggat Singh*, Oudh Cas. 11, it was said that he would be guilty even under s. 177.

(3) *Parmaya*, (1885) B. U. C. 210; *contra* in *Raghoji*, 3 B. H. C. R. 42, under the Stamp Act of 1862.

(4) *Ghanaya*, (1879) P. R. No. 17; *Sunt Lal*, (1881) P. R. No. 41.

(5) *Suraji Mohan*, (1873) B. U. C. 76; but if he intends to injure anybody, s. 182, ill. (c), meets the case.

(6) Act X of 1897. No definition of the term existed in the earlier Acts.

(7) S. 90.

(8) S. 62, sub-sec. 2.

case. The standard of "due care and attention" is not the standard of the hypothetically "reasonable man." But it is the standard of the man whose "good faith" is on trial. The Court has to see whether he, circumstanced as he was, had exercised the care and attention which might be expected of him. It is, therefore, irrelevant to say that, in such a case, any other man would have acted differently. It may be so, but the question is not what another man would have done but what the accused did at the time, and what more he could have done, but which he had failed to do. As Batty, J., remarked in a case, "good faith" requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution, must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning."[9]

"Due" Care.

358. The "due" care required must depend upon the nature of the act, its magnitude and importance, and the facility a person has for the exercise of care and attention. It does not constitute "good faith" necessarily that the person making the imputation believed it to be true. Due care and attention imply a genuine effort to reach the truth, and not the ready acceptance of an ill-natured belief.[10] A butcher unskilled in surgery employed to set a bone on board a vessel on the high seas, would be judged by a very different standard to a qualified surgeon discharging the same duty. So a surgeon working in his surgery would be judged by a different standard to a surgeon in the field. But where a quack unskilled in surgery performs an operation which even a trained surgeon seldom dares, he cannot be accredited with good faith, if his patient trusting him succumbs to his operation. Such was the case of one Kabiraj who, having no knowledge of surgery beyond what he had acquired in his practice, operated a man for internal piles by cutting them out with an ordinary knife, in consequence of which he died from haemorrhage. It was held that as the operation was one so imminently dangerous that even educated surgeons scarcely ever attempt it, the accused was guilty of manslaughter punishable under section 304-A of the Code.[11]

359. In another case, the accused saw a stooping child in the early gloaming and believing it to be a demon, dealt it blows, of which it died. It was proved that the place had the reputation of being haunted but the Court held that, though he was under a mistake of fact he had acted without care and caution and that, therefore, he was guilty under section 304-A of the Code.[12] So again, in another case, *A* caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and *B*. *B*'s men having proceeded to reap the crops on behalf of *B*, the servants of *A* went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, which they did not do; he then told one of the constables to fire, who fired into the air. Upon this some of the reapers flew away while others remained there and assumed a defiant attitude. The station-house officer without attempting to make any arrests and without also warning the reapers that if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them. It was, therefore, held that the station-house officer and the constables were not acting in good faith and that the order to shoot was

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(9) *Abdool Wadood*, 31 B. 293 (298); *Mhd. Gul* v. *Haji Fazley* 56 C. 1013; *Upendra Nath Bagchi*, 36 C. 375; *Yad Ali*, (1929) C. 779; *Bhola Nath*, 51 A. 313.

(10) *Anandrao Balkrishna*, 17 Bom. L. R. 82; 27 I. C. 657; *Channing Arnold*, 41 C. 1023 (1058), P. C; *Gayadin*, (1934) O. 124.

(11) *Sukaroo Kabiraj*, 14 C. 566.

(12) *Hayat*, (1888) P. R. No. 11; *Levett*, Cro. Car. 536.

illegal and did not justify the act of the constable, and that both he and the station-house officer were guilty of murder.[13]

360. The circumstances that operate on the exercise of care and attention are, thus, so varied and variable that it is not possible to fix a general standard by which the presence or absence of "good faith" may, in any case, be tested. But at the same time, in such cases, it is always permissible to argue *ex post facto*; that is to say, a person may show that there was a want of "good faith" because there was the absence of the requisite care and caution. On the other hand, a person relying upon "good faith" may show that he had taken the necessary care and caution, and that, therefore, his act was done in good faith. As the Law Commissioners observed: "He will be required to prove that his conduct was such as to lead fairly to the inference that he acted in good faith as alleged. It is true that he cannot prove directly what was in his mind, but he may be able to prove facts by which this may be sufficiently manifested."[14] "To satisfy the Court of his good faith, he must shew at least that he acted advisedly, and that he had reasonable ground *prima facie* for believing that he ought to do what he did."[15]

Belief must be Reasonable.

361. So, in order to establish *belief* in good faith, "a person's simple belief in good faith that circumstances are such and such, ought not to be sufficient; there ought to be sufficiently strong and just grounds for his belief. An instance has been known of a person shooting his own servant who had come to his room at night mistaking him for a robber. Such a one ought not to be held blameless, for he ought to have ascertained that he was a robber before he killed him. The party, in such cases, would have to satisfy the Court that he believed in good faith that the man was a robber, which must be taken, we conceive, to exclude a mere reckless conjecture or suspicion. Belief must have a foundation, and that must be shown."[16] So where a person in ragged attire was seen carrying under his arm three pieces of cloth and a police constable thereupon suspecting him to be in possession of stolen goods questioned him and was told that the cloth was made in England. But noticing that each piece bore Gujrati marks, and not knowing that such marks are placed on English-made goods, he concluded that the statement was false, and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely, but the complainant objecting to it, there was a scuffle. The constable then arrested the complainant but he was subsequently released. The latter prosecuted him for wrongful restraint, but the Court held that the putting of question to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions was an indication of good faith, and the constable was, therefore, protected under section 79.[17]

362. On the other hand, where a person acts with thoughtless precipitancy, without making sufficient inquiries and jumping to a conclusion upon materials wholly unjustifiable, it cannot be said that he had exercised good faith. Such was the case of a Police Sub-Inspector who saw a horse tied up without any concealment, and because it resembled the animal his father had lost some time previously, he jumped at once to the conclusion that the horse was either stolen or acquired as stolen property. The Sub-Inspector never sent for the supposed owner of the horse, nor took the trouble of getting any credible information as to whether it was his father's horse or not. Had he done so, he would have found that his father's horse had already been found in another place. The Sub-Inspector could not, therefore, plead good faith in exoneration of his conduct.[18] The same view was taken in another case in which the Sub-Inspector had made a search without complying with the prerequisites of s. 165 of the Criminal Procedure Code.[19]

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(13) *Subh Naik*, 21 M. 249.
(14) First Report, § 113.
(15) First Report, § 114; *Channing Arnold*, 41 C. 1023 (1058), P. C.
(16) First Report, § 161.
(17) *Bhawoo* v. *Mulji*, 12 B. 377.
(18) *Sheo Surun* v. *Mhd. Fazil*, 10 W. R. 20.
(19) *Gopi Mahto*, 10 Pat. 821; *Chatterji*, (1933) A. 434.

363. As a person, acting in good faith, is excepted from criminality under the chapter relating to General Exceptions, and as the word " good faith " is there used in varied collocation, its presence, in each case, must depend upon the circumstances which alone entitle a person to exemption from criminal responsibility. The sense of the term in that connection will have, therefore, to be considered elsewhere.[20]

(20) *See* Ch. IV, *post*, and the several sections in which the word occurs.

CHAPTER III.

OF PUNISHMENTS.

"Punishments."

53. The punishments to which offenders are liable under the provisions of this Code are,—

First.—**Death.**

Secondly.—**Transportation.**

Thirdly.—**Penal servitude.**

Fourthly.—**Imprisonment, which is of two descriptions, namely :—**

(1) **Rigorous, that is, with hard labour.**

(2) **Simple.**

Fifthly.—**Forfeiture of property.**

Sixthly.—**Fine.**

364. Analogous Law.—This chapter on Punishments is really a chapter on adjective law, though it is naturally connected intimately with the substantive law enacted in the Code, in which, accordingly, it finds a place. But all the same, it is a chapter relating to procedure and its provisions have, therefore, to be read with the Procedure Code which largely affects its provisions. The authors of the Code had appended a long note[1] to this chapter, which is partly explanatory and partly vindicative. This chapter was, again, exhaustively reviewed by the Indian Law Commissioners, the result of whose minute and critical examination is embodied in sections 433-528 of their Second Report. Jeremy Bentham has in his "Principles of Penal Law" devoted several chapters on the *rationale* of punishment,[2] and the subject has, in fact, received a consideration which has created quite a literature on the subject. It is not here proposed to pursue the subject from any desire to present the result of studies in this branch of law, for it is unnecessary and would be beyond the scope of the present work. At the same time, it would be conducive to an intelligent study of a subject, which is otherwise obviously repellant and repulsive from its nature and association, if sufficient light is thrown upon it as may be useful alike to the student studying for its principles, and the judge and the lawyer administering its stern provisions in practice.

True Measure of Punishments.

365. It is a standing complaint against the Code that it is Draconian in its severity as regards punishments. This criticism was not overlooked by the authors who wrote: "We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison discipline exists, where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labour not of an attractive kind and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in a gaol where the superintendence is lax, where the work exacted is light and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the intensity of the punishment is increased, its length may safely be diminished. As members of the Committee which is now employed in investigating the system followed in the gaols of this country, we have had access to information which enables us to say with confidence that, in this department of the administration, extensive reforms are greatly needed and may easily be made. The researches of that Committee will, we hope, enable the Law Commission, hereafter, to prepare such a Code of prison discipline as, without shocking the human feelings of the community, may

(1) Note A.

(2) Vol. I, Collected Edn., pp. 390-578.

yet be a terror to the most hardened wrong-doers. Whenever such a Code shall come into operation, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed."[1]

366. Principle.—Punishment is the suffering in person or property inflicted on the offender under the sanction of law. It is the retribution due for violation of the rules of society which are made for its preservation and peace and the infraction of which is a crime. The Code measures the gravity of the violation by the seriousness of the crime and its general effect upon public tranquillity. The measure of guilt is, therefore, the measure of punishment. And it is, therefore, essential that the punishment must fit the crime. It was, at one time, a moot question whether retribution or reform was the sole motive of punishment. Bentham regarded the prevention of mischief as the sole aim of punishment.[2] Other writers regard retribution as its chief mission,[3] but it is evident that so long as punishment was the concern of the person aggrieved, retribution was the sole object. But when it became a function of the State and as society progressed, retribution receded into the background, and prevention of crime and reform of the criminal became as much its concern as the primitive wreaking of revenge. The true doctrine of punishment in modern civilized State is, therefore, now based on the prevention of crime, but it is only its main, though not its sole, object. For, notwithstanding what has been said by Plato, both personal as well as public sentiments demand that the person who has made others suffer unjustly should himself be made to suffer in return. This is quite distinct form the moral side of an act with which properly the Courts are not concerned. They are concerned solely with the nature of the act viewed as a crime, or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

367. The principal object of punishment, however, is the prevention of crime, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another. It may generally be taken as a sane principle to follow, that punishment should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a re-action of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community.[4]

Discarded Punishments.

368. The seven forms of punishments here prescribed necessarily exclude other forms of punishment. Two such forms were specially considered by the draftsmen, namely, dismissal from office, and pillory or exhibition of the offender on a donkey. They considered the first as unfit for executive action, and the second as unequal: "To employ a punishment which is more bitter than the bitterness of death to the man who has still some remains of virtuous and honourable feelings, and which is a mere matter of justice to the utterly abandoned villain, appears to us most unreasonable."[5]

Why Flogging Condemned.

369. It will be observed that flogging is not in the list of punishments provided by the Code. This was also the punishment passed in review by the draftsmen and condemned for the same reason as pillory and donkey-riding on the ground that, to a person in decent station in life, it adds disgrace to the severity which could not be

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(1) Note A, Reprint, p. 95.

(2) Principles of Penal Laws, Pt. 2, Ch. 3, p. 396 (Vol. I, Coll. Edn.).

(3) Mercer's Criminal Responsibility, p. 19.

(4) *Per* Burgess, J.C., in *Nga Ku*, (1897) U. B. R. 330 (334): *Nga Tha Kin*, 11 I. C. (U. B.) 792; *see*, to the same effect, Bentham's Principles of Penal Law, Pt. 2, Bk. I, pp. 406-408.

(5) Note A, Reprint, p. 103. (*Pothen*, L. B. R. 62.)

justified except when inflicted upon juvenile offenders.[1] The draftsmen, however, admitted that their remarks did not apply to juvenile offenders in whose case that form of sentence is both deterrent as well as unexceptionable. In 1864, a Whipping Act was passed and it introduced the sentence of flogging in certain crimes.[2] This act was recently the subject of comment in the House of Commons, and at the instance of the Secretary of State for India in Council, a Bill was drafted and sent out to this country to take the place of the old Act, and it was passed into law in 1908. It has considerably modified the rigor of the old Act and has confined that form of sentence to only old offenders and juveniles.

370. Measure of Punishments.—The appropriateness of the nature and measure of sentence in each case depends upon the gravity of offence, the position and status of the offender, his previous character and the existence of aggravating or extenuating circumstances. A day's imprisonment to an honourable man will have far more deterrent effect than a life spent in durance vile by a hardened criminal. The measure of punishment is, therefore, the measure that must be adapted to each case. But there are certain general considerations which may be here set out, for they are the basic principles upon which the enactment has announced the maximum punishments, leaving their adjustment, in each case, to the discretion of the Judge.

371. Death.—The sentence of death stands in the forefront in the category of punishments. The question whether the State has the right to take away a man's life has often been agitated, but it is a question upon which the moralist and the jurist are never likely to agree. For, while the one condemns it as a relic of a barbaric age in which "life for life" was the common form of revenge, the other justifies it on the ground that its retention in the Penal Laws is itself a terror which has a deterrent effect upon criminals, while its application furnishes an object lesson which not only purges society of its canker worms but tends generally to elevate its conception of, and respect for, human life.

372. All the same the tendency of modern times has been to abolish the capital sentence, and its abolition in several European States does not appear to have had any unfavourable effect on crime. England is, however, still one of those countries in which the capital sentence is still retained. It is, however, confined to eleven cases, namely :—

(1) Treason.
(2) Murder.
(3) Attempted murder by administration of poison, or by wounding, etc.
(4) Burglary aggravated by assault with intent to murder, etc.
(5) Robbery with wounding.
(6) Piracy aggravated by assault with intent to murder any person on board the vessel in respect of which the piracy is committed.
(7) Setting fire to a dwelling-house with any person living therein.
(8) Destroying vessels with intent to murder.
(9) Exhibiting false lights, etc., with intent to bring a vessel into danger, etc.
(10) Destroying ships of war, Royal Arsenals, etc.
(11) Unnatural offences.

373. It will, thus, be seen that with the exception of the first and last two, the other eight offences are offences involving either the wilful destruction of human life, or the wilful exposing of it to peril. From the tabulated statement elsewhere given, it will be seen that the capital punishment is confined by the Code only to six principal offences, namely :—

(1) Treason, *e.g.*, waging war against the King (s. 121) ; abetment of mutiny (s. 132).
(2) Perjury resulting in conviction and death of an innocent person (s. 194).
(3) Murder (ss. 302, 303).
(4) Abetment of suicide of a minor or insane person (s. 305).
(5) Attempted murder by a transported convict (s. 307, cl. 2).
(6) Dacoity with murder (s. 396).

374. The offences for which the Code awards the sentence of death are thus really two, namely, (*a*) treason and (*b*) murder. In this respect the Code presents a notable contrast to the English Law, and the authors had deliberately made the departure adding "that to put robbers, ravishers and mutilators on the same

(1) Note A, Reprint, p. 104.
(2) Act VI of 1864.

footing with murderers is an arrangement which diminishes the security for life.[1] Then as regards offences in which there is a close connection with murder, the draftsmen observed that as those offences were almost always committed under such circumstances that the offender had it in his power to add murder to his guilt, there would be no restraining motive if the punishment of the crime which he has already committed were exactly the same with the punishment for murder. "A law which imprisons for a rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder.[2]

375. As regards the sentence of death itself, though the drafstmen could not dispense with the sentence, they added that it is a sentence that ought to be very sparingly inflicted.[3] It is provided by the Code of Criminal Procedure that "when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead."[4] And "when the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred."[5]

376. Transportation.—The sentence next after death in gravity is transportation for life, which is only another name for banishment, the maximum period of which is 20 years. It was formerly not allowed for any term short of life, but now an offender may be transported up to seven years.[6] In the case of Europeans and Americans the sentence of transportation is inapplicable, the Court being only empowered to sentence the offender to penal servitude instead of transportation in accordance with the provisions of the Penal Servitude Act.[7] And as regards persons sentenced to transportation, it is provided in the Code of Criminal Procedure that the sentence shall not specify the place to which the person sentenced is to be transported.[8] This sentence is probably as ancient as the other sentence of death, and it has been the favourite method of putting out of the way political offenders and schismatics, rebels and revolutionaries, patriots and reformers. It is even now the favourite method of lopping off tall poppies, and semi-barbaric nations resort to it sanctifying its usage on the ground of *lettres de catchet*, which is, however, not a judicial but an executive act.

377. The sentence of transportation figures more largely than the extreme penalty of law. It is the maximum sentence reserved for the following sections:—

(1) S. 121. Waging war (alternative with death).
(2) S. 121-A. Conspiracy against the State.
(3) S. 122. Collection of arms, etc., with the intention of waging war against the King.
(4) S. 124-A. Sedition.
(5) S. 125. Waging war against any Asiatic power.
(6) S. 128. Public servant allowing prisoner of State or war in his custody to escape.
(7) S. 130. Aiding, etc., of such escaped prisoner.
(8) S. 131. Abetment of Mutiny.
(9) S. 132. Abetment of Mutiny if it is committed in consequence (alternative with death).
(10) S. 194. Perjury in a capital crime.
(11) S. 195. Perjury in a crime punishable with transportation.
(12) S. 225. Resistance to apprehension of a convict sentenced to death.
(13) S. 225-A. Omission to apprehend or sufferance of escape on part of public servant in certain cases.
(14) S. 226. Unlawful return from transportation.
(15) S. 232. Counterfeiting coin.
(16) S. 238. Import or export of counterfeit coin.
(17) S. 255. Counterfeiting Government Stamps.
(18) S. 302. Murder (alternative with death).
(19) S. 304. Culpable homicide.

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(1) Note A, Reprint, p. 93.
(2) *Ib.*, approved by the Law Commissioners in 2nd Report, § 462.
(3) *Ib.*
(4) S. 368 (1).
(5) S. 371 (3), Cr. P. C.
(6) S. 59, *post*.
(7) S. 2, Act XXIV of 1855; *see* s. 56, *post*.
(8) S. 386 (2).

(20) S. 305. Abetment of suicide by a minor or insane person (alternative with death).
(21) S. 307. Attempted murder with hurt.
(22) S. 311. Being a Thug.
(23) S. 313. Causing miscarriage without woman's consent.
(24) S. 314. *Ditto*, if the woman dies.
(25) S. 315. Abortion.
(26) S. 326. Causing grievous hurt by a dangerous weapon.
(27) S. 329. Causing grievous hurt for extortion.
(28) S. 364. Kidnapping and abduction in order to murder.
(29) S. 371. Trade in slaves.
(30) S. 376. Rape.
(31) S. 377. Unnatural offence.
(32) S. 388. Extortion by threat of unnatural offence.
(33) S. 389. Intimidation by threat of accusation of unnatural offence.
(34) S. 394. Robbery with hurt.
(35) S. 396. Murder in dacoity (alternative with death).
(36) S. 400. Belonging to a dacoit gang.
(37) S. 409. Criminal Breach of Trust by public servant, banker, merchant, agent, etc.
(38) S. 412. Receiving property stolen in dacoity.
(39) S. 413. Trade in stolen property.
(40) S. 436. Mischief by fire to destroy a house, etc.
(41) S. 437. Mischief by fire with intent to destroy vessels, etc.
(42) S. 449. House-trespass to commit an offence punishable with death.
(43) S. 459. Grievous hurt caused whilst committing lurking house-trespass.
(44) S. 460. Death or grievous hurt by a confederate concerned in house-breaking.
(45) S. 467. Forgery of a valuable security, etc.
(46) S. 472. Manufacturing seal with intent to commit forgery.
(47) S. 474. Possession of a forged security, etc.
(48) S. 475. Counterfeiting device or mark for forgery, etc.
(49) S. 477. Fraudulent tampering of a will, etc.
(50) S. 511. Certain attempts.

Justification of Transportation.

378. Previous convicts may also in certain other cases be sentenced to transportation. This sentence is, thus, one which presents as much variety, as it is one which is the maximum sentence which may be passed in any case in which an enhanced sentence is admissible. The draftsmen explained the appropriateness of this sentence as follows: "The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is an unmixed evil. It is by the terror which it inspires that it produces good, and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance, but it is not so much dreaded beforehand, nor does a sentence of imprisonment strike either the offender or the by-standers with so much horror as the sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means, of which the natives have but an indistinct notion, over an element which they regard with extreme awe, to a distant country, of which they know nothing, and from which he is never to return. It is natural that this fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends."[1]

379. The concluding remark has, however, no application, for law now allows transportation for seven or more years, in which case, the transported convicts do return to the scenes of their earlier years, though the terror of exile has by no means abated on that account. Indeed, it may be doubted, if the learned draftsmen have not attributed the terror to a cause which is not all in all. For no little terror of transportation is due to the fact that the person banished is as good as dead, for his relations cannot see him, and if a Hindu, his crossing the Black Water involves forfeiture of his caste. That this last terror has not wholly disappeared will be

(1) Note A, Reprint, p. 94.

testified to by those who have to cross the Black Water for their intellectual advancement, and who on return find themselves strangers in their native land.

380. Transportation to be Abolished.—Though the sentence of transportation has not been removed from the Statute Book its abolition has been decided upon by Government; but the difficulty so far encountered has been to fix its equivalent. A Committee has gone into the question and published its reports, and action is awaited to alter the law.

381. Penal Servitude.—In the original draft there was no provision for this sentence. On the other hand, the draftsmen deprecated the imprisonment of Europeans in India on the ground that "it would lower the prestige of Englishmen if they are placed in the most degrading situations stigmatized by the Courts of justice and engaged in ignominious labours of a gaol."[1] They, therefore, recommended the execution of the sentence of transportation by transporting European offenders to some British Colony situated in a temperate climate.[2] They also substituted banishment as an alternative sentence. But the passing of an English Statute[3] in 1849 left the Indian Legislature no alternative but to substitute penal servitude for these punishments.

382. The punishment of penal servitude is by section 56 reserved for Europeans and Americans.[4] It is inadmissible in the case of Indian offenders. It consists in keeping an offender in confinement and compelling him to labour. Persons sentenced to penal servitude are, during the term of the sentence, confined in such prison within British India as the Government of India directs, and kept to hard labour.[5] The subject of penal servitude has been exhaustively dealt with in the Act bearing that title;[6] and this has substituted that form of sentence "by reason of providing a place to which Europeans or Americans can, with safety to their health, be sent for the purposes of undergoing sentences of transportation or of imprisonments for long terms."[7] The same Act provides that the term "European" shall be understood to include any person usually designated a European British subject.[8] But as European *British* subjects only are included in that term, it does not follow that other Europeans are excluded thereby, for the sentence of penal servitude being stated to be appropriate in the case of an American, it is the sentence that will be substituted also in the case of Europeans *other than* British subjects. As penal servitude is regarded as more exacting than transportation, the Act lays down a proportion in which the latter is convertible into the former. The proportion is as follows:—

Transportation for 7 years		*equals* Penal Servitude for	4 years.
,,	7 to 10 years	,, ,,	4 to 6 years.
,,	10 to 15 years	,, ,,	6 to 8 years.
,,	exceeding 15 years	,, ,,	6 to 10 years.
,,	for life	,, ,,	life.

383. Imprisonment.—Imprisonment is ordinarily confinement of a person in a penitentiary or gaol by way of punishment. But such confinement must not necessarily be in a place prescribed for the purpose. "It seems clear that any place, whatsoever, wherein a person under a lawful arrest for a supposed crime is restrained of his liberty—whether in the stocks at the street, or in the common gaol, or in the house of a constable or private person, or the prison of the ordinary—is properly a prison within the Statute; for imprisonment is nothing else but a restraint of liberty.[9] So it is imprisonment in the true sense of the term where a person is sentenced till the rising of the Court,[10] as the liberty of the person is thus restrained, though the person so sentenced is not confined in gaol or subjected to gaol discipline. Of this sentence the framers of the Code wrote: "Of imprisonment we propose to

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(1) Note A, Reprint, p. 96.
(2) *Ib.*, pp. 95, 96.
(3) 16 & 17 Vict., c. 99.
(4) *Duma Baidya*, 19 M. 483.
(5) S. 21, Prisoners' Act (V of 1871).
(6) Penal Servitude Act (XXXIV of 1856).
(7) *Ib.*, Preamble.
(8) *Ib.*, S. 15.
(9) 2 Hawk, P. C. 18, s. 4. The statement is made with reference to 1 Edw. II, *De fragentibus prisonam*.
(10) Such a one considered to be evasion of justice merely. *Kunhi Bava*, 114 I. C. 234.

institute two grades, *rigorous* imprisonment and *simple* imprisonment. But we do not think the Penal Code is the proper place for describing, with minuteness, the nature of either kind of punishment."[1] This was, therefore, left to the Gaol discipline, and tasks varying with the locality, health and culture of the prisoners have been prescribed as forms of rigorous imprisonment. In England the picking of oakum and working the treadmill, in India the picking of wool, the crushing of grain, the breaking of metal and the pressing of oil are regarded as the usual tasks allotted to rigorously imprisoned offenders; while lighter work or no work at all is exacted from those sentenced to simple imprisonment. Indeed, simple imprisonment is really detention in gaol custody, the prisoner being at liberty to do light work to break the monotony of prison life, if he is so disposed. Such sentence is appropriate to men of position or culture to whom the ignominy of imprisonment is a sufficient punishment.

384. It was originally proposed to fix both a minimum as well as a maximum punishment in several cases, but the propriety of prescribing a minimum sentence in all cases was questioned by the Select Committee, who were of opinion that considering the general terms in which the offences had been defined, and the presence of mitigating circumstances which may render adherence to the prescribed minimum a matter of hardship and even injustice, it was ultimately resolved to fix only the maximum, the apportionment of sentence, in each case, being left to the discretion of the Judge. But in the case of certain heinous offences, it was considered indispensable to fix deterrent minimum sentences, and so the Code prescribes minimum sentences in the two following cases: (*i*) Where at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person—in which the minimum term of imprisonment fixed is 7 years;[2] and (*ii*) the same sentence is prescribed as the minimum in the case of a robber and dacoit armed with a deadly weapon at the time of the commission of the offence.[3] In all other cases the Code fixes no minimum sentence. The maximum sentence fixed for a single offence is 14 years,[4] and the lowest term actually named for one offence is twenty-four hours.[5] And so while the kind of imprisonment to be awarded in each case is left to the judgment of the Judge, the Code instances three cases in which the flagrant nature of the crimes is marked with the single sentence of rigorous imprisonment. These are offences of giving or fabricating false evidence with intent to procure conviction for an offence which is capital by the Code or by the law of England;[6] (*ii*) unlawful return from transportation;[7] and (*iii*) house-trespass in order to commit an offence punishable with death.[8]

Why Minimum Sentences Not Fixed.

On the other hand, there are a number of delinquencies for which the sentence prescribed is only simple. These cases are—

(1) S. 168. Public servant unlawfully engaging in trade.
(2) S. 169. Public servant unlawfully buying or bidding for property.
(3) Ss. 172, 173. Evasion of summons.
(4) S. 174. Failure to attend on summons or order.
(5) S. 175. Failure to produce document.
(6) S. 176. Failure to give information.
(7) S. 177. Failure to render assistance.
(8) S. 178. Refusal to take oath.
(9) S. 179. Refusal to answer questions.
(10) S. 180. Refusal to sign statement.
(11) S. 188. Disobedience of legal order.
(12) S. 233. Escape from confinement through negligence of a public servant.
(13) S. 225-A (*b*). To apprehend, etc., negligent omission.
(14) S. 228. Interruption of judicial proceedings.
(15) S. 291. Continuance of nuisance after injunction to discontinue.
(16) S. 341. Wrongful restraint.
(17) Ss. 500, 501, 502. Defamation and knowingly printing or selling defamatory matter.
(18) S. 509. Indecent behaviour.
(19) S. 510. Misconduct by a drunken person.

384-A. This classification is made only to show what the view of the Legislature is as regards the gravity or otherwise of the various crimes described in the

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(1) Note A, Reprint, pp. 94, 95.
(2) S. 397.
(3) S. 398.
(4) S. 55.
(5) S. 510.
(6) S. 194.
(7) S. 226.
(8) S. 449.

Code. This, however, gives only a general idea of the relative importance of the various crimes. It gives no further suggestion. In fact, as observed before, the Legislature has advisedly left the apportionment of punishment, in each case, to the Judge. And so left, the Judges often find themselves in a quandary as to the principles by which they should regulate their discretion. The result has been a gross inequality of the punishments awarded by the different Courts, and this has led to the establishment of principles, which, though leaving sufficient discretion to the Judge, are yet such as are intended to reduce the inequality to a minimum. These principles will, therefore, be here set out.

385. Principles of Punishment.—In every criminal case, two things have to be considered: *first*, the heinousness or enormity of the crime itself, and, *secondly*, the particular circumstances under which the accused has committed it. The first is determined by the law, as will be seen from the preceding discussion, and the comparative table of offences prepared for that purpose. The second point requires further consideration, and will now be considered. Amongst the various offences treated of in the Code the first in order of importance are offences against the *person*. These are properly accounted as of greater magnitude than offences against property: (*i*) Because bodily injury inflicts more suffering to the party injured than loss of property; (*ii*) it is more difficult to protect persons against personal violence; (*iii*) personal violence spreads a feeling of insecurity and terror through the community; and (*iv*) injury from it in serious cases is irreparable.

Offences against Person.

386. As, therefore, *personal* crimes are more serious than offences against property, it is the duty of the Judge to see that the sentence in the one case is heavier than in the other. But at the same time it must not be forgotten that those are also the cases in which mitigating circumstances are oftener present. For they are crimes which may be committed in the supposed exercise of the right of private defence. They may be the result of a momentary impulse, or provocation, or a feeling of wrong, or they may be very technical having no criminality in them,[1] all of which are mitigating circumstances which it would be injudicious to ignore. Then, again, as regards the offender, he may be a man of tender age or of immature understanding, an old man of senile intellect, a man given to uncontrollable fits of temper, or he may have acted under the order of a person in authority over him, or, of one who was in a situation to influence him or to dominate his will. Then, again, the offence may have been committed under a combination of circumstances and the influence of motives which are not likely to recur either with respect to the offender or to any other. Lastly, the Judge cannot ignore the state of health and sex of the accused, his position in life and the extent of deprivation of the ordinary comforts to which he was accustomed.[2]

387. On the other hand, the following circumstances cannot but be regarded as aggravating: (*i*) Deliberate violence—especially when it is super-added to another crime, *viz.*, robbery and dacoity, in which case, the offender justly forfeits all human sympathy; (*ii*) use of lethal weapons;[3] (*iii*) wanton cruelty and malignity; (*iv*) treachery as where a man is inveigled into an ambush and then murdered; (*v*) nature of the injury—as where a man is clubbed to death, or where he is stabbed with a knife; (*vi*) motives, which will, of course, play a most prominent part in determining sentences. For though the proof of motive is not necessary to establish a crime, it

Aggravating Circumstances.

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(1) *Ananda Parhi*, (1931) Pat. 242.

(2) Bentham mentions the following nine circumstances in mitigation of punishment: (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friend; (5) transgression of the limits of self-defence; (6) submission to menaces; (7) submission to authority; (8) drunkenness, and (9) childhood. The published reports of cases give effect to these considerations, *e.g.*, youth is always a ground for mitigation in a case of murder. *Nga Tha Kin*, 11 I. C. 792. *See* also cases under s. 302. So age (*Muniandi*, 16 M. L. T. 535); position (*Kewala*, 1913 P. L. R. 317; 21 I. C. 478); but a Baluchi custom justifying the accused in taking the life of his sister for unchastity is no ground for mitigation of sentence, *Rahim Khan*, 24 I. C. 589; *Kaim*, 28 S. L. R. 279.

(3) *Mya Din*, 10 I. C. (R.) 773.

is an element which is very material in determining the sentence. Thefts from places of public resort, such as the fairs, railway trains and the like, are justly deserving of condign severity, inasmuch as such offences are extremely difficult to discover, and, therefore, profitable to those engaged in committing them.[1] The same reason justifies the severity with which thefts of ornaments from infants are visited.

388. There is still another consideration which demands notice. All criminals may be divided into three classes, namely (*i*) the casual, (*ii*) the habitual, and (*iii*) the professional.

(i) Casual Criminal.

The casual criminal may be a victim of circumstances. On the other hand, he may be a professional criminal in the bud. But since the Court has no reason to suppose that it is so, all first offenders have the sympathy of the Court, provided, of course, that they have not forfeited it by their aggravating conduct. In the absence of such circumstances the case of a first offender must be viewed with commiseration, and as in such a case repentance and reformation are always possible, punishment should be rather by way of warning than of penalty. Such a criminal should be given every chance to retrieve his lost reputation, and the Legislature has now provided means by which this may be now done.[2] Even when warning and recognizance are deemed insufficient the penalty inflicted should correct and not sting. It should be such as to produce contrition and not recoil.

389. The case of a habitual offender deserves condign punishment. He is a pest on society and he has forfeited its protection. But while it is so, there may still be mitigating circumstances in his case. He may have been driven to the crime by famine and hunger, the wants of his family, or the failure of his crops. Though a habitual, he may have exercised moderation in his crime, helping himself to just what he wanted, and leaving alone what he did not. A petty plunderer like this can scarcely be treated as a habitual in the real sense of the word.

(ii) Habitual Criminal.

390. A habitual criminal may become a professional criminal. Educated to crime, living by crime, he commits crime as his business in life, deliberately, with malice aforethought, calculating carefully the proportion which the chance of profit bears to the risk of detection, capture, trial, conviction and punishment — all of which are taken into account.[3] In India, there are castes of professional criminals, the members of which follow theiving as a hereditary calling. These cut-throats and thieves were, at one time, the *thugs* and *pindarees* whose terror is at present immortalized in the nursery rhymes. But, though they have passed away, there still remains a number of castes of hereditary thieves such as the *Minas*, *Vaddars* and *Pasees*, who are trained to their ancestral calling from early childhood. In the Deccan there are castes of hereditary coiners. In the North there are whole villages of depredatory tribes who overrun the country after the unctuous festival of Dassehra, offering their sacrifice to their protecting deity, the Goddess Kali. They consult Brahmin astrologers as to the " auspicious " day and hours for their burglaries. They work in gangs and assume disguises through which only a skilled eye can penetrate. They are highwaymen, house-breakers by night and holy mendicants by day. Thus safely they reconnoitre the places which they plunder at night. They possess jemmies, picklocks, skeleton keys and unsuspecteing long nails which they dexterously employ in house-breaking. They can jump incredibly high, and scale over walls with nothing but a *dhoti* or rope to support in. Such criminals, whenever brought to justice, should have all the terrors of law shaken upon them. They are enemies of society upon which they prey, and they should be hounded down by a remorseless sentence.

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(1) *Ananda*, 15 I. C. (B.) 803.
(2) S. 562, Cr. P. C.
(3) Cox on the Principles of Punishments, p. 135.

391. The character of the criminal is, then, an important determining factor in the awarding of punishment. But as in the case of offences against the person, so in the case of offences against property, there are aggravating and mitigating circumstances affecting the crime apart from the criminal. These are sufficiently indicated in the sections which have accordingly provided for graduated sentences, applicable to such cases. But apart from these circumstances, there are others which aggravate or mitigate the crime, and which have to be taken into consideration in awarding sentence. An offence, for instance, committed in respect of property, of necessity exposed but yet impossible to be closely watched by the owner, is naturally visited by a severer punishment to safeguard it, than property over which closer supervision is possible. Horses and cattle in the fields, or with travellers encamping with their belongings in the open illustrate this rule. The cause with which an offence may be committed as compared with the gravity of the possible consequences is another circumstance of aggravation. Hence the severity of sentence visited on forgers, coiners and utterers of base coin; law has no means of prevention in these cases, except by awarding exemplary sentence both as a deterrent to the wrong-doer as well as a warning to others similarly inclined.

Offences against Property.

392. Lastly, offences against the *peace* receive marked disapproval of law, not only because they are offences against the persons (§ 370), but also because they lead to widespread mischief by attracting partizans and confederates and by the recklessness which the collective courage and encouragement begets. They are also the fruitful source of *vendetta* which it is the object of law to avert. This exegesis on the measure of punishments is not intended to be complete ; because, to be complete, it must pass in review all the sections of the Code which have worked out the relative gravity of the offences in the graduated sentences annexed to them. The principles hereinbefore discussed are, therefore, only supplementary and are intended to give only an indication of the trend of judicial discretion as influenced by other circumstances.

Offences against Peace.

393. Forfeiture.—Blackstone justified the sentence of forfeiture on an assumed original compact between the subject and the State, in which the State safeguarded civil rights of the subject so long as the subject obeyed its laws.[1] But this theory has long since become obsolete and is no longer the favoured formula of sociology. Under English law, forfeiture is now reserved for outlawry.[2] A complete history of forfeiture was given in the previous edition of this work, to which reference is invited.[3]

394. The Code, as originally drafted, followed the English law before its amendment in 1870, and was only amended in 1921[4] by abolishing the sentence of forfeiture in the case of offences except those punishable under ss. 126, 127, and 169 of this Code, in addition to which s. 517 of the Code of Criminal Procedure enables the Court " to make such order as it thinks fit for the disposal of any property or document produced before it, or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence." But, inasmuch as this section authorizes both restoration as well as confiscation of property and is limited to property used in the commission of the offence, it cannot be treated as legalizing the sentence of forfeiture.

395. Pecuniary Forfeiture or Fine.—The sentence of fine is allied to forfeiture. It is, indeed, forfeiture of money by way of penalty.[5] It was justified by

(1) 4 Black., pp. 383, 384.
(2) 33 and 34 Vict., c. 23, s. 1.
(3) *See* 1 Penal Law (4th Ed.) pp. 342, 343.
(4) Act XVI of 1921.
(5) It is rightly so treated by Bentham in his Principles of Penal Laws, Pt. 2, Bk. 3, pp. 467-470 (Vol. I, Coll. Ed.). On pp. 468, 469 Bentham classifies the superiority of fine as follows : (1) It has the striking advantage of being convertible to profit. (But then Bentham forgets that on that very account it is liable to abuse). (2) It can be regulated according to the means of the offender. (Why should this be an advantage and why cannot

the Law Commissioners on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offender, since the sentence not only affected him but also his dependants.[1]

396. Since fine with all its defects continues to be a sentence and the Code does not invariably prescribe the maximum, it is necessary that it should conform to certain well-defined principles ensuring that its amount, in each case, is reasonable but not excessive. In order to secure this result, four points have to be kept in view ; (*i*) The profit of the offence ; (*ii*) the value of the thing which is the subject-matter of the offence ; (*iii*) the amount of the injury ; and (*iv*) the fortune of the offender.[2] These reasons underlie the report of the authors of the Code and have been adopted in other systems of law.[3] In some cases, not heinous, the Legislature has fixed a limit, but, where no limit has been fixed, it does not follow that fine should be unlimited. Consequently, excessive fine is a sufficient ground for appeal or revision. Fine as an additional penalty can only be justified in special cases, (*a*) where a short term of imprisonment is considered expedient as where the offender is too old or infirm to undergo a long term of imprisonment, (*b*) where it is desirable to compensate the complainant, and (*c*) where the offence involves misappropriation of property by the offender. In other cases, it is inexpedient to add fine to a substantial term of imprisonment, and in practice, it is only in exceptional cases that fine is added to a substantial term of imprisonment.[4]

397. As regards the imposition of fine as a sentence, the Code may be divided into four parts : (*i*) Offences in which fine is the sole punishment and its amount is limited ; (*ii*) offences in which fine is an alternative punishment, but its amount is limited ; (*iii*) offences in which it is an additional imperative punishment, but its amount is limited ; and (*iv*) cases in which it is both an imperative punishment and its amount is unlimited. A classification of offences from this standpoint would at once shew how the Legislature has carried out its express intention in affixing that sentence.

398. Thus in the following cases fine is the sole punishment, and except in two cases, its amount is limited :—

(1) S. 137. Negligently suffering a deserters to conceal in a vessel—maximum fine Rs. 500.
(2) S. 154. Criminal responsibility for riot held on one's land—maximum fine Rs. 500.
(3) S. 155. Liability of person for whose benefit riot is committed —unlimited fine.
(4) S. 176. Liability of agent of such person—unlimited fine.

399. The second and third classes comprise by far the largest number of offences in the Code. Lastly, come those heinous cases in which the fine is both compulsory and unlimited. Such are—

(1) S. 123. Concealment of conspiracy to wage war against the King.
(2) S. 124. Assault on Governor-General, etc., with intent to compel or restrain the exercise of any lawful power.
(3) S. 126. Depredation on an ally.
(4) S. 127. Taking property in such depredation.
(5) Ss. 128, 129. Public servant allowing escape of political prisoner.
(6) S. 130. Aiding, etc., escape of such prisoner.
(7) Ss. 131, 132. Abetment of mutiny.
(8) S. 133. Assault by a subordinate on a superior officer.
(9) S. 134. Abetment of above.

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other punishments be also regulated.) (3) It implies no infamy (so far it fails to fulfil the object of punishment). (4) It is remissible so that complete reparation can be made for an unjust sentence—which is certainly its great advantage. (5) It is popular (which is the reverse of its advantage). One further advantage overlooked by Bentham is that fine has the effect of relieving the tax-payer by reducing the cost of prevention and punishment of crime.

The true disadvantages of fine as a sentence are stated by Bentham to be as follows : (1) It is the family and the dependants who are innocent. (2) It is not exemplary, as at its execution no spectacle is exhibited.

The true disadvantage of fine is its inappropriateness in serious crime. Its true advantage lies in the means it affords for compensating the complainant.

(1) Note A, Reprint, p. 97.
(2) Note A, Reprint, p. 98.
(3) This is in accordance with 4 Black., 377; view of the English Criminal Law Commissioners (7th Ed., p. 107); and the Bill of Rights, though advisedly opposed to Livingstone's Code of Louisiana (*See* Note A, pp. 97-99).
(4) *Islam*, (1931) C. 710.

(10) S. 380. Theft in a dwelling house, etc.
(11) S. 475. Counterfeiting device or mark for authenticating documents.
(12) S. 457. Lurking house-trespass by night.

400. "Certainty with respect to the punishment which each of two or more prisoners is to suffer is as essential in a sentence when the punishment is a fine as it is when the punishment is a term of imprisonment."[1] The sentence of fine of a specific sum on a number of prisoners individually and collectively is therefore, illegal.[2]

401. The procedure provided by the Legislature foı the recovery of fine will be discussed under section 64 which is the section in point.

402. Whipping.—Corporal punishment was not provided for in the Code. It was expressly abolished in 1834 in territories subject to the Presidency of Fort William,[3] though the same exemption was not extended to the other two Presidencies. In 1844[4] power was, however, given to Magistrates to punish offenders of tender age with stripes. It also provisionally empowered them, "until adequate improvement in prison discipline can be effected" to sentence to corporal punishment persons convicted of petty theft. By a later Act[5] it was extended to life convicts. The sentence, however, became general in its application to certain cases by an Act of 1864[6] which was replaced by Act IV of 1909,which reduces the number of offences in which the sentence of whipping is admissible. "The principal merit of simple afflictive punishments is their exemplarity. All that is suffered by the delinquent during their infliction may be exhibited to the public, and the class of spectators which would be attracted by such exhibitions, consists for the most part of those upon whom the impression they are calculated to produce would be most salutary."[7] But the drawbacks of such a punishment are many. In the first place, the suffering it produces is momentary, and it varies with the caprice or desire of the executioner. In the second place, while it produces trivial effect upon low natures, the degradation that it involves in the case of persons of social standing is out of all proportion to their delinquencies, so much so that a respectable man would prefer death to such dishonour. In the third place, it is a sentence in which reparation is impossible.

403. The punishment is a relic of the old form of tortures of which many forms were devised by the ingenuity of the Middle Ages, and all of which, including flogging, have now been abandoned in Europe. And even as regards this country, there was a strong movement against its continuance, but while its total abandonment has been considered inexpedient, the Legislature has modified its generality and sanctioned its application only to hardened criminals to whom the ordinary punishment may not be sufficiently deterrent. The authors had, however, condemned this punishment except in the case of juvenile offenders.[8] (§ 369). The mode in which this sentence is to be executed is described in the Code of Criminal Procedure.[9]

404. No Punishment.—The enumeration of punishments in this section is exhaustive. Consequently, an order of detention passed by the District Magistrate under the Reformatory Schools Act,[10] or an order for notifying address of previously convicted offenders passed under s. 565 of the Code of Criminal Procedure,[11] or an order for release upon probation of good conduct under s. 562 of the same Code or one for mere detention as prescribed in certain Revenue Acts for failure to pay the land assessment[12] do not amount to punishment under this Code. Since the Code prescribes no minimum period of imprisonment, an order for

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(1) 5 M. H. C. R. (App.) 5.
(2) *Ib.*
(3) Reg. II of 1834.
(4) Act III of 1844.
(5) Act XVIII of 1845.
(6) Act VI of 1864 amended by Act II of 1895. For Upper Burmah, *see* the Burmah Laws Act (XIII of 1898), s. 3 (*b*) and Sch 2; for the Punjab Frontier Districts and Baluchistan, *see* the Punjab Frontier Crimes Regulation (Reg. III of 1901), ss. 6 & 12
(2) Now re-enacted as Act IV of 1909.
(7) Principles of Penal Laws (Coll. Ed., Vol. I), pp. 145, 416.
(8) Note A, Reprint, pp. 104, 105.
(9) Ss. 390-396.
(10) Act VIII of 1897; *Krishna*, 27 I. C. (M.) 198.
(11) *Jhagroo*, 9 N. L. R. 88.
(12) S. 130, C. P. Land Revenue Act (C. P. Act I of 1917).

imprisonment till the rising of the Court is punishment within the meaning of this section.

Commutation of sentence of death.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

405. Analogous Law.—The power of commutation here conferred upon the Executive Government follows the precedent of English Law under which it is lawful for the Secretary of State to order convicts, under sentence of transportation, to be confined in any place appointed for the purpose by His Majesty, in England, until, it may be, they "shall become entitled to their liberty."[1]

406. The provisions of this and the next section have, in a great measure, become unnecessary by the ampler provisions of the Code of Criminal Procedure, which empower the Governor-General in Council and the Local Government to commute, suspend or remit all judicial sentences,[2] provided that in the case of commutation, they are empowered to commute any one of the following sentences for any other mentioned after it: Death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which an offender might have been sentenced, simple imprisonment for a like term, fine. These powers of the Government are independent of those possessed by the Sovereign, who, being the fountain-head of mercy, is entitled to grant pardons, reprieves, respites, or remissions of punishment.[3] In one case, however, the High Court also possesses the power of commutation, for it is provided in the Procedure Code that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.[4]

407. Principle.—The principle of this section is thus explained by the framers of the Code: "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances, of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest Judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote Provinces of the Empire, in which convict settlements are established, and the way in which the interest of those Provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government is only competent to decide."[5]

408. Commutation of Capital Sentence.—The power of commutation, as here described, is not in harmony with the corresponding section of the Code of Criminal Procedure.[6] For while under this section the sentence of death may be commuted "for *any other punishment* provided by this Code," the Procedure Code only authorizes the Government to "commute any one of the following sentences, for any other mentioned *after* it", *i.e.*, in the case of death sentence the only power it possesses is of commuting it to the sentence of transportation. Under the Code, however, there is nothing to debar the same authority to commute the sentence to any sentence, though it may be the lowest sentence of fine. In any case, whatever its power, it can only commute the original sentence. It cannot commute a commuted sentence, for its power ceases the moment a commutation is made. The power of commutation is independent of the consent of the convict. He may or may not consent to suffer commuted sentence which takes effect as a substantial

(1) 5 Geo. IV, c. 84, s. 10.
(2) Ch. XXIX (ss. 401, 402).
(3) *Cf.* S. 401 (5), Cr. P. C.
(4) S. 382, Cr. P. C.
(5) Note A, Reprint, p. 95; Law Commissioners' 2nd Rep., ss. 511, 512.
(6) S. 402.

sentence from the date of commutation. The power of commutation must be unconditional, nor should it be made subject to its acceptance by the convict. On the other hand, the power to suspend or remit a sentence may be either unconditional or it may be made subject to "conditions which the person sentenced accepts."[1] In the latter case, the same authority may recall its clemency on breach of the condition.[2] The condition, again, may be imposed on the accused or any one else.[3]

409. The power of commutation is left advisedly unqualified by any indication of the Legislature as to the reasons for, or the circumstances under which, it will be exercised. The case of a pregnant female convict has been elsewhere provided for.[4] What remains is the case of a person in whose favour similar dictates of humanity might influence the Government to intervene. It may be that a person, too young or too old, or one whose loss to his family would mean its ruin, might be spared the extreme penalty of law. Cases of infanticide often call for the exercise of clemency. A young widow led astray, destroying her offspring, a mother unable to support her newly born babe are not infrequently supplicants for the exercise of this power. Then, again, social and intellectual greatness, past or future services to the State, disclosure of extenuating circumstances not known to the Judge, or not sufficiently accounted for, would be considerations which the Government could not overlook. In fact, after justice has pronounced its doom, there always still remain considerations of clemency and expediency, which require a wider outlook and which call for the exercise of the plenitude of power. Mercy is, therefore, the prerogative of the King as the head of social order and well-being, and the power of commutation or suspension is the power which his representatives must, of necessity, possess, as they possess other attributes of sovereignty.

Commutation of sentence of transportation for life.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

410. Analogous Law.—The necessity for this power has been explained before in the words of the draftsmen of the Code (§ 407). Provision for the commutation here prescribed has also been made by the Code of Criminal Procedure.

Sentence of Europeans and Americans to penal servitude.

56. Whenever any person being an European or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude instead of transportation according to the provisions of Act XXIV of 1855 :

Proviso as to sentence for term exceeding ten years, but not for life.

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

411. Analogous Law.—Act XXIV of 1855 is the Penal Servitude Act, which is based on an English Statute.[5] The proviso was added by the Indian Penal Code Amendment Act of 1870.[6] The procedure for the trial of European British subjects is prescribed by the Code of Criminal Procedure.[7]

412. The term "European" is explained by the Penal Servitude Act[8] to mean what has since come to be designated a "European British subject,"[9] the meaning of which term has already been explained elsewhere. (§ 382)

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(1) S. 401, Cr. P. C.
(2) S. 401 (3), Cr. P. C.
(3) *Ib.*, Cl. (4).
(4) S. 382, Cr. P. C.
(5) 16 & 17 Vict., c. 99.
(6) Act XXVII of 1870, s. 3.
(7) Ch. XXXIII.
(8) Act XXIV of 1855.
(9) *Ib.*, s. 15.

413. As the sentence of penal servitude is exceptional and reserved only to the cases of Europeans and Americans, it is not a legal sentence to be passed on a native of India. Where, therefore, a Court had sentenced a prisoner to penal servitude for life, the High Court altered it to transportation for life.[1]

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

414. **Analogous Law.**—Not only for the purpose of calculating fractions of terms of imprisonment, but also for the purpose of the sentence itself, transportation "for life" has now come to mean transportation for 20 years, the transported convict being, on expiration of that term, free to remain in his abode of exile or return home at his pleasure.

Offenders sentenced to transportation, how dealt with until transported.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

415. **Principle.**—As transportation is the sentence reserved for heinous crimes, the convict is naturally regarded as rigorously imprisoned till the sentence, passed on him, can be given effect to. But except for this temporary purpose, the two sentences cannot be regarded as identical, for, as the ratio laid down for the conversion of transportation into penal servitude shows (§ 381), rigorous imprisonment is far more arduous than transportation, and, therefore, the one cannot be regarded for all purposes as equivalent to the other. Therefore, in cases in which the sentence of transportation cannot be at all carried out, the substituted sentence of imprisonment would have to be revised by Government under section 401 of the Code of Criminal Procedure.

Transportation instead of imprisonment.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.

416. **Analogous Law.**—This section is new, and was added after the submission of the original draft Code. It enunciates a rule at variance with the views of the authors of the Code, who were of opinion that, to be effectual, the sentence must be lifelong,[2] (§§ 378-379) also adding that their recommendation was in accordance with the then prevailing usage.[3] This recommendation was approved by the Law Commissioners, who were appointed to revise the draft and the present section was thus only added when the Bill was before the Council, but its addition necessarily involved an alteration of the other corresponding sections of the Code, which have, however, remained unamended. Thus the words used in several places are "shall be punished with transportation for life or with imprisonment which may extend, etc.," which naturally implies what the authors had, indeed, intended that the only transportation to which the Court could condemn an offender is "transportation for life" and not for any shorter term as here prescribed. In other words, while the Court has an option in determining the duration of the term of imprisonment, it has no option in determining the duration of the term of transportation. In the section of the Code which prescribes transportation as a punishment, with the exception of this section, the language used is such as not to leave the Court

(1) *Duma*, 19 M. 483.
(2) Note A, Reprint, p. 94; approved by the Law Commissioners in 2nd Report, s. 466.
(3) *Ib.*, p. 94.

any option regarding the duration of the term.[1] As this is the only section which authorizes the Court to pass a sentence of transportation for a shorter period than for life, the correct mode of proceeding is to mention that the sentence is passed in accordance with this section,[2] in which case, the form to be used should be as follows :—

" The Court directs under the provision of section and section 59 of the Indian Penal Code, that the said be, etc."

This section is inapplicable to a conviction had under a special or a local Act.[3]

417. Principle.—This section places on the Statute Book an adaptation of the doctrine that banishment need not be permanent, but may be of shorter duration, for any term up to 7 years. When transportation was the legal punishment in England, it was usually inflicted to last from 7 to 14 years. The authors of the Code were against short terms of transportation (§ 416). But as Bentham remarks : " Punishments which are inflicted at the antipodes, in a country of which so little is known, and with which communication was rare, could make only a transient impression upon the minds of people in this country. 'The mass of people,' says an author who had deeply considered the effects of imagination, 'make no distinction between an interval of a 1,000 years and of a thousand miles.' "[4]

418. Meaning of Words.—"*Offender is punishable with imprisonment, etc.,*": The word " punishable " implies that the punishment for the offence is at least 7 years or upwards. An offender may be *punished* with imprisonment for 7 years with combined sentences, but in that case the section is inapplicable, and the convict cannot be transported. In order to admit of commutation into transportation the imprisonment must be rigorous.[5] "*It shall be competent,*" *i.e.*, merely lawful but not obligatory. "*Instead of awarding sentence of imprisonment,*" *i.e.*, notwithstanding anything to the contrary hereinafter contained. "*Such offender is liable to imprisonment,*" *i.e.*, under the sentence passed by the Court.

419. Commuted Transportation.—This section may be regarded in some degree as a counterpart of section 55, which authorizes the Government of India and the Local Governments to commute the sentence of transportation to any other sentence. This section enlarges the power of the Court by authorizing it to commute the sentence of imprisonment into one of transportation. But the power of the Court is circumscribed by the section, the requirements of which must then be strictly fulfilled. In the first place, then, the sentence must, in one offence alone, be a least of 7 years' imprisonment. It cannot be made up by adding two or more sentences, even though passed at the same trial for different offences,[6] or sentences passed at separate trials for two or more offences of the same kind,[7] nor can there be a general sentence of transportation for two or more offences when only one of the sentences passed is of 7 years' imprisonment.[8] As, therefore, the single sentence passed by the Court in one offence must be of at least 7 years' imprisonment, it follows that no Court can avail itself of the power conferred by this section, unless it has jurisdiction to sentence offenders up to 7 years.[9] As such powers are only wielded by Judges of the High Court and Sessions Court, and Magistrates specially empowered under section 30 of the Code of Criminal Procedure, it follows that the operation of the section is confined only to those Courts, and in respect of offences

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(1) *Naiada*, 1 A. 43 (45), F. B.; *Boodha*, 9 W. R. 6 F. B.; *Mhd. Sharif*, (1915) P. R. 14, 29 I. C. 826; *Alla-ud-din*, 52 I. C. (A.) 49.

(2) *Rughoo*, (1864) W. R. 30.

(3) S. 40, *ante*; *Muthuramalingam*, 11 M. L. J. 127.

(4) Bentham's Principles of Penal Laws, Bk. 5, pt. 2, p. 491 (Vol. I, Coll. Edn.).

(5) 1 W. R. Cr. Letters No. 5; *ib.*, No. 10.

(6) *Premchand*, (1864) W, R. 35; *Mootkee Kora*, 2 W. R. 1; *Sunda*, (1866) P. R. No. 63; *Mt. Mathro*, (1886) P. R. No. 4; *Bahadur*, (1886) P. R. No. 14 ; *Salar Baksh*, (1901) P. R. No. 27; *Nga Meik*, (1905) U. B. R. 11 P. C.; *Tonooram*, 3 W. R. 44.

(7) *Gourchunder*, 8 W. R. 2.

(8) *Shonaulla*, 5 W. R. 44.

(9) *Boodhooa*, 9 W. R. 6, F. B.; *Nuran*, (1880) P. R. No. 17.

which are punishable with 7 or more years' imprisonment. Thus, then, the offence must be punishable, and the offender punished with at least 7 years' imprisonment before it could be commuted to transportation under this section. Where, therefore, a person was convicted of an attempt at rape, and sentenced under this section to transportation for 7 years, the sentence was held to be illegal on the ground that though rape is punishable with 10 years' imprisonment, an attempt at rape is punishable under section 511 of the Code with only 5 years' imprisonment. It was, however, added that as rape is also punishable with transportation for life which counts as transportation for 20 years, the sentence of 7 years' imprisonment, being less than one-half of 20 years, would have been legal if passed independently of this section.[1] So where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under section 193 and of forgery under section 467 and sentenced to 7 years' transportation for the first offence, and a further period of transportation for 3 years for the second offence, the second conviction was quashed as illegal on the ground that no transportation for less than 7 years could be ordered under this section.[2]

420. The minimum period of transportation being thus fixed to be 7 years, the Court has either to sentence one to that period or not at all.[3] It may, however, fix any term in excess of that period, provided that the term so fixed does not exceed "the term for which by this Code such offender is liable to *imprisonment*." These words leave no doubt as to what they mean. For example, an offence is punishable with death, transportation for life and rigorous imprisonment extending to 10 years. Here the Court may sentence the offender to the extreme penalty of law, or it may transport him for life or imprison him for 10 years, but if, in the last case, it wishes to *commute* that sentence under this section it can only commute it to transportation for any term between 7 and 10 years—10 years being the term of *imprisonment* to which the offender was liable under the section.[4] Of course, in such a case the Court may find itself confronted with a difficulty, for while its powers of commutation are thus limited, it may consider it a hard case for transportation for life, and as that is the only next alternative, it will have to choose between transportation for life or an imprisonment for 10 years. A transportation, say for 15 years, would, in such a case, be illegal.

421. Again, since the commutation for transportation is only legal in a case when the Court substitutes it for substantive sentence, it could not, for example, award it in default of payment of fine.[5] Where, therefore, a house-breaker was sentenced to transportation for 9 years and to pay a fine of 300 rupees, he could not be sentenced to a further term of 3 years in default of payment of fine. In such a case the only sentence that the Court could pass is a sentence of imprisonment in accordance with the rule laid down in sections 64 and 65.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

422. Analogous Law.—The provisions of this and sections 63-74 have been locally modified by the Frontier Crimes Regulation,[6] and the provisions of this and sections 63-65, 68-74 have been modified by the Sind Frontier Regulation.[7]

423. Principle.—This section is discretionary, and enables the Court to pass an appropriate sentence, whether rigorous or simple, or partly of one kind and

(1) *Joseph Merrian*, 10 W. R. 10.
(2) *Gourchunder*, 8 W. R. 2.
(3) *San Da*, (1906) 4. L. B. R. 65.
(4) *Rughoo*, (1864) W. R. 30; *Keifa Singh*, 3 W. R. 16; *Mohanundo*, 5 W. R. 16; *Boodhoor*, 9 W. R. 6, F. B.; *Joseph Merrian*, 10 W. R. 10; *Naiada*, 1 A. 43 F. B.; *Atnera*, (1903) P. R. No. 31.
(5) *Kunhussa*, 5 M. 28.
(6) Reg. III of 1901, ss. 13 (2), 61.
(7) Reg. III of 1892, s. 28 (1).

partly of the other, according to the individual requirements of each case—the discretion being, of course, subject to the provisions of the Code, which has, in some places, specified the nature of imprisonment appropriate to certain cases.

61. [*Sentence of forfeiture of property.*] ***Repealed.***[1]

424. **Analogous Law.**—This section which has since been repealed by Act XVI of 1921 stood as under: "In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned."

Sentence of forfeiture of property.

Illustration.

A, being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, A's father dies, leaving an estate which, but for the forfeiture, would become the property of *A*. The estate becomes the property of Government.

For a comment on this section, *see* Penal Law (4th ed.) pp. 356-358.

62. [*Forfeiture of property, in respect of offenders punishable with death, transportation or imprisonment.*] ***Repealed.***[2]

425. **Analogous Law.**—This section which has since been repealed by Act XVI of 1921 stood as under: "Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and, whenever any person shall be convicted of any offence for which he shall be transported or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rent, and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment, shall be forfeited to Government subject to such provision for his family and dependants as the Government may think fit to allow during such period."

Forfeiture of property in respect of offenders punishable with death, transportation or imprisonment.

For a comment on this section, *see* 1 Penal Law (4th ed.) pp. 358-360.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Amount of fine.

426. Analogous Law.—Under the General Clauses Act[3] the provisions of sections 63-70 apply to all fines imposed under the authority of any Act, Regulation, rule, or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.[4] Similarly, these sections have been also made applicable to several local Acts.[5] The policy underlying this section was the subject of much controversy at the draft stage of the Bill. The controversy arose from the fact that in some systems of Law the maximum limit of fine is fixed, whereas in the Bill the authors had fixed no such limit, but had left it solely to the discretion of the Judge. In adopting this course, they justified themselves on three grounds, *viz.*, (*i*) that the majority of the offenders being poor it would be a hardship on the offender and entail distress on his family, if a minimum is fixed; (*ii*) the incidence of penalty

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(1) Repealed by the Penal Code Amendment Act, 1921 (Act XVI of 1921), s. 4, which, again, has been repealed by Act X of 1927 as spent; but *see* the General Clauses Act, 1897 (X of 1897) s. 7.

(2) *Ib.*

(3) Act X of 1897.

(4) S. 25, Act X of 1897.

(5) Bom. General Clauses Act, s. 26 (Bom. Act I of 1904); Mad. General Clauses Act, s. 19 (Mad. Act I of 1891); Bengal Act V of 1867, s. 4.

varies according to the pecuniary capacity of the offender and must be left to be adjusted to the circumstances of each case; (*iii*) lastly, if the measure of fine were to be proportioned to the amount of the offender's property, it would lead to endless complications.[1]

427. The authors, therefore, recommended adoption of the clauses as here enacted, following the authors of the Bill of Rights, who, with many instances of gross abuse fresh in their recollection, could devise no other rule than that excessive fines should not be imposed. So Blackstone observed " that the *quantum* of pecuniary fines neither can nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes ; and, at all events, what is ruin to one man's fortune, may be a matter of indifference to another's. Statute law has not, therefore, often ascertained the quality of fines, nor the common law ever."[2]

When the Maximum may be Fixed.

428. This was, again, the view reiterated by the English Criminal Law Commissioners who remarked that " the inequality and injustice in some cases, and the inefficiency in others, of resorting to *fixed and absolute* fines as a mode of penal restraint confines its operation within narrow limits, principally to instances of minor delinquencies punishable by virtue of a summary jurisdiction, and in some particular instances of higher magnitude where the condition of the class of persons on whom the restraint operates is such as to remove, or at least greatly to reduce, the probability that it will operate either with unequal severity, or will be ineffectual from the inability of those who offend to pay the fine, and where, in addition, such a mode of punishment is appropriate to the nature of the offence, and does not afford room for invidious comparison with other instances in which corporal punishment is inflicted in respect of less heinous transgressions."[3]

429. Principle.—The great objection to limiting the amount of fine is then the danger that while it may be inconsiderable to the rich, it may be unjustly oppressive to the poor. The magnitude of a fine must, therefore, in justice be proportioned to the offender's means. There are, however, certain cases in which the transgressions are so small, or are such as affect only a class that the limitation of fine is unobjectionable. Barring such cases the policy of the Legislature has been against limiting it. Its amount is left to the discretion of the Judge. But there are small delinquencies in which it would be unfair to leave fine to the discretion of the Judge. In such cases, the law has to fix the maximum. In other cases, it has left the amount to the discretion of the Judge because of the objections to any other course being taken. (§§ 395, 427).

430. Fair Measure of Fine.—Fine may be limited by Statute, in which case the section has no application. Where it is not so limited, the section provides that it may be " unlimited but shall not be excessive." This does not imply that any Magistrate may impose an unlimited fine, for the jurisdiction of Magistrates is in itself limited to the imposition of a limited fine,[4] and where it is so, that jurisdiction cannot be exceeded by reference to this section. In other words, while this section legalizes the imposition of any fine regardless of amount, it does not confer upon all Courts the power to award it. Now, as the power of the Presidency Magistrates and first class Magistrates is limited to a fine of Rs. 1,000 and of the second and third class Magistrates to Rs. 200, and Rs. 50 respectively, it follows that the maximum magisterial fine cannot exceed Rs. 1,000.[5] Only the High Court and the Court of Sessions are thus in a position to inflict an unlimited fine.[6] Indeed, in a large number

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(1) Note A, Reprint, pp. 97, 98.

(2) 4 Comm., p. 377.

(3) 7 Rep., Cited in Law Commissioners' 2nd Rep., s. 476.

(4) S. 32, Cr. P. C.

(5) Under s. 349, Cr. P. Code, 2nd and 3rd class Magistrates being empowered to refer cases before them to a first class Magistrate for enhanced sentence, the latter may inflict the same fine which he could have himself inflicted if he had tried the case.

(6) *Abdoor Rahman*, 7 W. R. 37 ; *Mohana*, (1895) P. R. No. 20, *contra* in *Subhan*, (1878) P. R. No. 18, is untenable, as the section was never intended to define jurisdiction or override that conferred by the Procedure Code. It only enunciates the principle, leaving its administration to the Procedure Code.

of cases dealt with in the Code, the amount of fine is itself limited, so that it is only in cases where it is not so limited, and where the offender is being tried before a Judge of the High Court or the Court of Sessions, that the question of unlimited fine becomes relevant.

431. But the prohibition of the section against excessive fines applies equally to all cases, though the section, as worded, does not deal with excessive fines in cases in which its amount is limited. Nevertheless, it is a general principle, which the section recognizes, that no Court should inflict a fine which it would be impossible or very difficult for the accused person to pay, or which is wholly disproportioned to the character of the offence.[1] (§ 395). Indeed, it is a cardinal principle of all punishments that the sentence passed must suit the crime, and in the case of fine, it should be specially so. In the first place, the fine inflicted must have reference to the nature and character of the offence. A person betrayed into crime by his cupidity is a person who should be exemplarily amerced as a deterrent check to his cupidity. "For in punishing thus, he is struck in the most sensible part, which has, so to speak, been pointed out by himself; for it is not possible but that the mischief which he has chosen as the instrument of his vengeance, must appear hurtful to himself."[2] In this respect the policy of law is to deprive him of all his ill-gotten gains (§ 429). For example, a person who has run away with a loaf of bread from a baker's stall, because he was hungry, cannot be treated on the same footing as a bank clerk, who misappropriates a large sum of money by falsification of accounts, or being an agent or servant, he defrauds his master by misappropriating large sums of money, out of which he has acquired property of his own. In such cases, law is callous as to the amount of suffering that it would thereby produce among persons affected thereby. For no man has a right to keep his family in comfort by plunder. Whenever such a case is brought before a Magistrate, it is perfectly competent to him to commit a case to the Sessions, so that the offender may be properly amerced.[3] But all cases in which the love of lucre plays a part cannot be treated alike. For there is a distinction between a highwayman and the father of a famishing family committing a theft for bread to support it. In the one case the offender is the object of a just vengeance of law, in the other case he is justly the object of its commiseration. Bentham lays down the three following rules as applicable to the subject under discussion :—

(1) That the greater the uncertainty, the greater should be the punishment.
(2) That it should be sufficient to turn the offender's advantage to a loss.
(3) That it should be deterrent.[4]

432. These principles are general but not inflexible, and, indeed, they are not intended to be so. For there can be no invariable standard applicable to all circumstances which are infinite and diverse in each case. Law has, therefore, refused to commit itself to any generalization on the subject. It has left it to the Judge to fix a fine with due regard to the circumstances of the case in which it is imposed, and the condition in life of the offender. In any case, fine must serve its own purpose; for it is not the object of fine to extend to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying the case,[5] and where a fine is not suited to the nature of the offence and is quite beyond the means of the offender to pay it, it should never be inflicted merely in order that a further term of imprisonment in default shall be suffered in addition to the substantive imprisonment which the Magistrate has inflicted to the limits of his powers. If the substantive sentence awardable by a Magistrate is in his opinion insufficient for the offence, it is a fit

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(1) *Per* Jackson, J., in *Abdoor Rahman*, 7 W. R. 37.

(2) Bentham's Principles of Penal Laws, p. 400 (Coll. Ed., Vol. I).

(3) S. 206, Cr. P. C.

(4) Principles of Penal Laws, pp. 401, 402 (Coll. Ed., Vol I). The language employed by Bentham is neither perspicacious nor easily intelligible. The text lays down what he means by his rules, which having regard to the numerous and varied circumstances of human life, are not probably capable of a more general enunciation.

(5) *Subhan*, (1878) P. R. No. 18; *Nga Chin*, 1 Bur. L. R. 483.

case, not for eking it out by the addition of a fine, but for committal or submission to a higher Magistrate for enhanced sentence.[1] It has already been remarked before that when more than one person is fined on conviction for a joint offence, the sentence must impose a specific fine on each prisoner,[2] and realize it from him and him alone. Consequently, a Magistrate is not justified in inflicting heavy fines on poor persons, on the mere supposition that they are backed up by influential persons who might pay for them. Such considerations should never influence the Magistrate who could have regard only to the circumstances of the accused and not of his possible allies.[3] It is, sometimes, also the practice to mulct offenders in prohibitive fines, the object being to convert the sentence of fine into one of imprisonment. Such a course is to be deprecated, and is opposed to the spirit of the section.[4] And as fine is a punishment for an accomplished wrong, it cannot be inflicted to prevent the commission of a possible offence.[5] Of course, there are cases in which non-compliance with a bye-law is expressly punishable with a daily fine, in which case, such a fine for continued infringement is perfectly legal, but such cases do not arise under the Code, and under it, therefore, no sentence of daily fine can be legally imposed.[6]

433. Procedure for Recovery of Fine.—The question as to what is an appropriate fine in a given case is ordinarily a question of fact and of judicial discretion. But inasmuch as the exercise of sound judicial discretion is in itself a question of law the question is not often considered as one of law in which the High Court would properly exercise its powers of revision.

434. Where a conviction has been had under two sections of the Code, in one of which only an alternative sentence of imprisonment or fine is allowed, a sentence of fine alone is illegal.[7] A fine once imposed cannot be remitted merely on the ground that the offender had already been fined departmentally for his wrong. So where a soldier was found drunk on a public road within Cantonment limits for which he was punished departmentally, as well as by the Cantonment Magistrate, it was held by the High Court that the fine judicially inflicted cannot be remitted, not having been in itself an improper one. "Departmental punishment cannot withdraw a wrong-doer from the cognizance of the ordinary Courts or relieve him from the penalties provided by the law."[8]

435. As will be presently seen (§ 440), that the Court sentencing an offender to a fine has also to sentence him to an alternative sentence in case of default. In such a case, the offender has to suffer imprisonment unitl the fine is paid. But the sentence of imprisonment does not necessarily take effect from the moment it is pronounced, for the Court is authorized to suspend its execution for a time in order to enable him to raise the amount.[9] It is further empowered to issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender, although the sentence directs that, in default of payment of fine, the offender shall be imprisoned.[10] Where several fines are due from an offender, it has been held that following the principle of s. 59 of the Indian Contract Act, the payer should have the option to determine the order in which to discharge the liability.[11]

436. Compensation out of Fine. As one object of fine is to compensate the complainant, the Code of Criminal Procedure empowers the Court to order, when passing judgment, that the whole or any part of the fine

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(1) *Mohana*, (1895) P. R. No. 20.

(2) 5 M. H. C. R. (App.) 5; West, J., assumed the legality of a joint fine in a case, the headnote alone of which is available, (1875) B. U. C. 90.

(3) *Bhilya*, (1891) B. U. C. 556.

(4) *Nga Chin*, 1 Bur. L. R. 483; *Abdullah*, 71 I. C. (L.) 998.

(5) *Nga Paw Hi*, 1 Bur. L. R. 421; *Sagar Dutt*, 1 B. L. R. 41; *Love*, 18 W. R. 44; *Jagannath*, 5 B. H. C. R. 103; *Kristodhone*, 25 W. R. 6; *Chairman, Municipality* v. *Aneesuddin*, 20 W. R. 64; *Tarineechurn*, 21 W. R. 31; *Ramkrishna Biswas*, 27 C. 565.

(6) *Nga Paw Hi*, 1 Bur. L. R. 421; *Kristodhone*, 25 W. R. 6.

(7) *Bhoobun*, 11 W. R. 39.

(8) *Ramnaik*, (1887) B. U. C. 318, 19.

(9) S. 388, Cr. P. C.

(10) S. 386, Cr. P. C.

(11) *Yakoob*, 24 S. L. R. 437.

recovered is to be applied (*a*) in defraying expenses, properly incurred, in the prosecution; (*b*) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.[1] In appealable cases such payment is to be made on decision of the appeal.

Sentence of imprisonment for non-payment of fine.

64. In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable [with imprisonment or fine, or][2] with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.[3]

437. Analogous Law.—This section, the wording of which has been pronounced to be "not happy,"[4] was clause 51 in the draft Bill, though its language was subsequently altered. Its object is to confer on the Courts the general power to impose imprisonment in default of payment of fine, the subsequent sections being then enacted to lay down limits to that power.[5]

Its Extent.

438. The general territorial extent of the section has been modified by two Regulations, the first of which[6] makes the first two clauses inapplicable to the hill tribes affected by the Kachin Hill Tribes Regulation; the second regulation being the Chin Hills Regulation,[7] which substitutes the words "In every case in which the offender is sentenced to a fine" for them. As regards the Punjab Frontier District and Baluchistan, its provisions are affected by the Punjab Frontier Crimes Regulation.[8] Apart from these local modifications, its provisions generally apply to all fines whether under the Code or otherwise.[9]

The provisions of this section must be read as supplemented by the provisions of s. 397 of the Criminal Procedure Code.[10]

Amendment.

439. The first two clauses were substituted for the words "in every case in which an offender is sentenced to fine" by the Indian Penal Code Amendment Act, 1882,[11] and the words "with imprisonment or fine" in the second clause were further inserted by the Amending Act of 1886.[12] These amendments were necessitated by the view taken in several cases of the Madras High Court in which it was held that the award of imprisonment in default of payment of fine, inflicted under the provisions of special or local law, was unauthorized by law.[13] In the first case, this section was held to have no application to a conviction under the Police Act, and in the second case, a similar view was reiterated, and a dissent expressed from two other cases[14] of the same Court, in which the award of the sentence of imprisonment in default of payment of fine was held to be a mere informality. The effect of the amendment is now to legalise the sentence of imprisonment in such cases, the other cases laying down the

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(1) S. 545, Cr. P. C.
(2) These words were inserted by the Indian Criminal Law Amendment Act, 1886 (X of 1886) s. 21 (2).
(3) See s. 426.
(4) *Per* Benson, J., in *Yakoob Sahib*, 22 M. 238.
(5) *Ib.*
(6) Reg. I of 1895.
(7) Reg. V of 1896.
(8) Reg. IV of 1887, ss. 15 (2), 52.
(9) General Clauses Act, s. 5 (Act I of 1868); General Clauses Act, s. 25 (Act X of 1897); *see* s. 40, *ante*, as to its applicability to special or local laws.
(10) For one such case, see *Nan E*, 9 R. 612.
(11) Act VIII of 1882, s. 2.
(12) Indian Criminal Law Amendment Act (Act X of 1886) s. 21 (2).
(13) 3 M. H. C. R. (App.) 9; 6 M. H. C. R. (App.) 40; 7 M. H. C. R. (App.) 22.
(14) 5 M. H. C. R. (App.) 21; 5 M. H. C. R. (App.) 23.

contrary being overruled by the Legislature, which has made the rule one of general application to all special and local laws.[1]

440. Principle.—The sentence of fine would be incapable of execution, if the offender had no available means to pay up his fine, and if there were no alternative sentence to induce him to pay it up. This section, therefore, generally confers upon the Court the power of imprisonment in default of the payment of fine, which often acts as a screw to make the offender choose the lesser of the two evils.

441. Meaning of Words.—"*Of an offence*": The word "offence" here means anything punishable under the Code or any special or local law.[2] "*Punishable with imprisonment as well as fine*": The words "as well as" are ambiguous. For they may either mean "imprisonment and fine" or "imprisonment *or* fine," though in reality they are intended to cover both.[3] Ordinarily, however, the phrase is used only in the first sense and not in the wider sense which has here become necessary by reference to the concluding words "in which the offender is sentenced to a fine whether *with or without* imprisonment," which refers to a case in which imprisonment is either superadded or is awarded as an alternative. "*It shall be competent*," *i.e.*, it is permissive but not imperative.[4]

442. Imprisonment in Default.—This section confers the general power on Courts to award the sentence of imprisonment in default of fine. The cases contemplated by the section are as follows:—

where the offence is punishable with—		*the offender is sentenced to*
(*a*) imprisonment *with* fine; or (*b*) imprisonment *or* fine; or (*c*) fine only	*and*	(*i*) imprisonment; or (*ii*) fine; or (*iii*) both.

the Court may sentence the offender to a term of imprisonment in default of the payment of fine. As the term "offence", as used in this section, means not only an offence punishable under the Code, but also an offence punishable under any special or local law,[5] it follows that the section is equally applicable to all offences whether committed under the Code or under any special or local law. (§ 439)

443. As observed before, the provisions of this section are permissive, and it is not obligatory on the Court, in every case, to award an alternative sentence. The Courts, sometimes, consider it incumbent upon them to pass such a sentence even in view of the fine forthcoming, but this is an erroneous procedure, and one which serves no useful purpose.

444. It will be observed that the section excludes cases, in which the only sentence is death or transportation. This is not because, in such cases, the Code does not prescribe the sentence of fine, but because the Legislature regards in them the added sentence of imprisonment as inexpedient.

The next section prescribes the limit to imprisonment for non-payment of fine.

Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.[6]

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(1) *Mitra*, 58 C. 1293. But nevertheless, in a case decided since the amendment, this section has been held to be inapplicable to mere technical offences such as those created by the Municipal and other similar Acts. *Basanta* v. *Corporation*, 15 C. W. N. 906; 11 I. C. 143; but this section is permissive merely and not mandatory. *Cf. Lakmia*, 18 B. 400.

(2) S. 40.

(3) *Yakoob Sahib*, 22 M. 238· *Darba*, 1 A. 461, F. B.; *Tirumalai*, (1894) 1 Weir 31; *Nga Myaing Gyi*, (1898) P. J. L. B. 494.

(4) *Beni Pershad*, (1878) P. R. No. 30: *Anon*, 1 Weir 31; *Cf. Lakmia*, 18 B. 400.

(5) S. 40; but see *Puna Luxman*, 6 Bom. L. R. 357; L. B. R. (1872-1892) 473; *Vaidyalingam*, B. U. C. 871; *Nga Tun Hlai*, U. B. R. (1897-1901), Vol. I, p. 221.

(6) *See* § 422.

445. Analogous Law.—This section remains exactly as it was originally drafted.[1] It is qualified by section 33 of the Code of Criminal Procedure.

446. The provisions of this section and those of s. 67 have been held to be equally applicable to punishments under special laws like the Bombay Gambling Act.[2]

447. Principle.—The principle of this section, as explained by the Law Commissioners, is that the punishment provided by it is in default of payment of fine and not in lieu thereof; in other words, the imprisonment does not satisfy the fine, which still remains due in spite of the imprisonment. The Commissioners thought that this was not a hardship, because the prisoner had the option of averting imprisonment by satisfying the fine, and, if he undergoes it, it is not more than a "reasonable punishment for his obstinate resistance to the due execution of the sentence."[3]

448. Meaning of Words.—"*The Court directs*," *i.e.*, may direct (s. 64). "*In default of payment of fine*," means failure to pay, not that it amounts to payment; (§ 447) on the other hand, when a portion of the fine is paid the offender is entitled to a proportionate reduction of the imprisonment (s. 69). "*Which is the maximum fixed for the offence*" apart from the enhanced punishment to which the offender may be liable under s. 75 *post*. The word "offence" here means anything punishable under the Code or under any special or local law.[4] *Punishable with imprisonment as well as fine*": The sense of the phrase "as well as" has been explained under the last section (§ 441). The section applies to cases both in which the sentence of imprisonment is compulsory, and where it is passed in default of fine. The only case not included in the section is the case dealt with in s. 67, in which the sentence passed is of fine only.[5]

449. Fair Term of Imprisonment.—This section prescribes the *maximum* period of sentence to which an offender may be sentenced under this section. It does not prescribe any inflexible rule, nor does it even attempt to lay down any general rule which the Court may follow in awarding imprisonment for non-payment of fine. But it is clear that the term of imprisonment in default of payment of fine should bear a reasonable proportion to the amount of the fine, regard being had to the circumstances of the convicted person.[6] The fact that one-fourth of the sentence is the utmost limit should be also the invariable rule. The maximum is fixed so that it may not be exceeded. Where, for instance, in a case of assault under s. 352 the offender was fined Rs. 50, he could not be sentenced to a month's imprisonment, for that period would exceed one-fourth of the maximum period of three months, the imprisonment prescribed for the offence.[7] Now, as under the scale provided by s. 67, the offender would have been, in such a case, liable to undergo simple imprisonment up to two months, if the offence had been punishable with fine only, it follows that the offender may conceivably get a shorter term in a more serious offence and a longer term in a less serious one,[8] and this is an anomaly for which there is no justification. It would, therefore, be the duty of the Court to be more discriminating in its application of these sections which are not the best possible, though they are undoubtedly the best the Legislature could provide.

450. As the only alternative sentence that the section provides is that of imprisonment, the Court cannot pass a sentence of transportation, for which s. 59 lends no countenance. So for the purpose of magisterial jurisdiction, the alternative sentence authorized by this section is not to be reckoned as a part of the

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(1) Cl. 52, Draft Bill.

(2) *Radho*, 91 I. C. (S.) 394; (1926) S. 144.

(3) Note A, Reprint, pp. 98-200. These views were generally concurred in by the Law Commissioners in their 2nd. Rep., ss. 489-494.

(4) S. 40, *ante* but see *Klawa*, S. C. 175 (Oudh).

(5) *Chunder Prashad Sing*, 10 W. R. 30.

(6) *Nga Cho*, (1885) S. J. L. B. 353.

(7) *Jehan Buksh*, 16 W. R. 42; *Darba*, 1 A. 461, F. B.; *Venkatesagadu*, 10 M. 165 (167), F. B.; overruling *Muhammad*, 1 M. 277.

(8) *Darba*, 1 A. 461, F. B.; L. B. R. (1872-1892), 364; *Ah Hein*, (1893-1900), 385; *Bhiharao*, B. U. C 979.

substantive sentence. But the powers of the Magistrates in this respect are defined by the Code of Criminal Procedure, to which reference has been made elsewhere (§§ 445, 446). The result of that provision, taken with this section, is that where a Magistrate only fines a person for an offence punishable with imprisonment as well as fine, he is competent to award an alternative sentence up to the extent of his power, provided that it does not contravene the rule of this section. Thus, suppose that in a case of theft under s. 379 of the Code convicted by a Magistrate of the first class, the offender is sentenced to mere fine. Now, the utmost sentence of imprisonment which he can pass in default of payment of the fine is under this section one-fourth of the maximum term of three years provided by that section, *i.e.*, 9 months. Now suppose, in the same case, if the sentence passed was one of imprisonment with fine, then, though *this* section would make no difference in the alternative sentence, yet the passing of that sentence would contravene s. 33 of the Procedure Code under which, in a case of such combined sentences, the maximum sentence in lieu of fine, which a Magistrate is empowered to pass, is not one-fourth of the sentence prescribed by the offence, but one-fourth of the sentence which the Magistrate is empowered to pass, *i.e.*, 6 months. The two sections, thus, do not always act in unison, but the Court has to see that, in complying with one, it does not contravene the other.

451. Since the offence of bribery is punishable with 3 years' imprisonment, an offender convicted on three counts might be sentenced to 18 months' further imprisonment, *i.e.*, six months under each count in default of payment of fine.[1]

Description of imprisonment for non-payment of fine.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.[2]

452. Analogous Law.—The word "offence" as used in this section denotes anything punishable under the Code or under any special or local law.[3]

453. Nature of Alternative Imprisonment.—This section enables the Court to award any kind of imprisonment, whether rigorous or simple, in default of payment of fine, provided that such imprisonment was allowable as a substantive imprisonment under the section. Consequently, where the sentence of rigorous imprisonment is the only sentence affixed to an offence, the Court cannot award simple imprisonment in default of fine.[4] In other cases it has a discretion.

Imprisonment for non-payment of fine when offence punishable with fine only.

67. If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

454. Analogous Law.—This section corresponds with s. 54 of the draft Code, but it was modified before its enactment, and it has since been amended by the addition of the words "the imprisonment which the Court imposes in default of payment of the fine shall be simple, and."[5] This amendment was anticipated by the Bombay High Court, which commented on the ambiguity of the section as it was then worded, and altered the sentence of imprisonment in default of fine from rigorous to simple.[6] The section has been modified as regards hill tribes affected by local Regulations.[7] It is further affected by s. 33 of the Code of Criminal

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(1) *Harsukh Rai*, (1919) 3 P. W. R. 3.
(2) *See* § 422.
(3) S. 40.
(4) *Shimonto Kotal*, 7 W. R. 31; *Nga Paw*, L. B. R. (1893-1900) 281.
(5) Act VIII of 1882, s. 3.
(6) *Santu*, (1868) 5 B. H. C. R. 45.
(7) Kachin Hill Tribes Regulation (Reg. I of 1895), s. 1 (3), and 3 Chin Hills Regulation (Reg. V of 1896) s. 3.

Procedure which has been set out under s. 65 (§§ 445, 446). This section is complementary to s. 65, as it deals with the cases not provided for in that section, namely, those in which the only sentence prescribed is that of fine. It lays down the equivalent maximum imprisonment that the Code is empowered to award in default of the payment of fine. This power is independent of, and unlimited by, the power of the Magistrate on summary trials,[1] so that, while a Magistrate, on a summary trial, cannot sentence an offender for a term exceeding 3 months, still, where he merely fines him, he may exceed that limit in sentencing him to an alternative imprisonment under this section.[2] But, in awarding the sentence of imprisonment under this section in default of the payment of fine, the Magistrate cannot exceed the term to which, in the exercise of his ordinary jurisdiction, he is entitled to sentence an offender.[3] As the maximum term of sentence, that may be passed under this section, cannot exceed 6 months, a first and second class Magistrate may pass a sentence up to that limit, but, inasmuch as a third class Magistrate cannot pass a sentence for more than one month, he cannot pass a longer sentence, though allowable under this section, for, it would be opposed to s. 33 of the Procedure Code. Of course, though a Court may, under this section, award imprisonment in default of payment of fine, it cannot be *levied* by imprisonment,[4] where imprisonment has not been awarded as an alternative sentence.

455. Principle.—This section refers only to an offence for which fine is the only punishment. It has no reference to offences punishable either with imprisonment or with fine, the sentences in which would be regulated by s. 65.[5]

Imprisonment to terminate on payment of fine.

68. The imprisonment, which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.[6]

456. Analogous Law.—The process of law under which fine may be levied is to be found in ss. 386 and 389 of the Criminal Procedure Code.

457. Principle.—This section subordinates imprisonment to fine. Such, indeed, was the intention of the sentence, and so it is provided in the next section that even if the accused pays a portion of the fine, he is entitled to a remission of his proportionate imprisonment.

Termination of imprisonment on payment of proportional part of fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.[7]

Illustration.

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, *A* will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time, while *A* continues in imprisonment, *A* will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, *A* will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while *A* continues in imprisonment, *A* will be immediately discharged.

458. Principle.—Though this section enacts in favour of proportionate remission of imprisonment on payment of a proportionate part of fine, still it confers

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(1) *Asghar Ali*, 6 A. 61.

(2) S. 262 (2), Cr. P. C

(3) *Darba*, 1 A. 461, F B.; *Asghar Ali*, 6 A. 61; *Venkatessagadu*, 10 M 165, F. B.

(4) *Paryag Rai* v. *Arjun Mian*, 22 C. 130; *Murad Ali*, 40 P. R. 1880; *Nga Kywe*, 4 L. B. R. (1872-1892) 410. Ss. 67, 68, 69, apply to the Madras Harbour Trust Act (Mad. Act II of 1886). In the case of hill tribes, to which the Kachin Hill Tribes Regulation (I of 1895) is applied, *the scale of punishment is different*, *See*, also, Chin Hills Regulation V of 1896, s. 3. (*See* foot-note 7 on p. 237).

(5) *Yakoob Sahib*, 22 M. 238.

(6) *See* § 422.

(7) *Ib.*

on the Court no power to refund the fine if the necessary remission earned has not been made owing to an error in not communicating the order to the jailor,[1] though in such a case, the prisoner may apply to the Government for refund of the fine so paid. It is, however, the duty of the Court to order release of the prisoner as soon as the terms of this section have been complied with. And when a fine is imposed in addition to transportation, and the whole or part of the fine is levied, it is the duty of the sentencing Judge to inform the authorities at Port Blair of the fact.[2]

Fine leviable within six years, or during imprisonment.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

459. Analogous Law.—This section was framed on the analogy of the procedure adopted for the recovery of debts in civil cases. As the imprisonment of the debtor does not absolve him from the payment of his debt,[3] so, it was said, should the imprisonment of a convict, whose case is worse and not better than that of a judgment-debtor, not absolve him from the payment of the fine.[4]

460. Principle.—This section enacts a rule of limitation, regarding the period within which fine may be recovered. The period of six years follows the English law of limitation for recovery of debts, while the provision that fine remains recoverable out of the assets of the deceased offender follows the principle of civil law applicable to debts. It will be noticed that this debt, though a Crown debt, is not the first charge upon the assets of the deceased.[5]

461. Procedure for Recovery of Fine.—This section is really a proviso to ss. 64 and 67, for, while these sections provide for alternative imprisonment, this section provides that the imprisonment so awarded and suffered will not absolve the offender from payment of the fine, which still remains due, and which may be recovered within six years of the sentence, or thereafter before expiry of his substantive imprisonment, if the offender be sentenced to more than six years' imprisonment.[6] This means that the limitation fixed by law for recovery of the fine is six years, within which it is competent to the Court to recover it. Such fine may be recovered from the moveable or immoveable property of the convict. The Code of Criminal Procedure provides for its recovery both out of the moveable and immoveable property of the defaulter.[7] In any case, the limitation applicable is six years, after which the offender's property cannot be proceeded against, though there being no limitation for his personal arrest, his liability to imprisonment awarded in default of payment of fine continues irrespective of time. Indeed, such imprisonment is not a satisfaction of the fine, but is a punishment for contempt.[8] The fine inflicted may, therefore, be recovered even though the offender may have served out the alternative imprisonment, and his liability does not even cease with his death. For, on his death, the fine may still be recovered from any property "which would, after his death, be legally liable for his debts." The effect of this clause is to make the unpaid fine rank as a Crown debt *pari passu* with the other debts of the deceased offender. The question as to what property of the deceased is so liable is a question the determination of which depends upon the personal law of the deceased and the civil liability of his estate to discharge his debts. It may, however, be added that, but for this clause, it would not have been always possible for the Crown to recover fine from the estate of the deceased offender. For instance,

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(1) *Nathu Mula*, 4 B. H. C. R. 37.
(2) 5 M. H. C. R. (App.) 44.
(3) S. 58, C. P. C
(4) Note A. Reprint, p. 100; *Sagwa*, 23 A. 497.
(5) Note A, Reprint, p. 100.
(6) *Fanthome*, (1882) A. W. N. 85; *Maya Dewji*, B. U. C. 40.
(7) S. 386, Cr. P. C. overruling *Sita Nath*, 20 C. 478.
(8) *Ganu*, (1884) B. U. C. 207; *Moodsoodun*, 3 W. R. 61; *Sagwa*, 23 A. 497.

in the case of a Hindu convict, the sons might have repudiated the debt as illegal and immoral and therefore, irrecoverable out of the family estate. In any other case, the liability might have been considered as only personal, ceasing with the death of the offender. The liability declared by the clause obviates such questions. It does not, however, create a charge on the offender's estate. There is, therefore, no case of special priority or enlarged limitation.

462. Though the imprisonment awarded in default of payment of fine does not absolve the convict from the payment of fine, still it counts as a sentence, and the Court has, therefore, to see that reducing the sentence of imprisonment and substituting therefor the sentence of a fine, has not the effect of enhancing the sentence as a whole. Where, for instance, the Magistrate had in case of cheating under s. 420 sentenced the accused only to a sentence of six month's imprisonment, and on appeal the Sessions Judge reduced the imprisonment to four months, but added a fine of Rs. 100, or in default of payment, two months' further rigorous imprisonment, it was held that the effect of the sentence on appeal was really to enhance it, for the accused may conceivably have to remain in prison for six months, and yet remain liable to pay the fine.[1] The mere fact that the fine is written off as irrecoverable is, subject to the limitation of six years, no bar to its subsequent recovery by coercive process of law, if it appears that the person from whom it was due has acquired means to pay it. As the section provides a special limitation for the recovery of fine, it cannot be further enlarged by acknowledgment or part-payment under the general law of limitation.[2]

Limit of punishment of offence made up of several offences.

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.[3]

Illustrations.

(*a*) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(*b*) But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*.

[*Offence*—s. 40.]

463. Analogous Law.—The last three clauses of this section are new and were added by the Penal Code Amendment Act of 1882.[4] The provisions of this section are closely analogous to those of s. 26 of the General Clauses Act[5] and of ss. 35 and 235 of the Criminal Procedure Code.

English Practice Compared.

464. Under English law, a person cannot be tried for two offences committed in the same transaction on the ground of unfairness to him in that it would amount to the giving of evidence of his bad character, and otherwise embarrass him in the defence.[6] This section, as well as s. 235 of the Criminal Procedure Code, adopt a rule more

(1) *Sagwa*, 23 A. 497.
(2) *Latiful Hasan* v. *Mumtz Ai*, 3 A. L. J. 818.
(3) *See* § 422.
(4) Act VIII of 1882, s. 4.
(5) X of 1892.
(6) *Castro*, 6 App. Cas. 229 (244.)

favourable to the accused, though this section merely provides for limiting the punishment in cases covered by it. As such, it provides only a penalty for a single offence under the law, and in so doing, recognizes the rule of Roman law, followed in many cases decided under the English law.[1] It is a recognition of the maxim, *nemo debet bis punire pro uno delicto*.[2]

465. The word " offence " is used in the section in its wider sense, as meaning anything punishable under the Code or any special or local law.[3]

466. Principle.—The object of the section is to confine punishment within reasonable limits. It is based on the rule that where the intention was to commit an offence, the commission of which involves the perpetration of acts, by themselves punishable, the offender shall not be punished for them separately, as his object was to commit one crime and not many. Moreover, if in such a case, every criminal act, however subservient to the main design, were penal, there would be no end to punishment, and the most trivial act might thus be magnified into offences, the punishments of which might be wholly disproportionate to the nature and gravity of the act accomplished. As both this section, as well as the two corresponding sections of the Procedure Code, are directed to this end, and as the two Codes approach the same question from a different standpoint, it is necessary to see how far the provisions of the one Code are affected by the corresponding provisions of the other.

467. It will be observed that the two sections of the Procedure Code do not profess to modify any part of this section, which has, therefore, to be first considered, and which again would prevail in case of conflict with them.

468. Meaning of Words.—" *Where anything.....is made up of parts* ": These words are general but mean where several acts constituting an offence are, taken singly, themselves offences. " *Of any law in force* ": *i.e.*, the same or separate laws.[4] " *The offender shall not be punished* ": Not that the offender commits no offence, but only that he cannot be so convicted, for if he is convicted, he will also have to be punished.[5] " *Unless it be so expressly provided* ": This makes it subject to an express direction to the contrary. The provision for separate punishments must again be something more than a mere fact that the act is punishable in law. It must be a direction sufficiently explicit to override the rule. " *Constitute an offence,*" *i.e.*, as defined in the Code. In the words of Mahmud, J., these words must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved.[6]

469. The section now deals with three specific cases: (*i*) Where a number of acts are committed, all of which are offences, both collectively as well as individually, in which case the author may be punished for any one of them or all collectively, but he cannot be punished for all the acts severally; (*ii*) where of such several acts, they not only individually constitute separate offences, but also constitute a different offence, when two or more of them are combined, then the offender can only be punished for any one of such offences, and not both[7]; (*iii*) where an act is penal under two or more Acts, the offender cannot be punished under each of them, for otherwise he would be punished several times over for the same act.[8] The section thus provides for (*a*) the plurality of acts (cl. 1), (*b*) the plurality

(1) *Moodie*, 1 M. & R. 128; *Berry Henderson*, L. R. 5 Q. B. 296 (302), followed per West, J., in *Dod Basaya*, 11 C.H.C.R. 13.

(2) " No one shall be twice punished for the same offence."

(3) S. 40, *Mhd. Ali Khan*, 55 A. 557.

(4) *Cf.* S. 26, General Clauses Act (X of 1897). *Rahamatulla*, 1 Pat. L. J. 373, 38 I. C. 438; *Kiamuddi*, 51 C. 79.

(5) " *Ubi jus ibi remedium* " (where there is a right there is also a remedy)—*Wazir Jan*, 10 A. 58; 4 M. H. C. R. (A p.) 27; but findings should be recorded on all counts, though punishments should be awarded as here directed—6 M. H. C. R. (App) 47.

(6) *Wazir Jan*, 10 A. 58 (69).

(7) Cl. 3.

(8) Cl. 2; *Lalamun Singh*, 1 Agra 31; *Rahmatulla*, 1 Pat. L. W. 349, 38 I. C. 433; *Sukhnandan Das*, 43 I. C. (Pat.) 445; *Bhagat Singh*, (1930) L. 266. *Anant Narayan*, (1933) M. 337.

of aspects (cl. 2), and (*c*) the organic connection of acts with a result differing from the elements (cl. 3).

470. Referring now to s. 35 of the Code of Criminal Procedure, it would be observed that that section was amended in 1923 [1] and the word "*distinct*" deleted. The effect of the amendment is that it is not necessary that the offences should be distinct in order to enable a Judge or Magistrate to pass consecutive sentences subject to s. 71 of the Penal Code. The combined effect of these two sections would be, that if a case falls under s. 71 of the Penal Code the Court cannot award a severer punishment than it could, for any of the offences, constituting component parts of the main offence.[2] Now if we turn to section 235 of the Procedure Code, cases occur in which the plurality of sentences, though legal under that section, would be illegal under the rule here enacted. But in such case, the Procedure Code yields to the rule of the section, which is paramount wherever its principle collides with the Procedure Code. Indeed, the two Codes provide two different rules intended for two different purposes. As was observed by Muttuswamy Ayyar, J., section 234 of the Procedure Code provides rules of criminal pleading only, the rules for assessing punishments being provided by this section supplemented by section 35 of the Procedure Code.[3] In other words, the combined effect of the three sections is that while it is legal under the Code of Criminal Procedure that the accused should be tried for more than one offence, whether they are parts of a greater or another offence or not, but in awarding punishment the provisions of this section shall be observed. There is thus no conflict between the three sections, and cases which note a conflict are cases in which this difference has been overlooked.

471. It will thus be evident that while there is no objection to several such offences being charged with and tried together, the Code limits the punishment to which the offender may be sentenced on conviction. It may, however, be noted that while section 235 of the Procedure Code speaks of the person accused being "charged with and tried," the illustrations all refer to cases in which the person accused may not only be charged with and tried but also *convicted* of separate offences. The conflict, if any, must then be with these illustrations and the section.

472. Test of Criminality in Complex acts.—This section lays down the true test of criminality in complex acts resulting in complex offences, in which the elementary acts are themselves complete offences as understood in section 40. The section enunciates the rule in which the Code authorizes the passing of a single sentence. But if this were all, all difficulties would have been reduced by reference to it, and in cases howsoever complicated and transactions howsoever long, the sentence would be as for one offence committed. That this was not the object of the Legislature is evident from the enactment of section 235 of the Procedure Code in which more than one offence are contemplated and made penal. The illustrations appended to this section then comprise cases which the Legislature had intended to exclude from the operation of the rule. These offences are ordinarily those committed in the same transaction, in which case the several offences committed are treated as independent offences.

473. The thirteen illustrations appended to section 235 of the Procedure Code are cases in which the Legislature saw no objection to the separate conviction of the offender. These cases furnish an apt contrast to the two illustrations appended to this section. Take, for instance, the first illustration of the two sections : A person rescues another from lawful custody. It is an offence complete and entire by itself. He is resisted by the custodian who is thereupon grievously wounded.[4] Now, since the wounding of the custodian was not a part of the offence of rescuing a person from lawful custody, the offender may be not only tried but also punished for the two offences. But suppose that the person rescued was recaptured by the constable,

(1) Offences in the Same Transaction.

(1) Act XVIII of 1923.
(2) *Hamma Timma*, 30 Bom. L R. 383.
(3) *Nirichan*, 12 M. 36.
(4) S. 235, ill. (*a*), Cr. P. C. ; of this section, ill. (*b*).

and the rescuer thereupon made another effort to rescue him with success. Here, since the second rescue was a part of the same intention in pursuance of the same design, the offender could not be convicted as for two offences to rescue a person in custody. So where a person breaks into a house, and removes property which happens to belong to several persons, he is guilty of only one offence, and not of as many offences as there are owners.[1] Where a gang of dacoits, in pursuance of the common object of robbery, attacked at the same time two houses of different owners in the same village, it was held that they could only be convicted of one offence of dacoity and not of two offences because of the two houses robbed.[2] For the same reason there could be only one conviction of a guard in charge of a goods train for robbery of peoples' goods from separate bags in a truck.[3] In such cases, the rule applicable appears to be this, that if the property, which it was the thief's intention to take, was lying handy so as to be available by one act of trespass, or which was so seized, then the moving of each article in the course of removal of the whole bulk of property cannot ordinarily be considered to be a distinct theft. The theiving project in such a case was single, although it may have been achieved in detail, and the fact that the spoil taken consisted of several things, whether belonging to the same or to different owners, does not necessarily break up the unity of the transaction. If, on the other hand, the property taken consisted of a number of articles so distinctly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must be ordinarily held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.[4] So if a person at one time criminally intimidates three persons, he has been held to commit three separate offences, and not merely one,[5] but it may not always be so.[6] So where the accused had abetted two persons to commit criminal breaches of trust he was rightly held liable to suffer the penalty for committing two offences.[7]

(2) Unity of Intention.

474. The unity of offences thus depends upon the unity of transaction as well as upon the unity of intention. Thus, suppose a thief goes to a threshing-floor where the grain of several cultivators is stored, and steals a little from every heap. Here it is plain that there was presumably but one act of thieving accomplished through one and the same trespass, unless it appears that he had distinct designs against the several owners. Such, however, will be the presumption in a case where the thief picks the pockets of several persons in a crowded place,[8] or where he breaks into three houses and steals property therefrom.[9] These and similar cases are thus subject to the rule that where there is a unity of intention, and the acts constituting the offence are founded on one single continuous transaction, there should be only one conviction,[10] though the offences may be several and distinct. So where a person breaks into a house with intent to commit theft, and does commit theft, the question at one time was whether he had committed two offences, or only one, and the Courts were by no means agreed.[11] It has, however, been now settled by the Legislature that in such a case he commits only one offence.[12] And this was the view current under the Procedure Code of 1872.[13]

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(1) *Shaikh Moneah*, 11 W.R. 38, followed in *Krishna*, (1897) B. N. J. 927; *Nga Po*, (1882) S.J.L.B. 168; *San Hla*, (1889) S.J.L.B. 475.

(2) *Nga San Dan*, (1889) S. J. L. B. 444; (followed in L. B. R. (1872-92), 475.

(3) *Har Dial*, (1905) P. R. No. 58.

(4) *Ali Mahomed*, 1 I. C. (C.) 335.

(5) *Goolzarkhan*, 9 W. R. 30.

(6) L. B. R. (1872-1892) 492.

(7) *Babujan (Sheikh)*, (1923) Cal. 403.

(8) C. P. Cr. C., Pt. 2, No. 20.

(9) 4 M. H. C. R. (App.) 27.

(10) 6 M. H. C. R. (App.) 47.

(11) The view taken in Calcutta was that in such a case there could be only one conviction—*Tunaokoch*, 2 W. R. 63; *Chytun*, 5 W. R. 49; *Nobo Pullee*, 6 W. R. 49; *Mussahur Daoudh*, 6 W. R. 92; *Sahroe*, 8 W. R. 31; *Ramcharan*, (1866) B. L. R. (Sup. Vol.) 488, F. B.; *contra* in *Tincouree*, (1864) W. R. 31. But the other three Courts had dissented from this view—*Anwarkhan*, 9 B. H. C. R. 172; *Tukaya*, 1 B. 214; 4 M. H. C. R. (App.) 37; *Daulatya*, 3 A. 305; *Zor Singh*, 10 A. 146; but the Calcutta view has since been accepted by the Legislature, s. 35, ill., Cr. P. C.

(12) S. 35, ill., Cr. P. C.

(13) *Anwar Khan*, (1872) Bom. (unrep.) Rul., 23rd May; *Govinda*, (1873) B. U. C. 79; *Noujan*, 7 M. H. C. R. 375.

(3) Proximity of Time and Similarity of Action and Result.

475. The question whether certain acts are the component parts of the same offence, depends upon whether the several acts were or were not a part of the same design, which again depends no less upon the proof of circumstances evidencing intention as upon the interval of time and place by which[1] the several acts are separated. If suppose that in the above illustration of house-breaking and theft, a burglar had broken the house, but was scared to flee. He, however, returned afterwards the following night and committed the theft. Here the two offences were distinct, because they were severable and were committed after an interval of time. They would, therefore, be separately punished. So where four policemen were charged with ill-treating the complainant Hamma, his wife Mt. Rakhma, and his son-in-law Yellia during the course of a police investigation into a case of theft, the question was whether the several acts of ill-treatment, between the 5th and 18th January, 1889, constituted only one offence or several offences, it was held that the several acts of violence between those dates could be rightly recorded as constituting only a single transaction. But the ill-treatment of Mt. Rakhma in different places was not taken in the same light, nor was her wrongful confinement and hurt caused to her on a previous day held to be a part of the same transaction.[2] And even as regards Hamma, though the several hurts could be tried together, they were held to constitute separate offences.[3]

476. Proximity of time combined with intention and similarity of action and results are elements for consideration whether the acts alleged form the same transaction or not.[4] The utility of this principle as a test was well brought out in a case in which the facts were these. Four robbers waylaid a party of women and their attendants on a road leading from Batesar Fair at 8 p.m. with the object of robbery. Whilst the robbery was being carried out, a Chaukidar, attracted by the noise, ran up shouting : " Take care, I am coming." Upon this the four thieves ran up and hit the Chaukidar with sticks, fracturing his skull, from which he died. These men had committed another robbery on the same evening between 5 and 6 o'clock, on the same road, about three miles distant from the scene of the murder. They were, therefore, charged at the same trial for two robberies and murder, and the question raised on appeal was whether they could be so tried; it was held that they could not, because the three offences were not immediately connected with each other so as to be jointly triable.[5] In this case there was proximity of time and place, but no unity of intention, which is the reason for holding the joint trial of two riotous factions irregular though not illegal.[6] In such cases, the applicability of the section is out of question, for the three offences could not be regarded as parts of the same offence, and illustration (*b*) of the section excludes such cases from its purview.

Illustrative Cases.

477. But where the accused were convicted of wrongful confinement and assault, the facts proved being that they had seized, dragged and pushed the complainant to certain place in order to punish him, it was held that all the acts of the accused fell within the definition of wrongful confinement and assault, and that, therefore, the case fell within the second paragraph of this section.[7] But where a Head Constable falsely charged a person for gambling and supported his action by false evidence, the two offences were held to be distinct and by no means parts of each other.[8] This view follows an older case the facts of which are not reported, but in which Kemp and Glover, JJ., generally laid down that " the offence of making a false charge and the offence of intentionally giving false evidence in any stage of a judicial proceeding

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(1) *Nga Tha*, 15 I. C. 485.
(2) *Fakirapa*, 15 B. 491.
(3) *Ib.*
(4) *Per* Jardine, J., in *Vajiram*, 16 B. 414.
(5) *Mulna*, 14 A. 502.
(6) *In re Choragudi Rai Jagadish*, 15 C. W. N. 732, 5 I. C. 847 ; *Bazu*, 8 W. R. 47 ; *Surroop Chunder Paul*, 12 W. R. 75 ; *Chandra Bhuiya*, 20 C. 537. In *Bachu* v. *Sia Ram*, 14 C. 358, the Court, however, set aside the conviction ; but this view was not concurred in *Chandra Bhuiya*, 20 C. 537.
(7) *Fakira Khan*, 19 C. W. N. 181.
(8) *Pir Mahomed*, 10 B. 254 ; *Balwant*, 14 B. L. R. 41.

are not cognate offences, nor are they parts of one and the same offence."[1] So, again, it has been laid down by the same Court that the offence of kidnapping and the offence of selling for the purpose of prostitution are distinct and separate offences, for it does not follow that because a person entices away a minor under the age of 16 years out of the keeping of her lawful guardian, it is necessarily with the intention of selling her for the purposes of prostitution.[2]

478. Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, and goes to form part of that offence and is not done with an intention or object which can be separated fron the general intention to kidnap, it will constitute an integral part of that offence, and should not form the subject of a separate conviction and sentence.[3] So where certain emigration agents induced two persons to leave their home on the pretence of obtaining service in India, and go to Azamgarh and thence to Ghazipur, the real intention being to ship them off as emigrants to Demerara or Trinidad, and with that object they were confined in the two cities for a number of days, upon which they were prosecuted for wrongful confinement and attempted kidnapping, it was held that inasmuch as the wrongful confinement was in furtherance of the attempt to kidnap, and was in fact a part of that offence, and as it was not done with any intention or object which could be separated from the general intention to kidnap, it was a part of that offence and could not be the basis of an additional conviction.[4] So where a Brahmin enticed away a girl of 11 years and sold her to one Bissessur, to be married to his son, where she remained two days, after which she was taken to a relative, where she remained a month, after which she was transferred to other places till the police rescued her, and prosecuted the Brahmin and Bissessur along with others, the former, for kidnapping (s. 363) and kidnapping a woman for forcible marriage (s. 366), it was held that they could not be convicted under s. 366,[5] but probably it would have been more correct to say that though they were rightly convicted under s. 366, they could not be convicted under s. 363.

479. The same rule cannot, however, be extended to offences under ss. 363 and 372, the latter of which is distinct from kidnapping, and is as such, separately punishable.[6] On the other hand, where the prisoner, being found guilty of kidnapping a child with the intention of robbing it, was convicted both under s. 363 as well as s. 369, it was held that the conviction under s. 363 could not be sustained, as an offence under that section was included in that described in s. 369.[7] So where a Sessions Judge had directed the commitment of the accused for adultery (s. 497) after the accused had already been convicted on a charge of enticing away (s. 498), the High Court held that if the committal was considered necessary, the Judge should have annulled the accused's conviction for adultery, for there could not be two convictions on the same collection of facts, the requisite intention in the one case being the substantive delict in the other.[8]

480. In fact, where the offence is one, it does not matter what means are employed to commit it. Where the accused was convicted of criminal intimidation under s. 506, a conviction under s. 507 could not be superadded to the intimidation on the ground that the accused had posted up an anonymous communication against the same person.[9] Where a person is charged with giving false evidence, a number of lies in a continuous deposition only constitute one piece of false evidence, though the same lie in two depositions would constitute, and be punishable as, two distinct offences.[10] The double conviction of the accused for trespass and rape has been justified on the ground that one offence was not involved in the other,[11] but presumably no rape in that case was possible without trespass. There is, of course, nothing in this section to preclude the Court from convicting the offender for two or more

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(1) *Abdool Azeez*, 7 W. R. 59.
(2) *Doorga Doss*, 7 W. R. 104 (Rev. p. 68).
(3) *Mangroo*, 6 N. W. P. H. C. R. 293.
(4) *Ib.*
(5) *Isree Panday*, 7 W. R. 56.
(6) *Doorga Doss*, 7 W. R. 104 (Rev. p. 68).
(7) *Po Lan*, 6 Bur. L. J. 77, 19 I. C. 167; *Shama Sheikh*, 8 W. R. 35.
(8) 5 M. H. C. R. (App.) 16.
(9) *Zora*, 4 B. H. C. R. 12.
(10) *Castro* v. *Q.*, 6 App. Cas. 229.
(11) *Kanchan Molla*, (1924) C 1015.

offences if they are distinct and separately punishable under the Code. Such is, for instance, the offence of kidnapping and rape,[1] house-breaking at night with intent to commit theft punishable under s. 457 and theft as a distinct offence punishable under s. 380.[2] But for the same reason a man cannot be awarded consecutive sentences under s. 394 and s. 397, though preparation (s. 399) and assembling (s. 402) for the purpose of committing dacoity, being separate offences, would be punishable as distinct offences.[3]

Theft and Receiving.

481. The offences of possessing stolen property under s. 411 and of voluntarily concealing the same property under s. 414 have been held to be identical for the purpose of punishment, the reason given being that s. 414 applies only when there has been no actual receipt of the stolen property and the act of concealing, or assisting in concealing stolen property, does not aggravate the offence of receiving it, the acts of the person being throughout parts of one single continuous transaction.[4] So where a person has obtained property by a criminal breach of trust, he may be convicted for that offence, but he cannot at the same time be convicted also for receiving or retaining stolen property under s. 411, for a person cannot be said to receive or retain stolen property which he had already stolen himself, by getting possession of it by committing a criminal breach of trust. Section 411 applies to a person who receives dishonestly property that has been stolen, or who, after it has been stolen by some means or other, obtains control over it, as for instance, if it is brought to his house, and he, knowing it to have been acquired by theft, retains it. Where, therefore, the attributes of "stolen property" only became attached to it by the fact of misappropriation, it could not be said to have been stolen when it was received by him.[5] In other words, the property was not stolen property when the prisoner received it; it became so as soon as he had committed its misappropriation. As possession was necessary for misappropriation, the one was a part of the other and could not be otherwise treated. So, a person cannot be convicted of using certain forged documents under s. 471, and of having them in his possession with intent to use them under s. 474; for "he could not well have used them unless he had them in his possession."[6]

482. But this reasoning would not hold good in a case where a zemindar employed one Bhagi to secrete stolen railway pins, in the fields and godown of his enemy Sedari for the purpose of implicating him as the thief. Here the zemindar had (*a*) secreted stolen pins and (*b*) he had by doing so fabricated false evidence against Sedari, and as the one act was no part of the other, though the two acts were done with the same intent, the accused was held to have committed two distinct offences and not only one offence under the Code.[7] In another case, the accused had cut down and appropriated a tree standing on Government land, whereupon he was convicted both of mischief (s. 425) as well as of theft (s. 379), and his conviction was upheld on the ground that the mischief was complete before the theft could have commenced.[8] But this case overlooks the fact that there could be no theft unless the tree was severed from the ground, and that as its severance was with the intention of committing theft,—an act necessary for that purpose, there could be no double conviction for mischief as well as theft. This, at any rate, was the view taken in two Calcutta cases in which mischief and theft were regarded as parts of one and the same offence.[9] And it is clearly the correct view.

483. Double Liability of Rioters.—This section prescribes a rule that in an offence, the several component parts of which themselves constitute different offences, the sentence should not exceed that prescribed for any one of them. But it naturally leaves the question what component parts constitute distinct offences to

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(1) *Ghulam Muhammed*, 7 L. 484.
(2) *Mamrez*, 89 I. C. (C.) 390.
(3) *Ghulam Rasul*, (1925) L. 819.
(4) 4 M. H. C. R. (App.) 13.
(5) *Shunker*, 2 N. W. P. H. C. R. 312; *Sheikh Mudun*, 1 W. R. 27; *Sreemunt*, 2 W. R. 63; *Seeb Churn*, 11 W. R. 12.
(6) *Nuzur Ali*, 6 N. W. P. H. C. R. 39.
(7) *Rameshar Rai*, 1 A. 379.
(8) *Narayan*, 2 B. H. C. R. 392.
(9) *Bichuk* v. *Auhuck*, 6 W. R. 5; *Sahroe*, 8 W. R. 31.

be determined by reference to other sections of the Code. Two such sections have given rise to some judicial conflict now sought to be reconciled by the amendment of s. 35 of the Procedure Code. The conflict relates to whether in a case of riot accompanied by the causing of hurt or grievous hurt the two constitute a single offence of riot or are a compound offence in which rioting and the causing of hurt or grievous hurt constitute distinct offences calling for separate sentences. The four sections germane to the discussion are sections 141, 149, 319 and s. 349. Section 141 "Fifth" provides that an assembly that does any of the acts mentioned in the section by means of criminal force is an unlawful assembly punishable under s. 143. Section 149 enacts a rule of constructive liability, and s. 319 includes in the definition of hurt the causing of bodily pain, while s. 349 defines criminal force in large terms and would include the causing of hurt, though in the punitive sections it is limited to common assaults. Now, if we take all these sections together their cumulative effect seems to be that the offence of rioting does necessarily postulate the use of some force, and that, therefore, where in such offence hurt is caused by a person or persons, unknown, the rioters cannot be separately convicted of the two offences of rioting and the causing of hurt, and it has been so held in some cases.[1]

484. But it is, of course, clear that where any of the rioters is found to have caused hurt, he becomes personally liable for his act, since section 149 has then no application, and it has been so held.[2] But on the first point the cases are, in spite of the amendment of s. 35 of the Procedure Code by no means unanimous, since some cases have held before the enactment and still continue to hold that since the use of criminal force does not include the causing of hurt a dual conviction even in those cases is legal, though the sentence must not exceed that prescribed for rioting as provided in this section.[3]

485. The difference between the two points of view depends upon the *quantum* of force included in s. 141. It is agreed on all hands that it does not imply the use of unlimited force or violence, *e.g.*, the causing of grievous hurt or death, though some cases go the length of including grievous hurt as comprised in s. 141; but in view of the amendment of s. 35 of the Procedure Code these cases should no longer be treated as authoritative.

486. Turning now to the amendment of s. 35 of the Procedure Code, its effect is to emphasize the control of this section in a conviction for two or more offences, not necessarily "distinct" as under the unamended section. This still leaves the main question still undecided.

487. There can be no doubt that the use of some force or violence is necessary to constitute rioting, and so long as it is limited to the extent the rioters had decided to use it or its members had anticipated that it would be used, the offence is a single one, and all would be equally liable for it.[4] But if the force or violence used is such as could have been never anticipated by the rioters then they could not be convicted of the offences so committed though they may be all guilty of rioting.[5]

488. The question then depends upon two other questions, namely, (*a*) what was the amount of force or violence used, and (*b*) could the rioters have foreseen it—both of which are questions of fact, and not of law. In case (*a*) the actual assailant may be convicted of a specific offence, committed on individual responsibility, if its commission could not have been foreseen by the rest. If it could have been,

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(1) *Nilmony Poddar*, 16 C. 442 F. B.; overruling *contra* in *Lokenath*, 11 C. 349; *Kiamuddi*, 51 C. 79; *Ponniah Lopes*, 57 M. 643; *Bajo Singh*, 8 Pat. 274; *Basiruddin*, 101 I. C. (C.) 660; *Amiruddin*, (1925) C. 217; *Harendra Barman*, (1931) C. 606; *Baradi*, (1909) 3 S L. R. 224.

(2) *Mohur Mir*, 16 C. 725; *Ferrasat*, 19 C. 105; *Ram Angutha*, 40 C. 511; *Kapil* v. *Rabhani*, (1925) C. 1039.

(3) *Bana Punja*, 17 B. 260 F. B.; *Malu*, 23 B. 706 F. B.; *Piru*, 49 B. 916; *Ram Sarup*, 7 A. 757 F.B. following *Dungar Singh*, 7 A. 29; followed in *Bisheshar*, 9 A. 645; *Wajir Jan*, 10 A. 58; *Sotha Valan* v. *Rama Kone*, 56 M. 481,

(4) *Ferrasat*, 19 C. 105 *Ramdarsan Mahton* (1929) Pat. 206.

(5) *Sothavalan* v. *Rama*, 56 M. 481.

they may be equally convicted with the actual offenders. In this view the construction of this section presents no difficulty. For the use of some force being a part of the offence of rioting, it cannot be separately punished; but as "the causing of grievous hurt or murder cannot be merely described as the use of force or violence," it is a distinct crime and, as such, separately punishable. And as the liability of aiders and abettors is, in this respect, subject to s. 149, co-extensive with that of the principal offender, it follows that if the knowledge of the commission of that offence could have been foreseen by the other rioters, they would then be equally guilty of it (§§ 281-285).

489. Same Facts constituting Different Offences.—The second paragraph deals with cases in which the same facts constitute different offences either under the Code or under different laws. Offences under ss. 143 and 146, 152 and 353,[1] or under 182 and 211 or under 417 and 420,[2] 323 and 324, 325 and 327, 394 and 397,[3] 435 and 436[4] are examples of such offences under the Code. In such cases the offence is one, though it is differently described, and consequently there cannot be a double penalty for one act[5] (§§ 477-480). There is a large number of offences described in the Code in which the principal offence is the same, but the presence of aggravating or extenuating circumstances requires enhanced or reduced punishment, which has led to the numerical multiplication of offences, but which are all related to the principal offence as genera and species. In all such cases, there cannot be two convictions but only one under the more appropriate of the two sections.[6] For when one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act unless there be in the mind of the offender a wholly separate intention. In some English cases, one act or set of acts of the accused person has been held punishable under two different statutes and a double conviction and sentence has been sustained.

Paragraph 2.

490. In such cases the intention of the Legislature is to guard two interests of different species, and to prevent the person, who has offended against both, from escaping with a penalty provided for the defence of one interest only. So where the accused were convicted for having climbed on to the foot of a warehouse,and set fire to it, with the intention of destroying it and its contents, the Court held that they could not be convicted on two counts, first under s. 436 of mischief in destroying a building used for the custody of property, and secondly under s. 435 of mischief by causing damage to property, to the amount of upwards Rs. 100, and it, therefore, set aside the conviction for the minor offence under s. 435.[7] So in another case, where the accused had been convicted of cheating both under ss. 417 and 420, the Court set aside the cumulative sentence under s. 420, holding that as the act was the same, the accused could not be subjected to a double penalty.[8] So where a mother killed her child by criminal negligence, she was held liable only under s. 304 and not both under ss. 304 and 317,[9] though in such a case a charge under both the sections would seem to be an appropriate one. As Straight, J., remarked: "The criminal exposure under s. 317 was the direct cause of the death of the child, and therefore the crime instead of stopping at s. 317, death being caused, took the more serious shape under s. 304. It was, of course, perfectly proper to frame a charge upon s. 317, because had any question arisen about the cause of death being the exposure, the transaction would have resumed its character under s. 317."[10] So, as the offence of unlawful assembly is included in the offence of rioting, there cannot be a conviction both under s. 143 and s. 146.[11] So there cannot be a double conviction for being in possession of implements and materials for the purpose of using the same for counterfeiting king's coin (s. 235) as well as for performing a part in the process of

(1) *Ferrasat*, 19 C. 105.
(2) *Francis Xavier*, (1890) B. U. C. 506.
(3) *Mamrez*, (1926) L. 47.
(4) *Dod Basaya*, 11 B. H. C. R. 13
(5) *Per* Lush, J. in *Berry* v. *Henderson*, L. R. 5 Q. B. 296 (302).
(6) *Dharm Deo Singh*, 35 I. C. (A.) 978.
(7) *Dod Basaya*, 11 B. H. C. R. 13.
(8) *Francis Xavier*, (1890) B. U. C. 506.
(9) *Banni*, 2 A. 349.
(10) *Ib.*
(11) *Meelan* v. *Dwarka Nath*, (1864) W. R. 7.

counterfeiting king's coin (s. 223),[1] or for counterfeiting king's coin ;[2] or culpable homicide (s. 304) as well as for being a member of an unlawful assembly armed with deadly weapons ;[3] for dishonestly receiving property (s. 411) as well as for assisting in concealment of stolen property (s. 414) ;[4] for abduction with intent to rob (s. 369) as well as theft from the person of a child so abducted ;[5] for house trespass and an attempt to murder by the trespasser ;[6] grievous hurt (s. 326) and dacoity with grievous hurt (s. 397) ;[7] of adultery (s. 497) as well as for enticing away for the purpose of illicit intercourse (s. 498) ;[8] for abetment of abduction of a woman (ss. 109 and 498) and for her wrongful confinement (s. 343).[9] For the same reason the Court quashed the double conviction for offences under ss. 354 and 506, holding that the intimidation by throwing a knife was a part of the assault complained of.[10]

491. Compound Offences.—The third paragraph deals with the plurality of acts, one or more of which are themselves criminal and which, when combined, give rise to a different offence, in which case also law limits the punishment to any one of such offences. So interpreting a similar clause in the old Procedure Code of 1872,[11] the Madras Court remarked, "Where several facts aggregated form one offence, and, if severed, constitute several, the offender may be charged with every offence committed, but the utmost punishment awardable is the extreme punishment for the concrete or for one of the separate offences."[12] There are many such offences in the Code. The case presented in the illustration to s. 35 of the Procedure Code, upon which the Courts at one time were divided, is an offence in point. There it is enacted that house-breaking with intent to commit theft (s. 457) and theft (s. 380) are two acts constituting one offence under s. 457,[13] but the two acts of house-breaking (s. 453) and theft (s. 380) are by themselves criminal though their combination produces an offence of a different kind (s. 457), which is distinct from the two offences of which it is made up. In such a case, the section declares that the punishment shall be in accordance with the last paragraph to be presently considered. The same rule applies to cases in which the same person is charged for abetment as well as attempt. So is a case where the accused was convicted of attempt to commit house-breaking by night (ss. 457 and 511), of receiving stolen property (s. 411), of abetment of his confederates in house-breaking by night (s. 109), and of being a member of an unlawful assembly (s. 143), the Court upheld the conviction only for attempted house-breaking, quashing the convictions under the other sections.[14] So a gang of dacoits cannot be convicted of dacoity as well as of abetment of it, in so far as they assist one another. An offence under s. 459, causing grievous hurt whilst committing house-trespass or house-breaking, is a composite offence, of which the elements are (*a*) house-trespass (s. 448), or (*b*) house-breaking (s. 453) and (*c*) causing of grievous hurt (s. 325 or s. 326). So s. 460 is made up of offences punishable under ss. 304, 325 and 456. Other illustrations could be easily multiplied were it necessary. But they all refer to offences in which the presence of some additional circumstance constitutes either a graver offence of the same kind, or a different offence altogether. The words "constitute an offence" as used in this paragraph refer to the definition of offences contained in the Code, irrespective of the identity or non-identity of the evidence whereby the several acts are proved.[15] So where a person falsely personated a public servant (s. 170) and using his position as such, committed extortion (s. 383 or s. 384), it was held that

Paragraph 3.

(1) *Hoyat*, (1905) P. R. No. 14.
(2) *Bishandas*, 71 I. C. (L.) 700.
(3) *Rubbeeoolah*, 7 W. R. 13.
(4) 4 M. H. C. R. (App.) 13.
(5) *Noujan*, 7 M. H. C. R. 375.
(6) *Barkat*, 60 I. C. (L.) 54.
(7) *Kottaigadu*, 30 I. C. (M.) 439; *Mabi*, 25 B. 706; distinguished in *Lab Singh*, (1923) Lah. 291.
(8) *Pochun Chung*, 2 W. R. 35.
(9) *Ishwar Chandra Jogee*, (1874) W. R. 21.
(10) *Nga Lu Nyun*, 4 Bur. L. J. 67, 10 I. C. 771.
(11) Act X of 1972, ss. 452, 456.
(12) *Noujan*, 7 M. H. C. R. 375.
(13) *Mahavir*, 1 Bom. L. R. 69; *Nag Pru*, (1886) S. J. L. B. 300. It was so held in the older cases; *Tunaokoch*, 2 W. R. 63; *Chytun Bowra*, 5 W. R. 49; *Nobo Pullee*, 6 W. R. 49; *Mussahur*, 6 W. R. 92; *Sahroe*, 8 W. R. 31; *Ramcharan*, 6 W. R. 39, F. B.; *Noujan*, 7 M. H. C. R. 375.
(14) *Fateh Khan*, 8 Bom. L. R. 835.
(15) *Wazir Jan*, 10 A. 58.

as the two acts constituted distinct offences, and as their combination did not constitute a different offence, the section offered no bar to his conviction under both the sections. As Mahmud, J., remarked : " It is not to the identity or non-identity of the evidence, nor merely to the individual facts of each case as to the practicability of the offence, but to the definitions of offences as to the elements of the *corpus delicti* that we must look for deciding the question as to the applicability of the latter part of s. 71 of the Indian Penal Code for purposes of assessing punishment.[1]

492. Quantum of Punishment.—The last clause lays down the *quantum* of punishment in the three classes of cases previously dealt with. Its wording has to be noted, for it has given rise to some controversy. It will be observed that all that the clause enacts is that the maximum punishment in cases covered by the section shall be the maximum punishment fixed for any one of such offences. The words " the Court which tries him could award " do not refer to the jurisdiction of the Court but to the penalties affixed to offences, the object of the rule being to limit the offender's punishment in such cases to the maximum sentence for the gravest offence that his acts may disclose. So far the clause appears to be clear. But subject to that maximum, the sentence should be passed in respect of only the gravest offence, or it should be distributed over the different offences of which a person may have been found guilty. The clause only prohibits the passing of a severer sentence than is the maximum provided for any one offence. It does not prohibit multifarious sentences following upon multifarious convictions. In other words, *prima facie* the section regulates punishment and not procedure. It only lays down the principle without affecting any rules of procedure not inconsistent with it.

Paragraph 4.

493. The question, therefore, whether on conviction at one trial of a person for offences comprised in the section, it is allowable to pass only one or more sentences, is then a question which has nothing to do with the Code. It is a question of mere procedure, for which reference must be made to the Procedure Code for guidance. Now, if we turn to s. 35 of that Code,[2] we find it laying down the following rules :—

(*a*) On conviction for several offences—the Court *may* sentence for all of them.

(*b*) Such sentences may be either concurrent or consecutive.

(*c*) But the maximum consecutive sentence shall in no case exceed imprisonment for more than 14 years; or twice the amount of punishment which a Magistrate is ordinarily empowered to inflict, whichever is less.

(*d*) Reservation (*c*) does not apply to *concurrent* sentences.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.[3]

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

494. Analogous Law.—This section was clause 61 in the Bill and its object, as explained by the Codifiers, was to provide against offender's escape from punishment for any offence, when it was certain that he had committed one or the other of two or more offences for which he was tried, though it could not be held with certainty that he had committed one of them to the exclusion of the other. Take, for example, the case of theft and criminal breach of trust. The offender is found to have fraudulently misappropriated property, but it is not certain whether his act amounts to theft or criminal breach of trust. He cannot escape punishment for both, consequently, this section provides for his conviction in the alternative.[4]

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(1) *Wazir Jan*, 10 A. 58.
(2) Act V of 1898.
(3) See § 422, *supra*.
(4) *Vide* Note A, Reprint pp. 105, 106.

495. The provisions of ss. 236 and 267 (3) of the Code of Criminal Procedure supplement the provisions here enacted.

496. Principle.—The section only applies when the Court has no doubt about the facts, nor of the offender's criminality, being only doubtful about the specific offence his act amounts to. In such a case, this section enables it to convict the offender in the alternative (§ 494).

497. Meaning of Words.—"*It is doubtful of which of these offences he is guilty*": The doubt exists not as to the accused's guilt but as to the nature of his guilt. "*The offender shall be punished...*": The court has to give him the benefit of the doubt as regards the sentence, but he cannot escape scot-free.

498. Conviction for Doubtful Offences.—This section and the cognate sections of the Criminal Procedure Code (Ss. 236 and 267 (3)) deal with a case in which the facts are certain and they amount to an offence, but which offence it is not certain. In such a case, the Court being in doubt as to the offence, gives him the benefit of its doubt in the sentence which it passes in view of the lesser of the two or more offences, of any one of which he is found guilty. It will be observed that the language of the section would seem to suggest that in such a case, the offender is to be punished "*for the offence* for which the lowest punishment is provided," and from which it might be argued that the offender is entitled to an acquittal for the graver of the two offences. But this is not its meaning, though its language is defective. As is clearly expressed in the Code of Criminal Procedure, in such a case the proper course is to convict in the alternative,[1] only the sentence being regulated in view of the minor offence. So, where a person is convicted of two offences in the alternative, one of which is murder, the section is an authority for punishing him with only imprisonment, though that would not have been the sentence admissible, if the offender had been only guilty of murder.[2] Of course, judgment in the alternative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged.[3] In such a case, the accused is entitled to be discharged, for it is not a case of doubtful offence but of doubtful criminality.[4] The section applies only to cases of certain criminality but uncertain offence.

Solitary confinement.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say :—

a time not exceeding one month if the term of imprisonment shall not exceed six months :

a time not exceeding two months if the term of imprisonment shall exceed six months and [shall not exceed one][5] year :

a time not exceeding three months if the term of imprisonment shall exceed one year.[6]

499. Analogous Law.—Under English Law, solitary confinement, though at one time legal was rarely awarded[7] and was finally abolished by the Statute Law Revision Act, 1893.[8] This section prescribes the limit within which solitary confinement may be awarded. It repeats an old English rule,[9] now obsolete as a form of torture which fails in its effect on the public. When unduly prolonged it leads to mental derangement.

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(1) *Tarinee*, 7 W. R. 13.
(2) *Sahee Singh*, (1906) A. W. N. 93.
(3) *Partapa*, (1913) 11 P. R. No. 11, 21 I. C. 904.
(4) *Jamurha*, 7 N. W. P. H. C. R. 137; *Khan Muhommed*, (1887) P. R. No. 11.
(5) See § 422, *supra*.
(6) These words were substituted for the words "be less than a" by s. 5 of the Indian Penal Code Amendment Act, 1882 (VIII of 1882).
(7) 7 & 8 Geo. IV, cc. 29, 30; 9 Geo. IV, cc. 55, 56; 11 & 12 Vict., c. 159; 14 & 15 Vict., v. 92; Larceny Act, 1861 (24 & 25 Vict., c. 96).
(8) 56 & 57 Vict., c. 54.
(9) Bentham, IV, p. 49; X, p. 530.

500. Principle.—Solitary confinement is isolation of the prisoner from human intercourse and society. It causes a feeling of oppression due to the gregarious instincts of man. Prolonged isolation from human communion becomes intolerable and often leads to mental derangement. When not unduly prolonged, it gives him time to reflect upon the utility of society which his acts were calculated to destroy. The feeling of loneliness has often a chastening influence upon man. On debased nature it has no influence at all. Indeed, the pangs of solitary confinement are felt most unequally by different prisoners. To some the solitary cell is a hermitage,[1] to others it is an infernal dungeon. To minds blank and unthinking it offers a salutary lesson. The sentence has been, therefore, reserved for hardened criminals, and as a punishment for atrocity or brutality.

501. Meaning of Words.—"*Solitary confinement for any portion*," which implies that solitary confinement cannot extend to the *whole* term of imprisonment.[2] "*Not exceed three months*," *i.e.*, out of any *one* punishment. There may then be solitary confinement of as many three months as there are convictions[3] whether simultaneously or successively, but this is neve done.[4] "*Not exceeding one month*": *See* section 49 for the definition of a "month." For the purpose of solitary confinement a month signifies a period equal to the average duration of a calendar month, that is, (disregarding fractions) 30 days.[5]

502. Solitary Confinement.—The sentence of solitary confinement is a mode of undergoing the sentence of rigorous imprisonment. It is not a substantive sentence by itself. As such, an order that a portion of a sentence shall be suffered in solitary confinement is not a judgment against which there can be appeal. It is an order which must be, however, passed and pronounced with the sentence. And as the only restriction made in the section is that it may be added only in cases in which the Court awards the sentence of *rigorous* imprisonment, it follows that it cannot be ordered in offences which are either not punishable with rigorous imprisonment, or in which the offender is not so punished. If he is so punished, it is immaterial that the trial was summary, for the mode of trial does not affect that sentence.[6]

503. But since it is a sentence which is reserved only for an offence "*for which under this Code*" the Court has power to pass a sentence of imprisonment, it follows that solitary confinement cannot be awarded on conviction for offences under special or local laws.[7] And since solitary confinement "is to be ordered for any portion or portions of the imprisonment to which he is sentenced," it follows that where rigorous imprisonment is no part of the substantive sentence, solitary confinement cannot be awarded.[8] It is, therefore, illegal in a case in which the offender has been sentenced to imprisonment in default of the payment of fine,[9] or in default of furnishing security for good behavioura.[10]

504. Solitary confinement is then a sentence reserved only for cases in which a person is sentenced to rigorous imprisonment or in a case in which rigorous imprisonment is the sentence prescribed by the Code. In that case, the section empowers the Court to direct that a portion of the imprisonment up to the limit of three months shall be suffered in solitary confinement. As, however, this is a period fixed for any one sentence, the accused may be sentenced to as many three months of solitary

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(1) "Stone walls do not a prison make
Nor iron bars a cage;
Minds innocent and quiet take
That for a hermitage."
To Althea from Prison.—Richard Lovelace (1618-1653).

(2) *Nyan Sukh Methar*, 3 B. L. R. 49.

(3) *Nihala*, (1877) P. R. No. 11; *Khushal*, (1877) P. R. No. 13.

(4) *Fatta*, (1878) P. R. No. 16.

(5) *Ib.*

(6) *Anna Khan*, 6 A. 83.

(7) *Gholam Hossain*, (1866) P. R. No. 120; *Hurnarain*, (1870) P. R. No. 20; *Manawar*, (1875) P. R. No. 4; *Mukh Ram*, (1879) P. R. No. 24; *Jammu*, (1889) P. R. No. 17; *Gurdit Singh*, (1889) P. R. No. 17; *Nga Kun Ba*, (1899) P. J. L. B. 554; *Bidha*, 21 A. L. J. 914; *Nazir Singh*, 76 I. C. 184.

(8) *Umar Singh*, (1869) P. R. No. 20 *Bunsi*, (1882) P. R. No. 9.

(9) *Jita*, (1873) P. R. No. 26; *Jamdad*, (1887) P. R. No. 53.

(10) *Kundan*, 36 A. 495; *Phakkar*, (1927) A. 472.

confinements as there are convictions, though it is the most unusual course (§ 500) and one which is only barely legal.[1] In fact, it would be as wrong to accumulate sentences of solitary confinements, as it would be wrong to pass several sentences of whipping amounting to 30 stripes each on different simultaneous occasions.[2]

505. Whenever the Court sentences a person to solitary confinement, it must specify the exact period for which that sentence is passed.[3] Being a sentence highly penal, the Court must not overstep the strict limits provided by the section. It has, for instance, no power to direct that the sentence of solitary confinement shall be executed in the first week of every month.[4]

506. No Solitary Confinement.—Since the section empowers the infliction of solitary confinement for a conviction *under this Code*, it follows that it is not competent to the Court to impose that sentence in a conviction had under any other law, *e.g.*, the Criminal Tribes Act[5] or the Arms Act.[6]

Limit of solitary confinement.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and, when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

507. Analogous Law.—This section has been enacted on medical grounds. Continuous solitary confinement is conducive to physical deterioration and mental derangement. It has, therefore, been decided that it shall be at least regularly intermittent.

508. Limit of Solitary Confinement.—This section regulates the execution of the sentence of solitary confinement, as the last section limits its duration. According to the rule here prescribed, the mode of execution depends upon the term of the substantive imprisonment. If it exceeds 3 months, then solitary confinement must be worked out in smaller instalments. For the term being long, the prisoner can serve out his sentence in shorter spells. On the other hand, where the substantive sentence is itself short, that is, where it does not exceed three months, then the longest period of solitary confinement at any one time may extend to a fortnight, but it shall not be more. This is, of course, the maximum term of solitary confinement which the prisoner may be subject to at a time. But where the whole term of imprisonment to which the prisoner was sentenced was only a fortnight, he could not be condemned to pass the whole of that term in solitary confinement.[7] Indeed, as the last section contemplates, only a *portion* of a sentence can be ordered to be passed in solitary confinement.

509. In case of longer sentences, no single period of solitary confinement shall exceed seven days in any one month. If, therefore, the sentence was for a term of one year and one day out of which 3 months were to be passed in solitary confinement, the order as to solitary confinement, though legal under the last section,[8] would be illegal under this, for three months could not be passed in solitary confinement within a year and a day, having regard to the rule enacted in this section. The Court accordingly reduced the period of solitary confinement to 84 days.[9] But this does not appear to be the view in the Punjab where in a case of 4 months'

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(1) *Ibrahim*, (1879) P. R. No. 7; *Abdulla Jan*, (1905) P. R. No. 37; *Nga Po Thain*, (1897) P. J. L. B. 596; *Nga Kaing*, (1898) 1 U. B. R. 247; U. B. C. M S. 100; (1892) 1 U. B. R. 146; *Patiram*, 5 C. P. L. R. 23: *Dangar Khan*, 68 I. C. 817; (1923) L. 104. In U. B. C. M. S. 10, *Nga Sein Po*, 1 R. 306, cumulative sentence of solitary confinement is said to be *illegal*.

(2) *Ratiram*, 5 C. P. L. R. 23.

(3) *Rajada*, (1869) P. R. No. 33.

(4) *Jiman*, 5 C. P. L. R. 17; *Duni Chand*, 3 P. W. R. 1913.

(5) Act III of 1911; *Bidha*, L. R. 5 A. 19.

(6) *Nazir Singh*, 76 I. C. (P.) 184.

(7) *Nyan Suk Mether*, 3 B. L. R. A. 49 (A. Cr.).

(8) *See* s. 73, last clause.

(9) *Anon*, (1879) 1 Weir 15.

rigorous imprisonment, of which one month was ordered to be passed in solitary confinement, the Court upheld the sentence as legal though its execution for more than 28 days was admitted to be not possible.[1]

75. Whoever, having been convicted,—

Enhanced punishment for certain offences.

(*a*) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, or

(*b*) by a Court or tribunal in the territories of any Native Prince or State in India acting under the general or special authority of the Governor-General in Council or of any Local Government, of an offence which would, if committed in British India, have been punishable under those chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years.

510. Analogous Law.—Section 75 was substituted for the original[2] by the Indian Penal Code Amendment Act,[3] which came into force on the 18th February 1910. The amendment was explained to meet the case of a habitual offender who, though convicted of serious offences against property, in a place like Berar, which is only technically a Native State, cannot be adequately punished upon his subsequent conviction for a like offence in the Central Provinces.[4] The amendment does not take account of a previous conviction by a Native Prince or State in alliance with His Majesty, though a conviction by an official in such a State appointed generally by the Governor-General in Council or a Local Government would be good for an enhanced sentence under this section. The question under clause (*b*) would thus, in each case, be whether the previous conviction was had by a tribunal "acting under the general or special authority of the Governor-General in Council or of any Local Government." A person whose services are merely lent to a Native Darbar by which he is constituted a tribunal is obviously not such a person. On the other hand, persons appointed to be Diwans and Magistrates in Native States which, owing to the minority or incapacity of their chiefs, are under management by the British Government are clearly such tribunals for the time being. Consequently, the question now arising in each such case would be not as to where, but by whom the offender had been previously convicted.

511. The concluding words of this section "or to imprisonment of either description for a term which may extend to ten years" were substituted for "or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not, in any case, be liable to imprisonment for a term exceeding ten years" by the Amending Act of 1886.[5] In its application to hill-tribes to which the Kachin Hill-tribes Regulation[6] is applied,[7] the Code is to be read as if the following additional section were inserted :—

"75A. Notwithstanding anything in this Code, or in any other enactment for the time being in force, a person convicted of any offence punishable under this Code or under any other enactment shall be punishable with fine in lieu of, or in addition to any other punishment to which he may be liable."

In the Chin Hills the Code is also to be read as if this section (save a few verbal differences and similarly worded), were inserted.[8]

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(1) *Fatta*, (1878) P. R. No. 7.

(2) For the text section as originally drafted *see* 1 Penal Law (4th Ed.) p. 35 footnote 18.

(3) Act III of 1910.

(4) The Mover's (Sir Herbert Risley's) speech in Council, *Gazette of India*, Pt. 6 (February 5, 1910), pp. 13, 14; *Syed Khader Sahib*, 1930 M. W. N. 173.

(5) Indian Criminal Law Amendment Act (X of 1886), s. 22.

(6) Reg. I of 1895.

(7) *Ib.*, ss. 1 (3), 3.

(8) Chin Hills Regulation (Reg. V of 1896).

512. Chapter XII deals with offences relating to coin and Government stamp (ss. 230-263A), Chapter XVII with offences against property (ss. 378-462).

513. Sections 221(7), 310, 311 and 315 of the Code of Criminal Procedure should be read as supplementing the law as here set out.

514. Charge.—The procedure relating to a charge under this section will be presently discussed (§§ 521-522). The charge after a previous conviction may be thus worded—

(i) Previous Imprisonment.

I (*name and office of the Magistrate or Judge*) do hereby charge you——as follows ——that you, on or about the——day of——, at——committed——and thereby committed an offence punishable under section——(*or* section——*where charge is in the alternative*) of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session *or* High Court.) And you the said——stand further charged that you, before the committing of the said offence, had been convicted on the——day of——of an offence punishable under Chapter XII (or Chapter XVII) of the Indian Penal Code with imprisonment for a term of three years, to wit, the offence——, which conviction is still in force and effect, and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried (by the said Court of Session, or High Court) on the said charge.

515. In all cases in which a previous conviction of any offence renders an accused person liable to whipping on conviction on the charge for which he is under trial, and it is intended to prove such previous conviction to enable the Court to add the sentence of whipping, the following charge would have to be added :—

(ii) Previous Whipping.

That at a date previous to the date of the offence of——now charged against you—— *viz.*, on the——you——were convicted by the Court of——of the offence of——specified in section 2 or 4 (*as the case may be*) of Act VI of 1864, and that this conviction of—— is still in full force and effect, and being a conviction for the same specific offence as that now charged against you, renders you liable in case you should now be again convicted of——to the punishment of whipping in addition to the punishment provided for the said offence by the Indian Penal Code.[1]

516. It should be noted that though no conviction can be legally had under this section without a specific charge, it does not follow that an enhanced sentence passed under this section constitutes an independent conviction. Consequently, a person convicted of, say robbery and sentenced to enhanced punishment under this section is not convicted of separate offences within the meaning of s. 35 of the Code of Criminal Procedure, so as to justify the awarding of two separate sentences.[2] As this section makes a previous conviction relevant, s. 54 of the Indian Evidence Act is no obstacle to proof of a previous character, which must, however, be adduced only after the accused is found guilty.[3]

517. As the section applies only to persons " convicted of an offence punishable under Chapter XII or Chapter XVII of this Code," it had been held to be inapplicable to convictions for offences comprised in other Chapters, *e.g.*, s. 369[4] or s. 511[5] or under special or local or other laws.[6] And as the section is a part of a Code which has of its own force no operation beyond British India, a conviction in a foreign State which has adopted the Code, is clearly beyond its comprehension.[7] And as to offences under the Code itself, it avowedly applies only to cases in which both the previous conviction and the trial are under Chapter XII or Chapter XVII. It has been consequently held that, if the

Limits of the Rule.

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(1) As to the offences punishable in case of second conviction with whipping in addition to other punishment, *see* ss. 3 and 4 of the Whipping Act (VI of 1864) and s. 391 (3), Cr. P. C.

(2) *Muthuakka*, 30 I. C. (M.) 435.

(3) *Ismail Ali Bai*, 39 B. 326 ; Followed in *Suban Sahib*, 52 M. 358 ; *Duming*, 5 Bom. L. R. 1034.

(4) *Fattu*, 75 I. C. (L.) (1923) L. 286.

(5) *Brij Behari*, (1926) 88 I. C. (A.) (1926) A. 44 ; *Banne*, 24 O. C. 260 ; 64 I. C. 142 ; *Mohammad Hussain*, 29 P. L. R. 34.

(6) *Moluck Chand*, 3 W. R. 17; *Hurpaul*, 4 W. R. 9; *Budhun*, 10 C. L. R. 392; *Khan Muhammad*, (1904) P. R. No. 17 ; *Private Johnson*, (1933) Pesh. 6.

(7) *Bahawal*, 21 I. C. 904; (1913) P. R. No. 11 (Cr.) ; *Muhammad Yar*, (1904) P. R. No. 2 *Venkatti Shetti*, 1 Weir 40; *Lal Singh*, 7 C. P. L. R. 24.

previous conviction was for theft, and the trial for an *attempt* to commit the offence of theft, and offence punishable under section 379 read with section 511 of the Code, this section would not apply, as attempted theft, as such is no offence in Chapter XVII, and section 511 is outside that Chapter.[1] For the same reason if the previous conviction was for an attempt and the subsequent trial for a completed offence falling within those Chapters, the previous conviction for the purpose of enhanced punishment cannot be taken into account. And as abetment of an offence falls into the same category, a person guilty of abetment, or on trial for it, may legitimately object to the evidence of a previous conviction against him.[2]

518. Again, as was observed by Prinsep, J., in a case, the object of the section being to provide for additional sentence, not for a less severe sentence, on a second conviction, recourse should not be had to it if the punishment for the offence committed is itself sufficient.[3] Nor was it the intention of the Legislature to enormously enhance the heinousness of petty offences. Where, for instance, a person convicted of receipt of property acquired by dacoity had undergone a sentence of seven years' imprisonment, and he was afterwards convicted of theft of articles of trifling value, the High Court considered the application of this section inappropriate.[4] But the value of property is often the result of an accident. The important question is the intention of the man and his character and attitude towards society,[5] the nature of the offence committed and the gravity of the risk involved. So, where the appellant after four previous convictions for theft had been for the fifth time convicted of the theft of property of no great value, the Court considered the sentence of seven years' transportation by no means excessive.[6] So, while there is no limitation against the applicability of the section, still, as a matter of judicial discretion, the Court is loth to take up an old conviction only for the purpose of awarding enhanced sentence.[7] The section should not be applied mechanically in all cases in which there has been a previous conviction. The interval of time that may have since elapsed, the age and character of the accused during this interval and the necessity of enhanced sentence should all be considered. So, where a man, 55 years old, was convicted of pocket-picking by making a snatch at a purse in a traveller's hand, dropping it at once when the owner called out, and it appeared that he had been previously convicted of pocket-picking in a crowd or a fair 10 years back, the Court considered that, having regard to his old age, his good character during the interval since his last conviction, the fact that he had probably yielded to a sudden temptation, that he was not a skilled thief, and that he had a large family dependent on him for support his previous conviction might be disregarded, and it accordingly reduced his sentence of transportation for seven years to rigorous imprisonment for one year, though he had been previously sentenced to four years' rigorous imprisonment for the same offence.[8] It goes without saying that the highly penal provisions of the section are not retrospective and have no application to an offence committed before the passing of the Code.[9]

519. Principle.—This section was no part of the original Bill, as it left the hands of Lord Macaulay and his colleagues. It was, however, added before the Bill was passed into law, and it was justified on the ground that repeated attacks on property merited more deterrent treatment than the Code had made provision for.

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(1) *Damu Haree*, 21 W. R. 35; *Sricharan*, 14 C. 357; *Nana Rahim*, 5 B. 140: *Kashia*, 10 Bom. L. R. 26; *Ram Dayal*, 3 A. 773; *Ajudhia*, 17 A. 120; *Bharosa*, 17 A. 123; *Banne*, 64 I. C. (O.) 142; *Motawel Pakuran*, 1 Weir 37; *Deva Singh*, (1872) P.R. No. 27; *Nihal Singh*, (1882) P.R. No. 37; *Fattu*, (1884) P. R. No. 34; *Chandrai*, 11 I. C. (L.) 623.

(2) *Kashia*, 10 Bom. L. R. 26.

(3) *Sheo Saran*, 9 C. 877; *Jowahir Singh*, 22 I. C. (L.) 759; *Ishar Singh*, (1926) L. 617.

(4) *Shamjee*, 1 C. L. R. 481.

(5) *Nur Din*, (1903) P. R. No. 28.

(6) *Nga Kan Tha*, (1895) 1 U. B. R. 147.

(7) *Nga Lu Gui*, (1884) S. J. L. B. 291; *Alladin*, 29 P. L. R. 59; *Indar Singh*, (1926) L. 617; *Karuppa Thevan*, (1929) M. 841; *Murido*, (1930) S. 58.

(8) *Kasim Ali*, 6 W. R. 23; *Ishar Singh*, (1926) L. 617; *Labh Singh*, 94 I. C. (L.) 365.

(9) *Kaushya Yeshu*, 4 B. H. C. R. 11; *Moluckchand*, 3 W. R. 17; *Hurpaul*, 4 W. R. 9; *Pubon*, 5 W. R. 66.

In the unsettled state of society at the time the Bill was under discussion, and to check the frequent organized plundering then going on, the ordinary penalties of the Code were considered to be inadequate. But, as observed before, the section confers a power, recourse to which need not be had in every case. It is a reserve armoury of the Criminal Court which should be drawn upon only in case of exceptional urgency (§ 518).

520. Meaning of Words.—"*Having been convicted*": This means a conviction for an offence and does not include imprisonment awarded for failure to give security under s. 108 or s. 110 of the Code of Criminal Procedure.[1] "*Punishable with imprisonment,*" that is, the penalty affixed to the offence must be three years or over, though the offender may have been punished with a less sentence. "*Shall be subject,*" *i.e.*, is liable to. It does not mean that the Court shall be competent to pass such a sentence. Its competency depends upon its jurisdiction. "*Subsequent offence*" implies that the subsequent offence was *committed* after the previous conviction.

521. Case for Enhanced Punishment.—Five conditions must be fulfilled before a person can be awarded enhanced punishment under this section :—

(*i*) He must have been previously convicted (*a*) in British India[2] or (*b*) by any other Court in India acting under the general or special authority of the Governor-General in Council or of any local Government,[3] of an offence which is punishable with imprisonment for at least 3 years.[4]

(*ii*) The offence of which he had been convicted, and of which he is subsequently charged, must be one included in Ch. XII or Ch. XVII of the Code.[5]

(*iii*) It must have been committed in British India.

(*iv*) He must be subsequently charged with an offence punishable with imprisonment for at least 3 years.[6]

(*v*) He must have committed it since his previous conviction.[7]

522. The previous conviction referred to in the section naturally assumes and implies the commission of, and the conviction for an offence in point of time prior to the commission of the subsequent offence.[8] If, therefore, a person shown to have been previously convicted but not of an offence *previously* committed, his conviction cannot be availed of in a subsequent trial for the purpose of enhanced punishment.[9] So the section is inapplicable where the two offences were committed at one and the same time,[10] though in such a case, one conviction may have been made previously. In one case the section was held to apply only to an offence committed by a person *after his release from prison*" on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of shewing what the effect of the first sentence would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses."[11] This is the doctrine of *locus pœnitentiæ* which, however humane and commendable, appears to find no place in the section. It is no doubt just that a

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(1) *Murid*, (1930) s. 58 ; *Khanu* 110 I. C. (L.) 804 ; *Jaimal Singh*, (1923) L. 224.

(2) *Muthusamy*, 58 M. 707 (Conviction out of British India is of no account.)

(3) *Bahawal*, (1913) P. R. No. 17, 20 I. C. 1007.

(4) *Bhanwar*, 42 A. 136 ; *Bahawal*, 21 I. C. 904, (1913) P. R. No. 11 (Cr.).

(5) *Fattu*, (1923) L. 286,

(6) *Chandaria*, 11 I. C. (L.) 623.

(7) *Sayad Abdul*, (1926) B. 305 ; *Sakya*, 5 B. H. C. R. 36 ; *Megha*, 1 A. 637 ; *Po So*, 9 L. B. R. 77, 42 I. C. 1007.

(8) *Ib.*

(9) *Megha*, 1 A. 637.

(10) *Jhoomuck*, 6 W. R. 90.

(11) *Per* Seton-Karr and Glover, JJ., in *Pubon*, 5 W. R. 66.

criminal should have time to reflect before the vengeance of law is visited upon him, but this is a matter for the consideration of the Court. It is not a necessary corollary of law.[1] So much, however, is clear that where a person is convicted at one trial of two or more offences, one conviction cannot be used as a previous conviction for the purpose of enhanced punishment.

523. Procedure for Enhanced Punishment.—The statutory provisions of the Procedure Code bearing upon the question of procedure have been already noted elsewhere (§ 494). Reference to them will shew that three elements are necessary to prove a previous conviction against an accused :—

(*i*) It must form a subject-matter of the charge.

(*ii*) It must be proved, if denied.[2]

(*iii*) The enhanced sentence must be within the jurisdiction of the Magistrate.

524. Why Previous Conviction Charged.—As regards the charge, the Code of Criminal Procedure provides that, if it is intended to prove a previous conviction for the purpose of awarding enhanced punishment, the fact, date, and place of the previous conviction should be stated in the charge. If such a statement is omitted, the Court may add it at any time before sentence is passed.[3] The object of this statement in the charge is to give notice to the accused of his liability to enhanced punishment, and to give him an opportunity of correcting error, if any, prejudicial to him. In order, therefore, to put the accused upon enquiry, mention of the fact, date and place of the previous conviction is essential ; otherwise, the accused cannot be legally sentenced to enhanced punishment.[4] The mere mention of the fact that the accused had been previously convicted of offences under the Indian Penal Code,[5] or that he " is an old offender, is obviously insufficient."[6] Any defect or omission in this respect may be made good by an addition made *before* the sentence is pronounced ; but it cannot be made good afterwards.[7] Nor can there be sufficient compliance with law unless a separate charge under this section is framed and recorded.[8] A previous conviction duly proved entitles the Court to award enhanced sentence for the offence for which the accused is on trial before it. It cannot sentence the accused as if he had been convicted of two distinct offences—the one being the previous conviction.[9] Reference to previous conviction in the charge is not an indictment, but a reference necessary to inform the accused that his offence presents circumstances of aggravation which, though not affecting his present criminality, will call for condign punishment, if the offence is otherwise adequately proved. It is, therefore, laid down that in a case tried by jury or with the aid of assessors, reference to the previous conviction must not be made till after the close of the trial. Reading the previous conviction before its close, is calculated to bias the jury or the assessors, and it is, therefore, sufficient to vitiate the trial.[10]

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(1) C. P. Cr. C. No. 19.

(2) *Feroze Khan*, 26 P. L. R. 843.

(3) *Abbulu*, (1909) 7 M. L. T. 77 ; s. 221 (7), Cr. P. C.

(4) *Dungri*, 10 I. C. (L) 241 ; *Haridas* 5 A. 500 ; in *Raghibali*, 3 A. 633 F. B. the facts were peculiar, and the accused was therefore held not to have been misled by *vagueness of the charge*.

(5) *Sheikh Jakir*, 22 W. R. 39.

(6) *Yippika*, (1881) Weir 885.

(7) *Raj Coomar*, 19 W. R. 41 ; *Annoji*, B. H. C. Cr. Rul., 27th April, 1873 ; *Mangloo*, (1930) L. 544.

(8) *Esan Chunder Dey*, 21 W. R. 40 ; *Dorasamy*, 9 M. 284 ; *Dungri*, (1911) P. W. R. No. 40, 10 I. C. 341. In *Ismail*, 39 B. 326 followed in *In re Subramanian*, (1916) M. W. N. 327, a previous conviction not charged induced enhanced sentence ; but the judgment is (it is submitted) unsound. In *Subramanian*, (1916) M. W. N. 327, the Sessions Judge who tried the appellant failed to charge him under this section, but before sentencing him questioned him about his previous conviction. The High Court thereupon refused to quash the enhanced sentence, though it pointed out the desirability of separately charging prisoners under this section.

(9) *Khalak*, 11 A. 393.

(10) *Kulum*, 10 W. R. 39 ; *Roshun*, 5 C. 768 ; *Jhinguri*, (1890) A. W. N. 12 ; but see *Nazim*, 5 C. W. N. 670 (672).

525. As the sole object of proving a previous conviction is not to eke out weak evidence against the accused but to help the Court to determine the measure of punishment,[1] the Magistrate should try to ignore that fact in considering his judgment. And it is only at the close of the trial that evidence of previous conviction should be admitted.[2] Such evidence must be clear and precise,[3] and whenever it is intended to prove it in accordance with section 511 of the Criminal Procedure Code, it must strictly conform to the requirements of that section. An examination of the accused for that purpose is not " proof " of a previous conviction, unless it be an " admission " upon which the Court is authorized to act.[4] And though under section 511 of the Procedure Code a certified copy of the record of the Court or of the sentence or order is sufficient, it must be a copy " certified under the hand of the officer having the custody of the records of the Court in which such conviction was had."[5] A mere *kaifiat* or report from the record office is not sufficient.[6] But a certificate under the hand of the officer in charge of the jail in which the punishment, or any part thereof, was undergone, has been held sufficient proof of conviction. So also it is held proved by the actual warrant of commitment under which punishment was suffered. In every case, of course, the identity of the accused with the person previously convicted must be clearly established.[7]

Proof.

526. The power of enhanced punishment does not carry with it enhanced power to award it. The jurisdiction of the Magistrate was neither created by the Code, nor is it enlarged or curtailed by it. The fact that enhanced punishment is legal, does not, therefore, imply that it is legal even though inflicted by a Magistrate not possessing the power to inflict it.[8] Whenever a Magistrate considers the infliction of a sentence beyond his competency essential, he should commit the case to the Court of Session.[9]

Jurisdiction.

527. A judgment awarding enhanced sentence must contain the date of the previous conviction and the sentence passed, as well as the particular offence for which it was had. This section does not empower the Sessions Judge to amalgamate a sentence which he is competent to pass upon a prisoner with a sentence under which he is already undergoing imprisonment, and then commute the amalgamated sentence, condemning the prisoner to a longer period of imprisonment than he is liable to suffer for the offence of which he had been last convicted.[10]

528. It should be noted that whipping was never the sentence recognized by the Code (§ 402), and this section gives no authority for passing a sentence of whipping in addition to any other punishment.[11] But such a punishment is not illegal, for provision is made for the addition of the sentence of whipping in certain cases specified in the Whipping Act.[12]

529. Nature of Enhanced Sentence.—It will be observed that the section provides for the enhanced sentence as comprising only of transportation for life, or imprisonment upto 10 years. In other words, the Court, if it awards a sentence of transportation, must sentence the convict to transportation for life. In lieu, however, of such sentence it may sentence the convict to imprisonment of either description for a term which may extend to 10 years, and under the provisions of s. 59, it may, in every case in which the offender is punishable with imprisonment for a

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(1) *Gulab Hamir*, (1894) B. U. J. 688 ; 6 M. H. C. R. (App.) 2 ; 1 Weir 36, 37.

(2) *Shiboo Mundal*, 3 W. R. 38 ; *Jehan Mullick*, 5 W. R. 67 ; *Kristo Behari Dey*, 12 C. L. R. 555 ; *Bepin Behari*, 13 C. L. R. 110.

(3) *Naimuddi*, 14 W. R. 7 ; *Abdul Malik*, 52 M. 795. (Police Certificate insufficient.)

(4) S. 310, Cr. P. C.; *Nazim*, 5 C. W. N. 670 (672).

(5) S. 511, Cr. P. C.

(6) *Sheikh Ramzan*, 15 W. R. 53.

(7) *Feroze Khan*, (1928) L. 107.

(8) *Vithaya*, (1871) B. U. C. 49 ; *David Narsu*, 6 Bom. L. R. 548 ; *Gulab Hamir*, (1894) B. U. C. 688 ; *Bahadur*, (1872) P. R. No. 41 ; *Nga Tun Tha*, (1804) P. J. L. R. 78.

(9) Ss. 347, 548, Cr. P. C.; *Ganu Ladu*, 2 B. H. C. R. 126 ; *Khalak*, 11 A. 393.

(10) *Sakya*, 5 B. H. C. R. 36.

(11) *Nga Tun Tha*, (1894) P. J. L. B. 78.

(12) Ss. 3, 4, Whipping Act (VI of 1864).

term of 7 years or upwards, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than 7 years, and not exceeding the term for which under the Code such offender is liable to imprisonment.[1] The section as to enhanced sentence is not to be pressed into service in every case of a previous conviction satisfying its conditions. The enhanced sentence must be called for by the justice of the case. Where, for instance, the subsequent offence was a petty[2] or a technical theft, the Court should not be justified in passing more than a nominal sentence.[3] In any case, the provisions of the section are merely permissive and not obligatory,[4] and are not to be resorted to without due regard to the character of the accused since his previous conviction, the nature and gravity of the crime and its other attendant circumstances justifying the imposition of a deterrent sentence.[5]

530. Section when Inapplicable.—It has already been observed that the section is inapplicable where the two convictions are not for offences comprised in Chapters XII and XVII. If, therefore, a person with such a previous conviction is again convicted, say under s. 403, he could not be awarded enhanced sentence under this section.[6] Nor could one convicted of an attempt (s. 511) be subjected to enhanced sentence under this section.[7] It has been held that in apportioning the sentence the Court may take into consideration, independently of this section, a previous conviction of the offender for the same offence, *e.g.*, under s. 323.[8]

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(1) *Muhammad Sharif*, (1915) P. R. No. 14, 29 I. C. 826.

(2) *Nga Po Huyin*, 10 I. C. (R.) 772; *Harnam Das*, (1930) L. 100, *Maula*, (1929) L. 787; *Ujarsingh*, (1933) L. 147; *Kuppuswami Chetty*, (1933) M. W. N. 1259.

(3) *Jawahir Singh*, 22 I. C. (L) 759.

(4) *Chamman*, 54 I. C. (Pat.) 623.

(5) *Po Nyein*, 9 L. B. R. 167; 45 I. C. 847.

(6) *Chandaria*, 11 I. C. (L.) 623.

(7) *Brij Behari Lal* (1926) A. 44; *Mhd. Hussain*, 29 P. L. R. 34; *Nathun*, (1933) L. 433.

(8) *Ismail Ali*, 39 B. 326; *Suban Sahib*, 52 M. 358; *Nga Ba Shim*, (1928) R. 200 F. B.

CHAPTER IV.

GENERAL EXCEPTIONS.

531. Topical Introduction.—"This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions....Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium, the exceptions in favour of acts done by the direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter." [1]

532. It will be seen that the chapter dealing with exceptions to criminal responsibility contains 32 sections, but the main principles which they illustrate are only seven. They are :—

(1) Where there is an absence of criminal intent (sections 81-86 and 92-94).
(2) Cases of accident (section 79).
(3) Mistake of fact (sections 76, 79).
(4) Act done by consent (sections 87-90).
(5) Triviality (section 95).
(6) Acts done in exercise of the right of private defence (sections 96-106).
(7) Privileged acts (sections 77, 78).

533. All these cases, though variously classified and described, are really cases in which there is absence of criminal intent. There is only one case dealt within section 95, in which provision is made for exemption in spite of the presence of criminal intent, the act committed being so inconsiderable as to be negligible.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations.

(*a*) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.

(*b*) *A*, an officer of a Court of Justice, being ordered by that Court to arrest *Y*, and, after due enquiry, believing *Z* to be *Y*, arrests *Z*. *A* has committed no offence.

534. Analogous Law.—This chapter has been extended to offences added to the Code since its original enactment.[2]

This section is analogous to section 79, the only difference between the two being that a person under this section believes himself to be *bound* by law to do a thing, whilst under section 79 he similarly feels *justified* by law in doing it. In the one case he acts because he believed he must; in the other, he acts because he thought that it was right. In either case the two sections throw round him the same protection.

535. Principle.—This section and section 79 are a paraphrase of the English common law maxim in its application to criminal law: *Ignorantia facti excusat*; *ignorantia juris non excusat.*[3] A mistake of law is never a defence in law, whether civil or criminal: *Ignorantia juris non excusat.*[4] This is the rule, but it is sometimes

(1) Note B. Reprint, p. 106.

(2) By the Indian Penal Code Amendment Act (XXVII of 1870). This Act adds new offences to the Code, to which Chs. IV, V and XXIII were extended. See *ib.*, s. 13, as amended by the Repealing and Amending Act (XII of 1891) under which this chapter was made applicable to offences punishable under ss. 121-A, 124-A, 225-A, 225-B, 294-A and 304-A.

(3) 1 Co., 177. "Ignorance of fact, excuses; ignorance of law does not excuse."

(4) "Ignorance of law is no excuse."

explained by another maxim. "Every man is presumed to know law,"[1] which, if a maxim, is not true, for there can be no presumption when it is a notorious fact that even professional lawyers are sometimes at war as to what is law. The true reason why ignorance of law is never a defence, is that, if it were a defence, it would screen offenders and lead to endless complications. For there would have to be an inquiry in every case, if an accused person was cognizant of law, which would lead to evasions of its provisions on the plea of ignorance. Moreover, the peremptory mandates of law in so far as they are universal and of general application are based upon fairness and commonsense, and they are, at any rate, available to any one desirous of acquainting himself with them. They are, therefore, never the copyright of the Legislature which offers every facility for their promulgation.

536. Ignorance of law is, therefore, never an excuse, and all persons resident within a State are held to be bound by it, it being immaterial whether they are its subjects or are foreigners.[2]

537. Of course, the term "law" as used in this connection means the general law of the land. But the rule applies equally to all laws, bye-laws, rules and regulations having the force of law.[3] For, though no man is presumed to be the walking cyclopaedia of all laws, however parochial and artificial, still, if ignorance of law were ever admitted to be an excuse, it would introduce the element of uncertainty in the administration of justice which is the foundation of civil society.[4] All the same, the rule is properly applicable only to the general municipal law, though for the sake of convenience it is held to be a rule of universal application, and as one admitting of no exceptions.[5] But exceptions there must be; since no man can be convicted of violating a law of which, as a matter of fact, he is wholly ignorant. It must, then, depend upon the law, the nature of publicity given to it, and the likelihood of the offender being acquainted with it. In a large number of Acts, some qualifying phrases occur which, in themselves, recognize the exceptions. On the other hand, there are bye-laws, such as those regulating the height of buildings, thickness of walls, preservation of open spaces and others conducive to public sanitation and hygiene—which no one can circumvent on the ground of ignorance. The question of *mens rea* must, therefore, depend upon the subject-matter of the enactment, its purpose and the various circumstances which would make the construction reasonable or unreasonable.[6]

Meaning of "Law" in this Connection.

538. So far as the present Code is concerned, it is apparent from the exceptions here made that the test of criminality in the Code depends upon the presence of criminal intent. The maxim—*actus non facit reum, nisi mens sit rea*[7] is, then, as true here as it is in England. It is, indeed, the keynote of the present chapter, as it is of the English Criminal Law. So Coleridge, J., in one case said: "Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into his state of mind; and if a person take what he believes to be his own,

No Intention: No Crime.

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(1) *Per* Erle, C. J., in *Pooley* v. *Brown*, 11 C. B. (N. S.) 575; *Kitchin* v. *Hawkins*, L. R. 2 C. P. 22; *per* Sir W. Scott, *The Charlotte*, 1 Dods. R. 392; *per* Pollock, C.B., in *Cooper* v. *Simmons*, 7 H. & N. No. 717. *Cf.* maxim: "*Ignorantia juris quod quisque tenetur scire neminem excusat*" (2 Rep., 3*b*), "Ignorance of the law, which every man is presumed to know, excuses no one." This maxim is quoted and paraphrased with comment, by Blackstone in 4 Black, p. 27. So Hale: "*Ignorantia corum quoe scire tenetur non excusat*" (Ignorance of those things which one is bound to know, excuses not) —P. C. 42.

(2) *Baronet and Allain*, (1852) Dearsly 51; 1 Jurisprudence, 498.

(3) *Kassim*, 15 I. C. (B.) 802 contra *Lewis*, 38 M. 773.

(4) Cf. *per* Willes, J., in *Tolson*, 23 Q. B. D. 168 (172).

(5) So Lord Westbury in one case remarked: "It is said '*Ignorantia juris non excusat*'; but in that maxim, the word '*jus*' is used in the sense of denoting a private right, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, the maxim has no application"—*Cooper* v. *Chibbs*, L. R. 2 H. L. 149 (170).

(6) *Per* Willes, J., in *Tolson*, 23 Q. B. D. 168 (172,173); *Narantakath*, 45 M. 986.

(7) "The act itself does not make a man guilty, unless his intention were so."

it is impossible to say that he is guilty of felony."[1] So, in another case, the Court remarked : " It has been said that ignorance of the law is no excuse. But when the Court has a discretion, the petitioner's ignorance of the law may be properly excused."[2] Where, therefore, the Divorce Act, 1857,[3] enacts that the Court shall not be bound to pronounce a decree for divorce, if it shall find that the petitioner has,during the marriage been guilty of adultery, the Court was held to have a discretion which it could exercise in favour of a person who had contracted a bigamous marriage in the belief that his marriage with his first wife had been dissolved by a private agreement setting each party free to marry again.[4] Here then was a case where a person had violated the Statute in ignorance of its provisions, but as he had no intention to do so, and as the Court had a discretion in the matter, it gave him the benefit of that ignorance. This principle may be illustrated by the view taken by the Indian Courts in similar cases, in which it was laid down that inasmuch as the provisions of section 494 of the Code are rigid and render a bigamous marriage, apart from intention, criminal, the plea of innocence is no defence to a charge under that section, though it would be a good defence to a charge under section 497, the language of which leaves room for its admission.[5] But the language of a Statute, though a guide, is not to be taken to be the sole guide in judging of the criminality of an act. For, as Foster, J., said " that though the words of the Statute seem to exclude any other excuse, yet the circumstances must be taken into consideration ; otherwise, a law calculated for wise purposes might be made a handmaid to oppression."[6]

539. In the light of these cases, the rule laid down by the Bombay Court cannot be upheld. In another case, the facts were different, but it illustrates the same principle. There the captain of a ship had hired native labourers and carried them on board. At the time that he set sail there was no prohibition against the employment of native labour, but before the natives were engaged, an Act was passed which prohibited the enlistment of native labourers without a license, and their confinement and removal from one place to another was declared to be a felony,[7] and the question was whether the Master of the vessel had brought himself within the Act. " It may, however, be suggested," the Court remarked, " that the carrying, though not unlawful in its commencement, became so when the Act came into operation, notwithstanding the ignorance of the Master that any such Act was in force and though it was then out of his power to obtain a license. But before a continuous act or proceeding not originally unlawful can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance ; and though ignorance of the law may of itself be no excuse for the Master of a vessel who may act in contravention of it, such ignorance may, nevertheless, be taken into account when it becomes necessary to consider the circumstances under which the act of proceeding alleged to be unlawful was continued, and when and how it was continued, with a view to determine whether a reasonable time had elasped without its being discontinued."[8]

540. In another case, however, ignorance of law was held to be a case for pardon and not acquittal. In that case, the accused, the Master of a ship, was

(1) *John Reed*, (1842) C. & M. 306.

(2) *Whitworth* v. *Whitworth*, (1893) P. 85 (88) : citing *Noble* v. *Noble*, L. R. 1 P. & D. 861.

(3) 20 & 21 Vict., c. 85, s. 31.

(4) *Whitworth* v. *Whitworth*, (1893) P. 85 (88).

(5) *Karsan*, 2 B. H. C. R. 117 (124, 1st Ed.) ; *Manohar*, 5 B. H. C. R. 17 ; *Khemkor* v. *Umiashan*, 10 B. H. C. R. 381; *Robi* v. *Gobind*, 1 B. 97 (116); *Sambhu*, 1 B. 347; *Umi*, 6 B. 126; *Narantakath*, 45 M. 956; contra *Abdul Ghani* v. *Azizul Huq*, 39 C. 409.

(6) Foster's Crown Law (3rd Ed.), App. 439 (440), cited *per* Willes, J., in *Tolson*, 23 Q. B. D. 168 (175); also followed by Lord Kenyon, in *Banks*, 1 Esp. 144 ; *Willamett*, 3 Cox. C. C. 281; *Cohen*, 8 Cox C. C. 41: *Sleep*, 30 L. J. (M. C.) 170; *O'Brien*, 15 L. T. (N. S.) 419.

(7) Kidnapping Act, 1872 (35 & 36 Vict., c. 19), ss. 3, 6, 9, 16, 20. (The title of this Act has been altered by 38 & 39 Vict., c. 51 to " The Pacific Islanders Protection Act, 1872.")

(8) *Per* Baggallay, J. (Bramwell and Thesiger, JJ., concurring), in *Burns* v. *Nowell*, 5 Q. B. D. 444 (454).

indicted for maliciously shooting a mariner of another vessel on the high seas, on the 27th June 1799, an offence made indictable by 39 Geo. III, c. 37, which came into force on the 10th May, 1799, that is, only six weeks before the commission of the crime of whose existence the accused had no knowledge. The jury found that the accused had fired upon the vessel in consequence of a quarrel with its captain, and that the act of the accused fell within the Statute 39 Geo. III, and Lord Eldon, thereupon, held him to be guilty thereunder, though he was unware of its existence, but thought it might be a case for pardon. However, on reference to twelve other Judges, it was held that the accused could not be indicted under a Statute of whose existence he had no knowledge, and that they, therefore, thought it right that he should have a pardon.[1] These are extreme cases, but then extreme cases are always employed to test the validity of a rule. But as it is, these cases only go the length of holding that ignorance of law may be pleaded in extenuation, though not in justification of a crime. There is, however, a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the Statute creating the offence, or by the subject-matter with which it deals, both of which must, therefore, be considered.[2]

541. So far as the Code is concerned, it declares that all the 32 sections forming this chapter should be read as qualifying the penal provisions which follow it. The question then is, whether any of the exceptions forming this chapter negative an offence otherwise shown to have been committed.

Absence of Specific Intention.

542. These sections necessarily lay down only *general* exceptions, that is to say, exceptions which negative, in all cases, the presumption of criminality. Independent of them, there are certain other considerations which are referred to in the various sections defining offences or laying down penalties which alone determine criminality in a particular case. For example, some offences are only complete, if the act constituting them is done "voluntarily," or "dishonestly," "knowingly" or "having reason to believe" in the existence of certain facts or in other conditions of the mind, which is, then, the essence of criminal obligation, the absence of which form other exceptions to criminal responsibility. It is only when an act is otherwise an offence, answering, as it does, all the requirements of a given definition, that resort must be had to these general exceptions which form, as it were, the touchstone of criminality, to which reference becomes necessary, because the deed would otherwise be a crime. Indeed, reference to this chapter need not be made by the prosecutor at all, for the elements, there dealt with, are not essential for the composition of a crime. They are rather dissolvents which reduce or annihilate criminality by associating it with other acts and intentions which have the effect of altering its original aspect and character.

543. Now, as the mental elements of different crimes differ widely, it follows that the appropriate exceptions to those crimes must also correspondingly differ. So the term "*mens rea*," "intent" or "guilty mind," though commonly supposed to underlie all crimes, still differs in each case according to the nature and circumstance of the crime. For instance, "*mens rea*" means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases, it denotes mere inattention. For instance, in the case of manslaughter by negligence (s. 304-A), it may mean forgetting to notice a signal. The term "*mens rea*" is, therefore, a mnemonic aid, but by no means an exact expression. And as an expression it is inexact and misleading.[3] Now as this chapter generally provides an antithesis to such general criminality, it must necessarily

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(1) *Richard Bailey*, (1800) R. & R. 1.
(2) *Nichols* v. *Hall*, L. R. 8 C. P. 322; *Sherras* v. *De Rutzen*, (1905) Q. B. 1918 (921): 1 Weir 74.
(3) *Per* Stephen, J., in *Tolson*, 23 Q. B. D. 168 (186).

be equally inexact and often misleading. Its exact applicability and its necessary shortcomings will best be illustrated by its application to concrete examples.

544. So far as regards this section, it lays down expressly what shall excuse an offence, and impliedly what shall not. Expressly it lays down that an act prompted by (*a*) a mistake of fact, (*b*) good faith, and (*c*) belief in legal compulsion, is protected. Impliedly it lays down that a criminal act under mistaken law is entitled to no protection. The question then is what is the meaning of these terms.

545. What is a Mistake of Fact.—Mistake has a recognized place in civil law. As such it is a well-known concept. There it is used in the sense of misconception or error of judgment not intended to produce the result attained. Such a mistake may,[1] or may not, be due to forgetfulness, ignorance, imperfect information, or faulty ratiocination. It may be due to chance, negligence, stupidity or even superstition, but it must not be due to design, pre-arrangement or pre-concert.[2] A mistake may be due to the imperfection of senses, or it may be due to the deficiency of intellect. Where, for instance, a man kills a man believing him to be a ghost,[3] a hunter mistakes a man for animal and fires, his mistake may be as much due to defective vision as to defective intellect. In either case, if there was no *mens rea* there was a mistake, and therefore it may be no crime. Here, through a mistake, a man, intending to do a lawful act, has done that which is unlawful. There has not been that conjunction between his act and his will, which is necessary to form a criminal act. "*Ignoratia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary. It is known in war, that it is the greatest offence for a soldier to kill or so much as to assault his general: suppose then the inferior officer sets his watch or sentinels, and the general, to try the vigilance or courage of his sentinels, comes upon them in the night in the posture of an enemy; the sentinel strikes or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence."[4]

546. So where a person made a thrust with the sword at a place where, upon reasonable grounds, he supposed a burglar to be, and killed a person who was not a burglar, he was held to have committed no offence.[5] Where the fact is a tangible object, a mistake regarding it may thus assume any form. Its identity may be mistaken or its form misread. Where, for instance, in a case the prisoner was indicted for unlawfully taking an English girl under the age of 16 out of the possession and against the will of her father, and it was proved that before the girl was taken away she had declared her age to be 18, which the prisoner also believed to be the case and his belief was reasonable, the question arose whether his erroneous *bona fide* belief exculpated him from the offence of abduction under the statute,[6] and it was held by the majority of the Court that he was guilty of the misdemeanour notwithstanding his mistake.[7] But this decision of the Court is regarded as unsatisfactory, and in conflict with established principles.[8] But the eventual decision

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(1) *Kelly* v. *Solari*, 9 M. & W. 54; *Brownlie* v. *Campbell*, 5 App. Cas. 952; followed *per* Kay, L.J., in *Barrow* v. *Isaacs & Sons*, (1891) 1 Q. B. 417 (425, 426).

(2) *Sandford* v. *Beal*, (1895) 65 L. J. (Q. B.) 74.

(3) *Waryan Singh*, (1926) L. 554.

(4) 1 Hale P. C. 42.

(5) *Levet's case*, 1 Hale, 474, cited *per* Stephen, J., in *Tolson*, 23 Q. B. D. 168 (187, 188).

(6) As the question turned upon the wording of the statute, it may be here quoted: "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding 2 years with or without hard labour."—24 & 25 Vict., c. 100, s. 55, *cf.* s. 361 *post* for a similar offence.

(7) *Prince*, 44 L. J. (M. C.) 164, so held by 15 Judges. Brett, J. (afterwards Lord, Esher, M.R.) alone dissenting.

(8) 1 Russ. (5th Ed.) 888; *Watkins* v. *Major*, 44 L. J. M. C. 164. It should be noted that in 48 & 49 Vict., c. 69, s. 7, the following is added: "Provided that it shall be a sufficient defence to any charge under this section that the person so charged had reasonable cause to believe that the girl was of or above the age of 18 years. *See* this case explained *per* Stephens, J., in *Tolson*, 23 Q. B. D. 168 (189, 190).

turned upon the wording of the statute, and the meaning of the word " unlawfully " therein occurring,[1] which was held to mean " without lawful excuse " or " without such an excuse as, being proved, would be a complete legal justification for the act even where all the facts constituting the offence exist."[2] In other words, a person, who deliberately does that which is wrong, must also take the risk of its turning out to be criminal, and if criminal, he cannot turn round and say that he had not contemplated the consequence of his wrongful act.

547. Natural Consequence.—That a man must be prepared to bear the *natural* consequences of his act is not disputed, as, if he strikes with a dangerous weapon with intent to cause grievous hurt, and kills, he cannot be heard to say that he had misjudged his blow. The result makes the crime murder, not because there may not have been a mistake but because the prisoner had run the risk. It may then be generally laid down that where an act is in itself criminal, criminal intention is presumed, and even proof of mistake of fact is then no defence. In this view the conviction of Prince was right, but not otherwise. On the other hand, where the act is initially indifferent, and becomes only criminal, by the existence of certain facts superadded, then the fact that the accused had misconstrued or mistaken those facts is a good defence, whether the misconstruction or mistake was due to lack of will or lack of knowledge.

548. Effect of Mistake of Mixed Law and Fact.—Sometimes the mistake pleaded is both a mistake of fact as well as of the law. Such a case may arise where a person makes bigamous marriage in ignorance of law,[3] or where he seizes property in the *bona fide* belief that it is his ; or take again the case of two persons reasonably believed to have committed murder in trying to escape, whereupon two persons give them a chase to prevent their escape : one is a policeman, and the other a private citizen. What would be their offence, if suppose each of them kills the runaways to prevent their escape ? It has been held that the policeman would be justified but not so the private citizen.[4] For his mistake " would be not only a mistake of fact, but a mistake of law in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected a murderer. The supposed homicide would be in the same position as if his mistake of fact had been true ; that is, he would be guilty, not of murder, but of manslaughter."[5] So on this point Bishop says : " In civil causes, it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence, if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act, in some precise mental condition, which mental condition is the gist of the offence, the jury, in determining this question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus to constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken belongs not to the latter. Yet if all the facts concerning the title are known to the accused, and the question is merely one of law whether the property is his or not, still he may show, and the showing will be a defence to him against criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one who does not himself believe it to be valid, does not prevent the act of taking from being larceny."[6] In short, a mixed question of law and fact, is, for the present purpose, treated as a question of fact if the accused was misled into an error of fact on account of an error of law.

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(1) See *Prince*, L.R. 2 C.C. 154 at pp. 170, 178 (*per* Blackburn, J., and Denman, J.)
(2) *Prince*, L. R. 2 C. C. 154 (175).
(3) *Narantakath*, 45 M. 986.
(4) 2 Hale P. C. 89 (97); 1 Russ. (5th Ed.) p. 726 ; *Raghunath*, (1920) Pat. 76.
(5) *Per* Stephen, J., in *Tolson*, 23 Q. B. D. 168 (188).
(6) Criminal Law (3rd Ed.), s. 378.

549. A mere mistake of fact is not enough. It must be an honest mistake, and it must not be known to the actor as a mistake when the deed was done. If the doer knew that he was impelled by a mistake to a deed which he knows to be wrong, he has no defence, save that of insanity. It is only an honest faith in a person's act, as a righteous act, that is entitled to legal protection. The fact may not exist, but he must honestly believe in its existence. On the other hand, if the fact exists, and he does not believe in its existence, there is no belief in "good faith" and consequently no protection. Where, for example, a person heard at night a noise and saw a man at the back of the door of his house, from which he believed that an attempt was being made to break into it, and, acting on that belief and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody, whereupon the plaintiff sued for damages for false imprisonment, and the question was whether the defendant had reasonable grounds for believing the plaintiff to be guilty, and if so, whether he honestly believed it. It was then pointed out that a mere honest belief is not enough unless there also existed reasonable grounds for that belief. As Keating, J., remarked: "It cannot be supposed that if a man merely dreamt of a certain state of facts, without any grounds for his impression, and acted on it, it would be sufficient."[1] In this case, the defendant may have grounds for suspicion. But as was pointed out by Willis, J., in another case,[2] mere suspicion will not do.

Mistake must be believed in.

550. What is the difference between suspicion and belief? "Suspicion may rest on no grounds: belief rests upon some grounds." But as there can be no reasonable grounds unless there are facts sufficient to justify that belief, it follows that what the Court first inquires about is what were the facts and whether they were sufficient to induce an *honest* belief, and not necessarily a *reasonable* belief,[3] in them.[4] This view was emphasised in an Indian case to which reference has been made before (s. 52), in which the facts were somewhat similar.[5] So in another case where a policeman had arrested a person as Giria which in fact he was not, the Court acquitted him on the ground that he had made reasonable inquiries and having come to Bombay from an up country station to effect the arrest he was honestly mistaken.[6]

551. The same view was taken in an English case in which the plaintiff, passing through the streets of the city of London with a bundle in his hand about 10 o'clock at night, was stopped by a watchman who took him to the defendant, a beadle, who questioned him as to the contents of the bundle, which the plaintiff replied he did not know and that he was carrying it to his sister in St. George's Fields, and referred him to a house there. He was arrested without enquiry at the house referred to, but was subsequently discharged, and the question was whether the beadle had the power of arrest, and it was held that he had such a power and that the arrest was justified by "abundant ground of suspicion."[7]

552. A person who kills another on jealous suspicion of a wife however strong, cannot therefore plead mistake, for he had no facts whereon to build his honest belief as required by law.[8] So where a number of men seize hold of a woman believed to be a witch and do her to death, they cannot defend their atrocity by reference to honest belief in the woman's witchcraft. For, if such a belief were sufficient to take away human life, there will be no security left but that a person may with impunity slay another because he believes him to be a ghost, or possessed of an evil spirit.

Mistake without good faith insufficient.

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(1) *Leete* v. *Hart*, L. R. 3 C. P. 322 (325).
(2) *Roberts* v. *Orchard*, 2 H. & C. 769 (777); *Hermann* v. *Seneschal*, 13 C. B. (N. S.) 392 (403).
(3) *Per* Keating, J., in *Leete* v. *Hart*, L. R. 3 C. P. 322 (323).
(4) *Hughes* v. *Buckland*, 15 M. & W. 346.
(5) *Bhawoo* v. *Mulji*, 12 B. 377.
(6) *Gopalia*, 20 Bom. L. R. 138.
(7) *Lawrence* v. *Hedger*, 3 Taunt, 14-16; *Dhanjibhai*, 20 B. 348.
(8) *Devji*, 20 B. 215.

553. Policeman's Duty.—The power of a policeman or other recognized conservator of peace to arrest and detain a person in custody must depend upon the terms of the particular statute creating it. Where the terms of such a statute are satisfied, reference to these sections becomes unnecessary, because these sections deal with *bona fide* mistake, and not with due performance of duty. Indeed, in the latter case, the question of *bona fides* and sufficient grounds is immaterial. For there was a duty to do, and it was done, whatever may have been the doer's motive. It is only when the act was not justified by law that the other questions arise. This is implied in illustration (*a*), where a soldier firing on a mob by the order of his superior officer, in conformity with the commands of the law, is held to be protected. Now this section does not state whether the order given by the superior officer was right or wrong. But it is implied that it was wrong. For if it had been right, then the act would have been legal, apart from good faith and his belief in its legality. It is only when the order is illegal that the questions of good faith and belief in its legality arise. A person is then not implicitly bound to obey the commands of his superior officer. The latter may order him to torture a person to death, but he is not bound to obey such an order; and, of course, the maxim *respondeat superior* has no application to such a case.[1] Only the fear of instant death would extenuate such a crime.[2]

554. A Soldier's Duty.—A soldier may be ordered to use force in four cases : (1) when his country is at war with another, (2) when an area is proclaimed under martial law, (3) when he is called in to aid the civil authorities to preserve or restore order, and (4) when the civil authorities withdraw leaving the military to preserve or restore order. In the first two cases the civil law is suspended and with it this section is in suspense.

Their duty.

555. In the third case, the responsibility of the civil power remains and it is on them to observe the behests of the section. In the last case, that responsibility is thrown on the military who are called in to perform the police duties in the discharge of which they are as much subject to the ordinary law as they would, if instead of being directly charged with the duty of restoring order they were still under the civil power, the only difference being that the directing control is shifted from the civil to the military.

556. It may be said that it is the duty of the soldier to obey his command, it is not for him to reason why. That is true, but only true within limits. The soldier obeying his command only throws the responsibility on his commandant but who has to justify his action. He is not entitled to discharge his duty at his discretion. If this were the law, there would be no difference between a country being placed under martial law which is no law at all and one in which the military are merely called in to perform the police duty.

557. It is, therefore, settled that in such a case the military must put their conduct to the touchstone of two following principles, namely (*a*) They must act in good faith, *i.e.*, with due care and caution and (*b*) they must not use more force or destroy more life and property than is absolutely justified by the necessities of the case.[3] The same rules apply to the private whose subjection to military discipline is not higher than his subjection to the higher law in favour of public safety when the act which the military discipline attempts to enforce or to justify, is one which affects the person or property of another. In such a case a soldier, for the purpose of establishing civil order is only a citizen armed in a particular manner. In judging of his action the civil law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief, that he is bound by law to obey the commands of his superior.[4]

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(1) *Devji*, 20 B. 215 ; *Latifkhan*, 20 B. 394.

(2) S. 94 (*q. v.*) ; *Latifkhan*, 20 B. 394.

(3) S. 130 (2), Cr. P. C. See the Report of Lord Bowen, Sir Albert Rollit and Mr. Haldane, Q.C. on the use of military force to suppress the colliers' strike in 1893, printed in 1 Penal Law (4th Ed.) pp. 426-428.

(4) *Gurdit Singh*, (1885) P. R. No. 27 ; *Niamat Khan*, (1883) P. R. No. 17 ; *Kennett*, 5 Car & P. 282 ; 172 E. R. 976.

558. A person who knowingly obeys an illegal order abets the illegal act of his superior, and as the latter, so is the former without any justification.[1] So where three sepoys of a regiment were cognizant of a quarrel which their Naik had with a mob which was threatening them under circumstances which did not render the act excusable under s. 96, and two men were shot dead, it was held that the sepoys who had fired in obedience to the Naik's orders were not protected by this section, as they must be taken to have known that the Naik was wrong in law, in firing upon the mob, and that they were not bound to obey his illegal orders.[2]

559. Limits of Soldier's Justification.—This view makes it clear that in this respect the duty of the officer and soldier is the same. Either has to believe in good faith that firing is necessary and that firing should not do more harm than is absolutely necessary. If the officer orders firing before it is necessary, the duty of the soldier is plain : he must refuse to fire, and if he does fire, he does so at his own peril. It might be said that this civil duty of the soldier is in conflict with his military duty and discipline, but as Willes, J., remarked : " I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders."[3] In fact, it is only in such cases that the rule here enunciated becomes applicable. The soldier is to exercise good faith, and with good faith he must believe in his legal duty. If he does not know that his officer is wrong, and if he believes that he is right, he is exempt from punishment, whatever may have been his mistake. As Sir James Stephen says : " Soldiers might reasonably think that their officer had good reasons for ordering them to fire into a disorderly crowd, which to them might not appear to be at that moment engaged in acts of dangerous violence; but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street, when no disturbance of any kind was either in progress or apprehended."[4]

560. This rule applies not only to soldiers but also to others who act in a similar contingency under the orders of their superior ;[5] so where a first class constable verbally ordered two police constables to arrest bad characters on the road and to fire if resisted, whereupon the constables challenged two men and fired and killed one man who did not stop, it was held that the order given being manifestly illegal, as it was uncalled for, the constables who obeyed it were themselves guilty of culpable homicide not amounting to murder, though the fact that the accused had acted under orders was material for mitigation of punishment.[6] So in a similar case a sailor was ordered by his superior officer on board a man-of-war to prevent the approach of boats and served out ammunition for the purpose. Boats having persisted in approaching in spite of repeated warnings, he fired a shot and killed a man. He was indicted for and convicted of murder, the Court holding that although he had fired under the impression that it was his duty to do so, it was murder, as the act was not necessary for the preservation of the ship.[7] These are cases in which the superior had authority, but he had exercised it at the wrong moment.

561. The case where the superior was without legal authority is, of course, worse. So where at the trial and execution of Charles I, a soldier who commanded the Guards pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die. It was resolved that that was no excuse, for his superior was a traitor, and all who joined with him in that act were traitors, and where the command is traitorous the obedience to that command is also traitorous.[8] Now, however, s. 94 would be a complete answer in such a case.

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(1) *Latifkhan*, 20 B. 394.
(2) *Per* Rattigan, J., in *Gurdit Singh*, (1883) P. R. No. 27 ; *Niamat Khan*, (1883) P. R. No. 17.
(3) *Keighley* v. *Bell*, 4 F. & F. 490.
(4) 2 Criminal Law, 205.
(5) *Trainer*, 4 F. & F. 105 (112).
(6) *Nga Myat Tha*, (1882) S. J. L. B. 164.
(7) *Thomas*, 4 M. & S. 442.
(8) *Axtell*, (1661) Keylin 13.

562. Engine Driver's Mistakes.—The applicability of this exception in the case of public may arise in a case where the public are bound by law to assist the magistracy and police as they are "in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorized to arrest"; and "the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway canal, telegraph, or public property."[1] So where the engine driver and fireman of a train were indicted for manslaughter arising out of a collision, it appeared that the engine driver had special instructions on that day when an unusual number of trains were running for the Ascot races, that the red signal which usually meant "stop" was to be read as only implying "danger," which he followed with the result that there was a collision with another train which had preceded them five minutes before and had stopped at Egham, of which fact the accused were ignorant. It was found that if this train had not stopped, as she did at Egham, there would have been no collision. Willes, J., directed the jury that the accused had obeyed the special instructions, believing that they were not illegal, that they had acted honestly in the belief that they were carrying them only, and that they could not, therefore, incur any criminal liability for the result. As for the fireman, he had obeyed the driver, as he was bound to do, and he had no hand in the management of the train. They were accordingly both acquitted.[2]

563. In another case, the deceased, a stoker on board a steam tug, was killed by its explosion, whereupon the captain and engineer were indicted for manslaughter. It appeared that the explosion was due to the failure of the safety valve to act on account of its being tied down by weights, in consequence of which there was more pressure on the boiler than it could bear. There was another valve, the duplicate keys of which were to be in possession of a government inspector and the captain, but the latter had no key at the time of the explosion, and the valve was out of order, but the accused were unaware of it. Hill, J., held that, as the deceased could have as well seen that the valve was out of order and might have repaired it without the intervention of either of the accused, there was no case for their conviction.[3] This case may seem to support the defence of contributory negligence, and the language used by Willes, J., in a case[4] would seem to support the view that a man was not criminally liable for negligence for which he would not be liable in a civil action, from which it might be inferred that as contributory negligence has a recognized place in tort, it should also have a place in delicts. But Lush, J., adverted to this expression of opinion in another case and said that it was quite at variance with what he had always heard,[5] and it is now the prevailing view.[6] The conduct of the person injured will, of course, have important influence as a matter of fact upon the relation of cause and effect between the act of the accused and the consequence induced. But beyond this it has no application. Indeed, in a civil action the primary object of the party injured being the recovery of damages, it is always admissible for the party in wrong to show that the injury complained of has been in part brought about by the party complaining upon himself. But in a criminal case, the object is not to redress personal wrongs but to protect the public, and the same plea cannot be allowed to prevail, for if it were, a person could not be convicted of murder for abetting suicide.[7] So Pollock, C.B., said that where there is a loss of life "each party is responsible for any blame that may ensue, however large the share may be, and so highly does the law value human life that it admits of no justification wherever life has been lost and the carelessness and negligence of any one person has contributed to the death of another person."[8] [For a further commentary on this subject see s. 304-A.]

564. Mistake when No Defence.—*Mens rea* is not required where the acts prohibited by a statute are not criminal in any sense, but are prohibited in the public

(1) S. 42, Cr. P. C.
(2) *Trainer*, 4 F. & F. 105 (112).
(3) *Gregory*, 2 F. & F. 153.
(4) *Birchall*, 4 F. & F. 1087.
(5) *Jones*, 11 Cox C. C. 544.
(6) *Per* Pollock, C.B., *Swindall*, 2 C. & R. 330; *per* Rolfe, B. in *Longbottom*, 3 Cox C. C. 439; 6 M. H. C. R. (App.) 31 (33).
(7) 6 M. H. C. R. (App.) 31 (33).
(8) *Swindall*, 2 C. & R. 330.

interest under a penalty. Even in crimes properly so called, the Legislature sometimes prescribes a punishment without requiring proof of moral guilt. But the general rule is that a presumption exists that *mens rea* is essential to every criminal offence. The question in each case is one of construction, but it may be generally stated that while *mens rea* is usually necessary in the case of an offence under this Code, it is usually not necessary in the case of a statutory offence. Ordinarily, such statutes are enacted in the interest of public convenience, public health, morals or revenue, or to protect women and children, and other persons suffering from disability But there are exceptions in each case, and this Code itself furnishes instances in the offences of bigamy, and abduction of a minor under section 361,[1] where the offence is complete without the presence of a *mens rea*.[2] In cases of statutory offences regard must be had, not only to the language but also to the policy which underlies the statute. For instance, under the English Lunacy Act, it is "not lawful" for any one to receive two or more lunatics in an unlicensed house. The accused received such lunatics but was found not to have known that the persons she received were lunatics. Stephen, J., who tried the prisoner told the jury "that an honest belief on the part of the defendant that that person was not a lunatic would be immaterial," and he was held to be right by a Court of five Judges.[3] Offences insuring the purity of food and drugs are punishable in the public interests apart from any question of *mens rea*. So the innocent possession of adulterated tobacco,[4] the sale of adulterated food or drugs[5] are offences which are punishable independently of *mens rea*. So again public policy demands the protection of infants and the preservation of moral relations which justifies the offences before mentioned, the control of intoxicants and poisons[6] and that which prohibits the delivery of intoxicating liquors to children under fourteen except in corked and sealed vessels.[7] Another class comprehends some, and perhaps, all public nuisances.[8]

565. There are, again cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.[9] Such cases often present much difficulty. The accused, a public works contractor, received permission from his department to quarry stones from a place which turned out to be a protected forest whereupon he was convicted under the Forest Act in Madras,[10] though the permission would have exculpated him in Bombay.[11] There can, of course, be no mistake of fact when there was no possibility for the existence of the fact. This was laid down in a case in which the accused pleaded his mistaken right to fish in a navigable river which Lush, J., held to be no defence as such a right was wholly unknown to the law.[12]

566. But these statutes, though they do not condone the crime, do not altogether ignore the *mens rea*, for it still enters in the apportionment of the sentence. But otherwise it is not permitted to obscure the public policy which demands of every man the exercise of a certain degree of diligence which it regards incompatible with the possibility of a mistake.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Act of Judge when acting judicially.

[***Judge***—S. 19. ***Good faith***—S. 52. ***Judicially***—S. 385.]

(1) *Prince's Case*, L. R. 2 C. C. 154.
(2) *Lolley's Case*, R. & R. 237.
(3) *Bishop*, 5 Q. B. D. 259.
(4) *Woodrow*, 15 M. & W. 404.
(5) *Fitzpatrick* v. *Kelly*, L. R. 8 Q B. 337; *Roberts* v. *Egerton*, L. R. 9 Q. B. 494; *Derbyshire* v. *Houliston*, (1897) 1 Q. B. 772.
(6) *Waman*, 10 Bom. L. R. 171; *Masse* v. *Morriss*, (1894) 2 Q. B. 414.
(7) *Brooks* v. *Mason*, (1902) 2 K. B. 743.
(8) *Stephens*, L. R. 1 Q. B. 702; *Medley*, 6 C. & P. 292; *Barnes* v. *Akroyd*, L. R. 7 Q. B. 474.
(9) *Morden* v. *Porter*, 7 C. B. (N. S.) 641.
(10) *Penchul*, 9 I. C. 567; *Lewis*, 22 I. C. 747, dissenting from *Kassim*, 15 I. C. (B.) 802.
(11) *Kassim*, 15 I. C. (B.) 802.
(12) *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582; following *Hudson* v. *Macre*, 33 L. J. M. C. 65.

567. Analogous Law.—This section and the next extend to judicial officers and their ministerial officers the same protection against criminal prosecutions, as the Judicial Officers' Protection Act[1] exempts them from civil liability.

568. Though this and the next section speak only of "Judge," having regard to the meaning of that term in s. 19, it embraces "Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially." The two sections, therefore, cover the same ground though they are differently worded. And so while the older Act speaks of acts "whether or not within the limits of his jurisdiction," it does not mean anything more than an act done "in the exercise of any power which is, or which in good faith he believes to be, given to him by law." A maliciously unjustifiable act is as much outside the limits of the one Act as it is of the other. So it was held under an old English Statute,[2] replaced by the Act of 1850, that the protection afforded by it to provincial Magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction. Trespass will not lie against a Judge for acting judicially but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff in every case to prove that fact.[3] This is so, but it does not mean that a plaintiff complaining of judicial misconduct has to establish the exceptional immunity of the defendant. All he has to shew is that the conduct amounts to a delict or an actionable wrong. It is then for the defendant to plead and prove the exemption.[4] The law, both civil and criminal is in this respect the same.[5]

569. Principle.—Judges and judicial officers have in all ages been the targets of malice and spite. Their function often leads to exhibition of temper and a feeling of retaliation. If, therefore, Judges had been placed on the ordinary footing as regards the defence of their official acts and conduct, they would soon have forsaken their legitimate duties in order to find time to vindicate themselves. Moreover, their exposure to the shafts of unsuccessful party or of condemned convict would have made their position one of considerable peril and precarious advantage. For no one would come forward to seek a situation in which his very fearlessness and independence would make him the butt of unscrupulous attack and organized opposition. The laws of all countries have therefore protected their Judges by special legislation, and the same protection has been thrown round them in this country from very early times (§ 567). So Markby, J., in one case said: "The duties which he (a Magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form the proceedings may take or however informal they may be. This has been so held in England,[6] and I do not see any reason to doubt that the same would be held here."[7]

570. At the same time while there is special protection, it is not unbounded nor unqualified. A corrupt and a tyrannical Judge is as much a pest of society as a brigand and a cut-throat. The one attacks society by polished weapons, the other

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(1) XVIII of 1850.
(2) 21 Geo. III, c. 70, s. 24; *Calder* v. *Halket*, 2 M. I. A. 293.
(3) *Calder* v. *Halket*, 2 M. I. A. 293; *Vinayak* v. *Bai Itcha*, 3 B. H. C R. (A. C.) 36; *Sinclair Broughton*, 9 C. 341, P. C.
(4) *Venkat* v. *Armstrong*, 3 B H. C. R. (A. C.) 47.
(5) *Vinayak* v. *Bai Itcha*, 3 B. H. C. R. (A. C.) 36.
(6) *Tozer* v. *Child*, 7 E. & B. 377.
(7) *Chunder Narain* v. *Brijo Bullub*, 14 B. L. R. 254 (257, 258).

by crude appliances. The Legislature has, therefore, passed the strongest laws against the two besetting sins of public servants, namely, corruption and tyranny. The Code itself contains salutary provisions directed against these abuses, and this section offers no impediment to such offenders being brought to book.

571. Meaning of Words.—"*Judge when acting judicially*": The exemption is only for acts done in the discharge of his duties. If a Judge fires a pistol on the high road and kills passers-by, he is as much amenable to the ordinary criminal law, as the humblest of the King's subjects. "*Power which is believed to be given to him by law*": "Power" here means jurisdiction, as it does in the auxiliary Code.[1] He may exceed his power, but he must not do so consciously. There must be (*a*) good faith, and (*b*) belief in his jurisdiction.

572. What Judicial Acts are Protected.—Reference has already been made to the policy of law in protecting judicial officers from civil (§ 569) and criminal liability. The two provisions are the outcome of the same policy, and they are subject to the same rules and restrictions. In such a case, four questions arise: (*i*) was the officer acting judicially; (*ii*) was his act within his jurisdiction; (*iii*) if not, did he *believe* that he had jurisdiction; and (*iv*) if so, did he believe it in good faith. If the first two questions are decided in the affirmative, his act is protected, and the two other questions do not then arise.[2] If his act was within his competency, the fact that he had acted carelessly and irregularly would not expose him to an action for damages[3] and *a fortiori* to a criminal prosecution. Again, no case for exemption arises if the officer was not acting judicially. It is an official, not a personal protection. That it is "the judicial character of the act which alone gives the protection may be seen by comparing the law as applied to persons who act under somewhat similar conditions, but not judicially. Thus it has long been the custom in England, and it is beginning to be the custom here, to confer large powers on individuals or bodies of individuals, to be used for the public benefit. The persons upon whom these powers are conferred in England are generally called commissioners, and they are placed in this position: whilst on the one hand, they are liable for any wrongful act committed by them, they are, on the other hand, generally protected from personal annoyance and from personal liability. A public officer (generally their secretary) is made defendant in the suit, and the law allows them to defray the costs and damages in any suit, brought against them, out of the property entrusted to their care. Without such protection as this, no one would act as a commissioner; whereas a greater immunity than this would be dangerous to the interests of those with whom they come in contact."[4]

573. So where a Deputy Magistrate, acting as Chairman of the Town Committee under a local Act, ordered the removal of an obstruction from the public road, it was held that though it was the act of a judicial officer, still it was not a judicial act and therefore not entitled to any special protection.[5] The clause under which this case was decided was somewhat ambiguously worded; for it said: "Whoever builds any wall or erects or sets up any fence, rail, post or other obstruction or encroachment in any public highway . . . shall be liable to a fine not exceeding Rs. 50; and the Magistrate shall have power to remove any such obstruction," the expenses of which were to be recovered from the obstructionist.[6] On the strength of this clause it was contended that the fine and the removal of obstruction were both judicial acts, as the one could not be separated from the other. But the Court held that if that were the correct construction, then the Magistrate could not remove an obstruction, unless he could find somebody to fine and pay for the removal. The two clauses were, therefore, severable and separate, and the power to fine and the

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(1) *See* Ch. III, "Powers of Courts," Cr.P.C.

(2) *Meghraj* v. *Jakir Husain*, 1 A. 280; *Halimoozzumah* v. *Municipal Commissioners*, 13 W. R. 340.

(3) *Collector* v. *Taruknath*, 7 B. L. R. 449; on review from *Taruknath* v. *Collector*, 4 B. L. R. (A. C.) 37.

(4) *Chunder Narain* v. *Brijo Bullub*, 14 B. L. R. 254 (257, 258) O. A.; *ib.*, 264-267.

(5) *Ib.*

(6) Beng. Act VI of 1868, Sch. K.

power of removal were two independent acts, the one being judicial and the other only executive, and, as such, entitled to no protection.[1]

What is a Judicial Act?

574. This case shows the difficulty of sometimes separating the judicial from what is purely a ministerial or executive act. And in a country where the two functions are still combined in the same individual, this difficulty is not of infrequent occurrence. At the same time, there must exist a clear line of demarcation between them. Even the word "judicial" is not free from ambiguity. For it has two meanings: "it may refer to the discharge of duties exercised by a Judge or Justices in Court; or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind; *i.e.*, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in Court, and they also act judicially when determining in the private room what is right and fair in some administrative matter brought before them, *e.g.*, the levying of a rate."[2] The word "judicial" properly applies to such a proceeding as is proper to the function of a Judge.[3] The fact that the proceedings are conducted in Court do not necessarily make them "judicial", for a Court may perform various functions. Parliament is a Court. Its duties as a whole are deliberative and legislative: the duties of part of it only are judicial. It is nevertheless a Court. There are many other Courts which, though not Courts of Justice, are, nevertheless, Courts according to our law. There are, for instance, Courts of investigation, like the Coroner's Court. The existence of immunity does not, therefore, depend upon the question whether the subject-matter of consideration is a Court in Justice, but whether it is a Court in law. It is only to a Court in law, that the privileges under reference apply.[4]

575. The act may be *sedente curia*, or it may be not, but if it was of a judicial character, it is entitled to the immunity of law.[5] Therefore, an order under the seal of a Criminal Court to bring a native in that Court, to be there dealt with on a criminal charge, is an act of a judicial character, and whether there was any irregularity of error in it or not, would be dispunishable by ordinary process at law.[6] So the taking or refusing of bail is a judicial and not merely a ministerial act, and mistake in the performance of that duty is, apart from malice, insufficient to support an action.[7] As has been before remarked (§§ 572-573) the fact that an officer or body of officials have judicial powers, does not imply that all their acts are of a judicial nature. The London County Council possesses judicial powers, but its members do not act judicially when they sit in council to consider the advisability of granting licenses for music and dancing.[8] "In the case of duties properly administrative, such as that of granting licenses, their action was consultative, for the purpose of administration, and not judicial."[9] So the proceedings of a military Court of inquiry are not judicial, though the enquiry made is authorized and is made by that Court "judicially," that is to say, in a manner as nearly as possible similar to that in which a Court of Justice acts in respect of an enquiry before it.[10] In this case the inquiry had

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(1) *Per* Couch, C.J., in *Chunder Narain* v. *Brijo Bullub*, 14 B. L. R. 254 (265-266).

(2) *Per* Lopes, L.J., in *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431 (452).

(3) *Per* Fry, L.J., in *ib.*, p. 447.

(4) *Ib.* pp. 446, 447.

(5) *Per* Baron Parke, in *Calder* v. *Halket*, 2 M. I. A. 293 (308).

(6) *Calder* v. *Halket*, 2 M. I. A. 293 (308), citing (1815) *Taaffe* v. *Downes* (unrep.) Irish case, see *ib.*, p. 300.

(7) *Parankusam* v. *Stuart*, 2 M. H. C. R. 396.

(8) *Per* Lord Esher, M.R. in *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431 (441, 443).

(9) *Per* Lord Esher, M.R., in *Royal Aquarium* v. *Parkinson*, 1 Q. B. 431 (443).

(10) *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255, O. A. L. R. 7 H. L. 744, explained *per* Lord Esher, M.R. in the *Royal Aquarium* v. *Parkinson*, (1892) 1 Q. B. 431 (442). It may be added that Kelley, C. B., based his decision on the ground that the motives as well as the duty of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a Court of law to determine." *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255 (272). Indeed, the learned Judge cited the Queen's Regulations (*ib.*, p. 266), in which it is expressly laid down, that a Court of inquiry is not to be considered in any light as a judical body;

been ordered by the Commander-in-Chief who was to pass the final order. So in a similar case, where the Viceroy suspected the Maharaja of Panna of being implicated in a case of murder by poisoning, and he thereupon appointed a special Court of inquiry who allowed counsel, recorded evidence, and submitted their report to the Viceroy for final orders, it was held by the Privy Council that the Court so constituted was in no sense a judicial tribunal, and its inquiry was not a judicial inquiry, nor its report a " judgment " against which there could be an appeal. It was in short a tribunal specially constituted " for the information of his mind," the final order passed being an act of State outside the pale of municipal law.[1]

576. Illegal Acts Excluded.—Assuming now that the act complained of was a judicial act, and not within the power given by law, the section requires that it should be further done in good faith and in the belief that it was sanctioned by law. These two requisites are the necessary pre-requisites for exoneration from criminal responsibility of all persons empowered to act under the direction of law. Law extends its protection only to a person who *bona fide* and not absurdly believes that he is acting in pursuance of his legal power.[2] The question of *bona fides* is out of question, if the act complained of was wholly illegal. A Commanding Officer of a Cantonment believing a person to be dangerous by reason of insanity, actual or impending, caused him to be arrested and detained in his house for medical examination. The medical officers reported him to be sane, but recommended that he should be placed under the observation of the Civil Surgeon of the place, for which purpose he was further detained. The Commanding Officer who had control and direction of the Police in the Cantonment did not act or intend to act under the Lunatic Asylums Act.[3] The person wrongfully detained sued the Commanding Officer for damages for false imprisonment, and the case ultimately went up to the Privy Council, whose judgment was delivered by Sir Barnes Peacock, who assumed, as it was the finding of the Courts below, that at the time of his detention the plaintiff was not a dangerous lunatic. He also found that the defendant had acted *bona fide* in the discharge of a public duty, and under belief that the plaintiff was dangerous by reason of lunacy. But at the same time he held that there was no law which empowered the defendant to put the plaintiff under restraint for such a purpose, nor had he, after the report of the medical officers that the plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the Cantonment and placed under the observation of the Civil Surgeon, even though recommended so to do by the medical officers. The Act for the protection of the judicial officers was relied on by counsel of the defendant, but their Lordships summarily rejected that contention, holding that the defendant was neither a judicial officer nor did he act judicially. In the result he was mulcted in damages for wrongful confinement.[4]

577. The same view was taken in another case in which a Commanding Officer of a regiment had caused a contractor of the regiment to be arrested and kept in confinement on a reasonable suspicion of fraud entertained against him, erroneously believing himself to be lawfully possessed of the authority to do so, though he was shewn not to have acted in malice or conscious violation of the law, nor for the furtherance of any unlawful purpose. The same view was taken by the Madras Court[5] in the case of a Collector of Sea Customs who professed to act under an Act which empowered the levy of a penalty in case of importation of contraband goods. Under that Act,[6] the Collector seized the goods of a merchant from Ceylon on the ground that he was smuggling opium. It was found that the action of the defendant in fining him by telegraph Rs. 56,000 after 15 months' delay without a trial and

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and this view was affirmed O. A. in L. R. 7 H, L. 744 (754) by Lord Cairns, L. C., who held that though the inquiry was not judicial, still the same exemption from prosecution of witnesses examined by it should be made on the ground of public policy, and this view was concurred in by the Full Court.

(1) *Maharajah Madho Singh*, 6 Bom. L. R. 763, P. C.
(2) *Spooner* v. *Juddow*, 4 M. I.A. 353 (379).
(3) XXXVI of 1858, s. 4.
(4) *Calder* v. *Halket*, 2 M. I. A. 293 (308)
(5) *Patton* v. *Hureen Ram*, 3 Agra 409.
(6) VI of 1863, s. 24.

without hearing him, and seizing and selling his palmyras to levy the fine, was, apart from jurisdiction, wholly illegal.[1] That in these circumstances, he could not have acted in good faith is clear; for fair enquiry and considerations which are indicative of good faith were totally wanting. The fact that his proceedings were acquiesced in by his superior officers is immaterial, as is also the fact that he may have entertained a belief that he had jurisdiction. A judicial officer is only protected if he exercises reasonable care in the performance of his official duty.[2] Mere *bona fide* belief is, therefore, not enough, it must be supported by act and conduct from which the Court may reasonably draw an inference that the defendant had fallen into the error in spite of himself. A Magistrate who wilfully acts beyond his jurisdiction does so at his own peril. He is entitled to no consideration,[3] as Lord Denman said in a case: "Magistrates cannot, as is often said, give themselves jurisdiction merely by their own affirmation of it."[4] So where a Magistrate charged and convicted a tailor for "misbehaviour as a domestic servant" under the Regulation of 1814 without information or evidence of the offence charged, and in spite of the plea of the accused that he had given up service because his wages had not been paid, into which there had been no enquiry, it was held that the Magistrate had acted without jurisdiction, and as he had failed to act reasonably, carefully and circumspectly, he could not be said to have acted in good faith, and he was, therefore, not entitled to the protection of the Act.[5]

578. The plea of *bona fides* can, therefore, only arise when there was a jurisdiction, but which was exercised under a misapprehension either with reference to a person not within it, or in excess of the power of the tribunal. It is out of place where there was initially no jurisdiction, and when the proceeding was throughout *corum non judice*.[6] If there was a jurisdiction, the fact that it was improperly conferred, or was otherwise defective, would be covered by the rule (§ 573).

579. Reasonable Belief in Jurisdiction Essential.—But a Magistrate who, whether from indolence or considerations of his own convenience, remanded under-trial prisoners for over three months, his proceedings could not be characterized as anything but unwarrantable and illegal.[7] An order for the removal of an obstruction under s. 144 of the Code of Criminal Procedure was in one case held not to be a judicial order, consequently a Magistrate who passes an illegal order has nothing to protect him.[8] But such an order cannot but be regarded as judicial, though it is necessarily summary.[9] And a Magistrate acts improperly when, purporting to act under that section, he orders the demolition of a house which is neither an obstruction nor a nuisance, though if, in such a case, the Magistrate honestly believed that he had jurisdiction, he was held entitled to the protection.[10] But the soundness of this view is open to question.

580. If a Magistrate acts in defiance of law with his eyes open, it cannot be said that he had acted in good faith. Indeed, such an order may be properly termed malicious, using that term in its wider sense. As Taunton, J., said: "There are two sorts of malice, malice in fact and malice in law; the former denoting an act done from ill-will towards an individual; the latter a wrongful act intentionally done without just cause or excuse."[11] This appears to have been the view taken in a case in which a Magistrate, professing to act under what is now s. 144 of the Code of Criminal Procedure,[12] had ordered the cutting of the plaintiff's *bund*

(1) *Collector* v. *Chithambaram*, 1 M. 89 (97) F. B.
(2) *Collector* v. *Chithambaram*, 1 M. 89 (106) F. B.
(3) *Amiappa* v. *Mhd. Mustafa*, 2 M. H. C. R. 443.
(4) *Bolton*, 1 Q. B. 66.
(5) *Vithoba* v, *Corfield*, 3 B. H. C. R. (App.) 1 (24).
(6) *Sinclair* v. *Broughton*, 9 C. 341 (353, 354) P. C.
(7) *Sahoo*, 11 W. R. 19.
(8) *Ashburner* v. *Keshav*, 4 B. H. C. R. (A. C.) 150.
(9) *Seshaiyangar* v. *Raghunatha*, 5 M. H. C. R. 345 (353); *Taraknath* v. *Collector*, 4 B. L. R. 37 (40, 41); *Bishoo* v. *Chunder*, 10 W. R. 27; *Jaykisto*, 1 B. L. R. (A. Cr.) 20; *Bhyroo Dyal*, 3 B. L. R. (A. Cr.) 4.
(10) *Seshaiyangar* v. *Raghunatha*, 5 M. H. C. R. 345 (359).
(11) *Mitchell* v. *Jenkins*, 5 B. & Ad. 5; Kindersley, J., in *Collector* v. *Chithambaram*, 1 M. 89 (99) F. B.
(12) The case was decided under Act XXV of 1861, ss. 62, 308 (Cr. P. Code).

to erect which he had acquired a right by prescription or user from time immemorial. In this case, the Magistrate had ordered demolition of the *bund* on a mere police report and without complying with the procedure laid down by law. He justified his action on the ground of public convenience, but on this the Court pertinently remarked that a Magistrate's idea of what is for the public convenience, in no degree justified him in appropriating or destroying the property of other persons, except in such manner as the law provides.

581. "The Government and the officers of Government are just as much bound to proceed in such matters according to law, as are private individuals; and the Government and its officers are just as much liable in damages for illegally appropriating or destroying property, for the purpose of adding to the convenience of the public, as is a private individual who appropriates or destroys property for his own convenience."[1] "The Judge says that he erred from ignorance and a misapprehension of the mode of procedure; that he acted judicially; and that it does not appear that his proceedings were characterized by a want of care." "In my opinion," observed Macpherson, J., "when a Magistrate violates the plain language of the law and the very first principles of judicial inquiry, his proceedings presumably are characterized by a want of care; and I think that, in the absence of any evidence to rebut that presumption, the Judge of the Court below was wrong in law in holding otherwise."[2]

582. The amount of care and circumspection required varies with the nature of the proceedings and the position of the accused. A Magistrate could scarcely hope to be acquitted of malice, where he issues a warrant for the arrest of a respectable person without any formal complaint or recorded evidence. Action on the report of Police is as strongly to be deprecated as it is usual with inexperienced Magistrates. The extensive power of arrest possessed by Magistrates must proceed from the exercise of judicial discretion, either on the Magistrate's own view, or upon materials furnished by a person responsible for putting the law in motion.[3] Even as such, the Magistrate is not a mere automaton, influenced by statements, however vague and improbable. Before deciding to take away a man's liberty, he must have reasonable and sufficient grounds for believing that action on his part is necessary. The question in such a case is not the question of jurisdiction but of abuse of jurisdiction. And the law on the subject is clear. Where the Magistrate's act is within his jurisdiction, the question is: Was his act illegal or merely irregular? If the latter, he is protected. In any other case, his liability depends upon circumstances. If act was both illegal and *mala fide*, he is entitled to no immunity merely on the ground that his act was within his jurisdiction. In this respect, law discriminates between a Court of Record and an inferior Court. In the case of the former, law presumes ability and experience to such an extent that it is held to be exempt even though its action be alleged to be *falso malitiose et scientor*.[4] But the law makes no such presumption in favour of inferior justices.[5]

583. The presence of "good faith" is, therefore, the touchstone of judicial liability, whether his act was with or without jurisdiction. But the fact that an act was within jurisdiction may be evidence of good faith, though it is not invariably so. So the law was thus summed up by Cockburn, C.J., in his charge to the Grand Jury: "When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it, or in excess of the power of the tribunal, in such cases the persons acting with judicial authority would not be criminally responsible; but supposing that there is no jurisdiction at all,

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(1) *Taraknath* v. *Collector*, 4 B. L. R. 37 (47); on review *Collector* v. *Taraknath*, 7 B. L. R. 449.

(2) *Taraknath* v. *Collector*, 4 B. L. R. 37 (49).

(3) *Surendra Nath Roy*, 5 B. L. R. 274 (291).

(4) *Per* North, C.J., in *Bernardiston* v. *Soame*, Tay. Rep. 291; *per* Earle, C.J., in *Kemp* v. *Neville*, 10 C. B. (N. S.) 523 (547); *Taaffe* v. *Lord Downes*, 3 M. I. A. 36*n* (39); *Fray* v. *Sir Colin Blackburn*, 3 B. & S. 67; *Hammond* v. *Howell*, 1 M. 84, O. A. 2 M. 218; *Anderson* v. *Gorrie*, 1 Q. B. 688.

(5) *Ferguson* v. *The Earl of Kimoul*, 9 Cl. & F. 311; *Miller* v. *Slare*, 2 W. Bl. 1141.

that the whole proceeding is *corum non judice*, that the judicial functions are exercised by persons who have no judicial authority or power, and a man's life is taken, that is murder; for murder is putting a man to death without jurisdiction, or without any of those mitigating circumstances which reduce the crime of murder to one of low degree. Thus in the case put by Lord Coke of a lieutenant having a commission of martial law, who puts a man to death by martial law in time of peace,—that, says Lord Coke, is murder.

584. "Again, on the second branch of the case, in which we take the legality of martial law for granted, if you think that although there may have been a mistake, and most grievous mistake, in condemning and sending this man to death, yet that the proceedings were done honestly and faithfully, and in what was believed to be the due course of the administration of justice, again I say you ought not to harass the accused persons by sending them for trial to another tribunal."[1]

585. Civil and Criminal Liability.—In the cases above cited instances have been for the most part given of cases in which the Judges were proceeded against civilly. But the same principles which govern their civil liability also govern their criminal liability. The difference, if any, between the two cases, is one of degree and not of quality. So it is laid down in Bacon's Abridgment: "Any fraud or misconduct imputed to Magistrates in proceeding, notwithstanding the issue of a *certiorari*, may be ground for a criminal proceeding against them, and Lord Kenyon[2] said he believed there were instances in which a criminal information had been granted against Magistrates acting in Sessions. But these must have been instances of manifest oppression and gross abuse of power, for generally the Justices are not punishable for what they do in Sessions."[3] Such was held to be the case where the Justices had caused a woman to be whipped for damning an older man under a statute which only applied to vagrants,[4] or where they corruptly refused to issue licenses to publicans.[5] And the result would have been the same, even if, apart from corruption, they had acted from malevolence or perversity. So Ashurst, J., said in a case in which the Justices had discharged a vagrant, who had been committed by another Justice, from mere caprice: "This, therefore, was gross misbehaviour in the defendants, which cannot be imputed to mistake or ignorance of law. And though they have denied generally that they acted from any interested motive in this business, yet that is not sufficient, for if they acted even from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations."[6]

586. The oppression and tyrannical partiality of Judges, Justices and other Magistrates in the administration, and under colour of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence.[7] Thus, if a Justice of the Peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information. But though a Justice of the Peace act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill-intention whatsoever, the Court will never punish him by the extraordinary course of an information, but will leave the party complaining to his ordinary remedy.[8] And whenever Justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded, whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case alone, they have become the subject of punishment.[9]

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(1) Cockburn, pp. 124, 156.
(2) *Seton*, 7 T. R. 373.
(3) 4 Bac. Abr. 631.
(4) *Mather*, 2 Barnardiston, 249.
(5) *Davis*, 3 Burr. 1317; *Holland*, 1 T. R, 692.
(6) *Brooke*, 2 T. R. 190.
(7) 4 Black., 141.
(8) 1 Black., 354, Note (17); *Palmer*, 2 Burr. 1162; 1 Russ., Bk. 2, Ch. XIV (5th Ed.), p. 297.
(9) *Per* Lord Tenterden, C.J., in *Borrow*, 3 B. & Ald. 434; *ex parte Fenton*, 2 Ad. & E. 127; Black, 354.

So, if a Magistrate were to refuse bail in a bailable offence wilfully and in defiance of the law, he will be liable to a criminal prosecution.[1]

Previous Sanction to Prosecution.

587. The Code of Criminal Procedure provides that no Judge or other public servant, not removable from his office by the Government of India or the local Government, can be prosecuted for any offence of which he is accused as such Judge or public servant, without the previous sanction of the Government having power to order his removal. Such Government may determine the person by whom, the manner in which, and the offence or offences for which the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held.[2] The object of this provision is to prevent petty or vexatious prosecutions.

Act done pursuant to the judgment or order of Court.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

588. Analogous Law.—This section is a continuation of the last, and it is subject to the same rules. Its provisions should be compared with those of the Act for the protection of judicial officers, which is quoted here, so far as it is material for the purpose of the present section. The language of that Act and this section is not similar, but how far the two really differ will be presently considered. (§ 594).

The clause under reference runs thus : " (1) .....No officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."[3]

589. The Police Act lays down the following clause which confers a special protection upon police-officers executing the order of Magistrates :—

" Section 43. When any action or prosecution shall be brought or any proceedings held against any police-officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

" Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine.

" Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section."[4]

590. Principle.—Protection of judicial officers would be inadequate and incomplete, if, though enjoining personal immunity, they may be attacked through their ministerial officers who have acted in obedience to their commands. The position of a ministerial officer, acting under the direction of a Judge, is not incompatible with that of a soldier obeying the commands of his commander. So Alison, in his *Principles of Criminal Law of Scotland*, writes : " The express command of a Magistrate or officer will exonerate an inferior officer or soldier, unless the command be to do something plainly illegal, or beyond his known duty." If through gross ignorance, or neglect or design, a Judge or Magistrate pronounces an unlawful sentence, what shall be said of the officers and others who carry it into execution? If the order or warrant was plainly illegal, as for example, to strangle a prisoner in

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(1) *Badger*, 4 Q. B. 468 ; *Dodgson*, 9 A. & E. 704.

(2) S. 197, Cr. P. C.

(3) Act XVIII of 1850, S. 1.

(4) Act V of 1861, s. 43. For local variations, *see* the Madras District Police Act (Mad. Act XXIV of 1859), s. 54 ; The Madras City Police Act (Mad. Act III of 1888), s. 81 ; The Bombay City Police Act (Bom. Act V of 1902), s. 140 (3) ; The Bombay District Police Act (Bom. Act IV of 1890), s. 80 (3) ; Bombay Village Police Act (Bom. Act VIII of 1867), s. 20.

jail, or to poison him, or the like, certainly the mere possession of such a warrant will not prevent the officer, who wickedly yields it obedience, from being held as party in the legal murder, and suffering for its commission. But, on the other hand, if the error was in such a part of the proceedings as the officer entrusted with its execution has no opportunity of seeing and is not called upon in duty to examine, and if the warrant put in his hands be fair and in ordinary form, certainly he will not be answerable for any illegality or vice in the previous, and to him, inscrutable proceedings.

591. "The same distinction is applicable in the case of a soldier acting in obedience to the orders of his superior officer, with this additional circumstance in his favour, that he is not only in a much humbler station, and trained to more implicit obedience than a legal functionary, but subject to a peculiar and peremptory code of laws, armed with powers of extraordinary severity, for the express purpose of enforcing on his part the most implicit obedience to command. It will require, therefore, the very strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits ; it is confined to what is commanded in the course of official duty, which plainly and evidently does not transgress its limits. For what if an officer were to command a private soldier to commit murder or to steal, or to aid him in a rape, or if he order a file of soldiers to fire on an inoffensive multitude, certainly in none of these cases will the privates be exempt from punishment if they yield obedience to such criminal mandates."[1]

592. It will be noticed that (*a*) good faith and (*b*) belief in the legality of the order are the only two requisites of an exemption from criminal liability under this section. Mistake of law may, therefore, be a good defence under this section, for in believing that an order issued was legal, a person may be misled by a mistaken view of law as much as by a mistaken view of facts.

593. Meaning of Words.—"*In pursuance of, or which is warranted by the judgment or order,*" *i.e.*, the act alone was either ordered by the Court or is justified by its order. The judgment or order must be in writing, unless an oral order is authorized by law.[2] "*If done whilst such judgment or order remains in force*": Suppose a warrant is issued for the arrest of a person or the attachment of his property, and while the bailiff is on his way to execution, the judgment of the Court is reversed. The bailiff does not know of it and cannot be communicated with. Is he protected under the section? Apparently not under this section, for the subsistence of the judgment is a *conditio sine qua non* for exemption. But he may be exempt under section 76 or section 79. "*Notwithstanding the Court may have had no jurisdiction*": The question raised is one of jurisdiction, and not propriety. A judicial order, if within jurisdiction confers an absolute immunity upon persons commissioned to execute it whatever may be said against its propriety. It is only in the case of a judgment without jurisdiction that good faith and belief in its legality are essential to immunity. "*The Court had such jurisdiction,*" *i.e.*, at the time of the judgment or order.

594. Protection of Ministerial Acts.—This section extends, as regards criminal prosecution of ministerial officers, the same immunity which they enjoy from civil liability under the Act of 1850.[3] Under that Act the immunity is confined to the execution of any warrant or order which under this section is extended to anything done *in pursuance of, or which is warranted by* the judgment or order. The difference in language between the two statutes is noticeable not only because they both relate to the same subject but also because they are complementary safeguards against accountability of persons placed in positions of subordinate responsibility. Now ordinarily, it may be taken as a sound maxim, that a person's civil liability for a wrong is greater and not less than his criminal liability. If so, it follows

(1) P. 673.
(2) *Maung Pa*, (1908) 4 L. B. R. 253, 8 Cr. L. J. 68.
(3) Judicial Officers' Protection Act (Act XVIII of 1850).

that the Act of 1850 should be wider in its operation than the present section. But it is not. For under the language used by the two sections it may be that a person cannot be reached on the civil side, but still he may be proceeded against criminally. For under the Act of 1850 anything done in execution of any warrant or order protects the officer charged with its execution whether the warrant was or was not legal and whether it was issued with or without jurisdiction. But under this section the officer is not to the same extent protected against criminal prosecution, for if the warrant was without jurisdiction, it must be shown that "the person doing the act in good faith believed that the Court had such jurisdiction." But this need not be pleaded in bar of a civil suit. So it was held in an English case that the governor of a prison is protected in obeying a warrant of commitment, on its face valid, though it may in fact be illegal.[1] So much appears to be deducible from the language of the Act itself. For it protects persons *bound* to execute legal warrants, who do any act "for the execution of any warrant which they would be bound to execute, if within the jurisdiction of the person issuing the same." In other words, persons placed in habitual obedience to the lawful orders of others are entitled to presume that all orders emanating from them are lawful, and if any single order be illegal, they cannot be held to act at their peril. At the same time no subordinate, whatever his subordination, can be exonerated for doing an act palpably and apparently illegal. Having had an actual notice of illegality or defective jurisdiction, he is bound to pause and not persist in an illegal pursuit.

595. It is not necessary under the Civil Act that the officer should have been accustomed to execute orders of Court. All that is necessary is that it should have been within the scope of his ordinary duties. If, for example, an orderly peon is employed as a bailiff, he is not entitled to exceptional protection. But this is not ingredient in judging of the criminality of an act under this section, which approaches the question from a somewhat different standpoint. In the first place, while the Civil Act confines its protection only to "an officer of any Court or other person bound to execute the lawful warrants or order," the section is more general, and protects not only such persons but also the public at large—the test being the act and not the person, and the limit of criminal responsibility being determined not by the ordinary duties, but by the terms of the order and belief in its legality. For instance, a person may be awarded a decree declaring his right to maintain a police force. The Court may or may not have jurisdiction to pass such a decree, but if there was such a decree, and he believed in the jurisdiction of the Court, he is entitled to enlist a police force, though, by so doing, he may contravene the law. So if a Court pass a decree for possession of property or delivery of land and on motion or appeal the judgment-debtor obtains stay of execution, his resistance to execution by the decree-holder would be as legal as seizure in execution on behalf of the latter.

596. In this connection the words "in pursuance of" must be distinguished from "warranted by." The former imply an act directly authorized by the order, the latter an act which, though not expressly authorized by it, follows from it, as a matter of course, or as a matter of legal or logical consequence. A warrant of arrest authorized the seizure of the person ordered to be arrested in pursuance thereof. If he escapes, his recapture again and again is warranted by it as a matter of necessity. Whether an act is warranted by, or is done in pursuance of an order, is a question, the answer to which must depend upon the construction of the order itself, and the legal incidents that may be attached to it. For instance, the warrant of a Civil Court, authorizing the seizure of moveable property, must be read subject to the rule that a person executing any process under the Code of Civil Procedure directing or authorizing the seizure of moveable property shall not enter any dwelling-house after sunset and before sunrise, or break open any outer door of a dwelling house.[2] He has, therefore, no right to seize property of a third person, or in possession of a third person in pursuance of such a warrant, which further does not warrant the breaking

(1) *Olliet* v. *Bessey*, T. Jones R. 214; *Butt* v. *Newman*, Gow. 97; *Henderson* v. *Preston*, 21 Q. B. D. 362.

(2) S. 271, Civil Procedure Cade (Act XIV of 1882), now *see* s. 62, Act V of 1908.

open the doors of a third person, or of the judgment-debtor except as and to the extent allowed by law.[1] If, therefore, a bailiff exceeds the power conferred upon him by the warrant and authorized by law, the party wronged may treat him as a trespasser, and avail himself of his right of private defence, or sue him for recovery of damages.[2] So, since the judgment-debtor is exempt from arrest while attending a Court, the protection being *eundo, morando, et redeundo*,[3] his arrest, while on his way to the Court in obedience to a citation to give evidence, and made within the precincts of a Court and with some show of violence and in the sight of the Magistrate, could not be justified by reference to the section.[4] Indeed, the use of force is only in rare cases justified by the Civil Procedure Code; and whenever it is authorized, it must be used with discretion. In the absence of an express direction a bailiff has no right to use force, and if, therefore, in executing a civil process he breaks open the gate of the judgment-debtor, he is guilty of mischief and may be proceeded against as such.[5] So again, since the jurisdiction to arrest is territorial, a person without jurisdiction cannot be illegally brought within jurisdiction and then arrested.[6] An officer charged with the duty to arrest must be in possession of his authority, for under the Code of Criminal Procedure it is obligatory on him to notify the substance of the warrant to the person to be arrested, and, if so required, to show him the warrant,[7] and the same rule would appear to apply to an arrest made in execution of a civil process[8] If, therefore, a person attempts to arrest another under a warrant not in his possession, he may plead this section as a defence to a charge of wrongful confinement or wrongful restraint; but the person arrested has then also the right of private defence, and he cannot be punished, if he resists his seizure or escapes from custody.[9] In such cases, though the judgment or order may be legal, and there may be no defect of jurisdiction, still the exemption does not extend, because the act complained of was not done in pursuance of the judgment or order, nor was it warranted by it.

597. So under the Gambling Act[10] the District Superintendents of Police and Magistrates, if on credible information satisfied, are empowered to authorize police officers of a prescribed rank to enter and search suspected gaming-houses. The receipt of credible information is a *sine qua non* of a legal search.[11] But if the officer concerned issue a search-warrant without credible information, the warrant is defective,[12] but the officer executing it is protected. These may be said to be cases of latent illegalities which no person in subordinate charge can be reasonably expected to canvass; where, however, the defect is patent and such as the exercise of a reasonable care may unravel, the case is different. For there is then no good faith. Indeed, in this connection it may be well to note that as there are different degrees of illegalities, so are there different grades of criminal liability. The judgment or order here referred to may be (*i*) illegal, or (*ii*) without jurisdiction. Its illegality may be either (*a*) patent, or (*b*) latent; and as regards jurisdiction, (*a*) it may have been issued by a Court acting wholly without jurisdiction, or (*b*) having jurisdiction, it may have been irregularly or improperly exercised. These distinctions

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(1) *Gazi*, 7 B. H. C. R. 83.

(2) *Gazi*, 7 B. H. C. R. 83; *Damodher* v. *Lall*, 8 B. H. C. R. (A. C) 177; *Goma* v. *Gokal Dass*, 3 B. 74; *Raj Bullub* v. *Issan Chunder*, 7 W. R. 355; *Subjan* v. *Sariatalla*, 12 W. R. 329; *Kishorymohan* v. *Hursook*, 17 C. 436, P.C.

(3) "While going, staying and returning."

(4) *Thakoordas* v. *Shunker Roy*, 3 W. R. 53.

(5) *Anderson* v. *McQueen*, 7 W. R. 12.

(6) *Shearwood*, 2 Tay & Bell 71.

(7) S. 80, Cr. P. C.

(8) *Amarnath*, 5 A. 318.

(9) *Amarnath*, 5 A. 318; *Janki Pershad*, 3 A 205 *Abdul Gafur*, 23 C. 896; *Satis Chundra* v. *Jadu Nandan*, 26 C. 748; *Durga* v. *Nabin* 25 C. 274; *H. Colville* v. *Kris Kishore*, 26 C. 746. The English Law is identical, *Codd* v. *Cabe*, 1 Ex. D. 352. It would be otherwise in the case of an arrest by a police officer on a suspicion of theft, *Vyankatrav*, 7 B. H. C. R. 50.

(10) S. 5, Act III of 1867.

(11) *Subsookh*, 2 N. W. P. H. C. R. 4762 *Chunni Mull*, (1871) P. R. No. 35; *Sandhi* v. *Kanhya*, (1876) P. R. No. 14; *Kada* (188 P. R. No. 6 F. B.

(12) *Banwari*, (1895) P. R. No. 38; *Vir Singh*, (1895) P. R. No. 59.

do not directly affect the question to be here considered; but their importance will be readily appreciated in cases arising out of resistance to lawful authority.[1]

598. Lastly, the section contemplates cases in which the act lacks in *bona fide* belief in the jurisdiction of the Court. Criminal law protects person acting in good faith. On the other hand, it makes no concession in favour of persons who act with their eyes open. In considering this question, regard must always be had to the nature of the act as well as to the position and education of the person acting. A jailor charged with the duty of carrying out the sentence of whipping may be aware that the Magistrate had no jurisdiction to pass it. He is not then bound to execute his order, and if he does so, he acts at his own peril. On the other hand, a menial flagellator may plead his exoneration on the basis of this section. The exercise of good faith then depends not only on the nature of the act, but also upon the character of the actor. The greater the illegality, the less is the chance of exoneration. But it is not all. For even a most flagrant act of illegality in a judgment or order may be unnoticed by a person ignorant of the language and too indolent to get it read. Such a person may lack "good faith" if he believed in jurisdiction without inquiry and without bestowing even a casual attention. A nod is as good as a wink to such a blind person, and he cannot claim protection of law: *Vigilantibus, non dormientibus jura subveniunt.*[2]

Act done by a person justified, or by mistake of fact believing himself justified by law.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration.

A sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

[***Good faith***—S. 52, *supra*.]

599. Analogous Law.—This section is closely analogous to section 76 with which it should be read in order to understand its true significance. It is well to note that the same facts which exempt a person under that section are sufficient to exempt him here. The commentary under this section is, therefore, merely supplementary.

600. Principle.—Section 76 deals with cases in which a person acts in the belief that he is *bound* by law to act. This section deals with a case in which a person acts in the belief that he is *justified* by law. Otherwise, the two sections are identical. Cases in which a person feels justified by law are naturally more numerous and complicated than those in which the act is the result of a legal compulsion. This section, like section 76, is generally worded, and protects not only acts justified but not justifiable by law, but also acts both so justified and justifiable, in which case, however, the question of criminality does not arise, for what is legal cannot be criminal. The section then properly applies to cases in which a person acts in the belief that his act is justified by law but which it is not.

601. Meaning of Words.—"*Justified by law*": The word "law" is used here in its large sense as signifying both written and unwritten law (§ 537). "*Mistake of fact*," "*Mistake of Law*" for the meaning of which, *see* section 76 (§ 545). "*Believes himself to be justified by law*": It is not necessary that the belief so entertained should be communicated to others. All that is necessary is that it should be entertained in the mind of the actor *at the time* of the performance of the act. This is essential, for belief *ex post facto* can have no effect upon its criminality.

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(1) Ss. 172-190, 223-227, 353.

(2) "Laws come to the assistance of the vigilant, not of the sleepy."

602. Acts Justified by Law.—As remarked before, acts justified by law form by far the most complicated and numerous cases in criminal law. In England, the powers of Government officers depend partly upon statute and partly upon common law. In India, however, where the laws have been mostly codified, Government servants derive their powers mainly from Statute Law, though they still retain some powers not derived from Statute. This is specially so in the case of superior officers of the Crown possessing some of the attributes of sovereignty, whose acts cannot be canvassed in a criminal Court, because they are done by virtue of a power which stands above the law.

Prerogative of the King.

603. How far this power is possessed, and in what cases it may be exercised, is a question, the answer to which depends upon the place assigned to the Government of India in the English constitution. And as the Government of India, doubtless, possesses and exercises some of the delegated functions of sovereignty, it becomes necessary to inquire into the legal status and liability of the British Sovereign who stands at the head of the English constitution. Now, as regards the king, the law ascribes to him in his political capacity absolute perfection. The king can do no wrong. This ancient maxim does not mean that whatever the king does is just and lawful. It means only two things: *first*, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his poeple; and *secondly*, that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people, and therefore, cannot be exerted to their prejudice.[1] By virtue of this prerogative the king is not under the coercive power of the law, which will not suppose him capable of committing a folly, much less a crime.

604. Powers of the Government of India.—Now, as the Government of India (which only means the Governor-General in Council) is a Government subordinate to the Crown and Parliament, it necessarily possesses rights and powers which are by no means co-extensive with those possessed by the Crown. And whatever powers it possesses, it may transmit by delegation to local or subordinate Governments under it. So far as the powers of the Government are conferred or defined by Statute, no difficulty need be encountered in the construction of the section. For a reference to the Statute will at once shew whether the act sought to be justified by law is so justifiable. The question, however, becomes more difficult when the justification is made on any of the other grounds.

605. Its Amenability to Civil Court.—That acts done in the execution of these sovereign powers were not subject to the control of the Municipal Courts either of India or England has been held in several cases.[2] On the other hand, it is clear that a corporation or company wielding sovereign powers cannot be exempt from amenability to Municipal Courts merely because it is a sovereign body, though, its acts, in respect of which its liability is to be determined, may in no wise possess the attributes of sovereignty.

606. Act of State.—It is thus clear that a Sovereign may possess rights which may be amenable to the jurisdiction and control of the Municipal Courts, and in respect of them it would be no defence to say that they were acts of State.[3] On the other hand, the Municipal Courts cannot arrogate to themselves any jurisdiction over the legitimate exercise of sovereign rights against which the subject may have a remedy—as will be seen in the sequel—but that it is not in the Civil Court. So far it is clear and universally conceded. But it does not advance the discussion much further. We have still to ascertain the exact nature and extent of the two classes of rights, for upon that depends the practical solution of the question. There

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(1) 2 Black., p. 246; 3 Black., 254, 255.

(2) *Nabob of Arcot* v. *E. I. Co.*, (1793) 4 Bro. C. C. 180; *E. I.* C. v. *Syed Ali*, (1827) M. I. A. 555 (577, 578), P. C.; *Secretary of State* v. *Kamachee*, 7 M. I. A. 476 (531).

(3) The term "act of State" has been used in two senses—in one sense as meaning the lawful acts of the executive Government and its servants; in the other and narrower sense, as denoting warlike and other acts done by the authority of the Crown affecting rights of aliens out of its dominions.

are, no doubt, certain acts of the sovereign power which would be obviously regarded as acts of State. Such would be an act of the Sovereign Power, in relation to peace or war, or an act done by it as being absolutely necessary for the public safety.[1] As the Privy Council observed : " The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer ; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." [2]

607. But there is no such thing as an act of State between the Sovereign and its subjects. Any seizure of their property or of their person to be legal, must be justified by law. If otherwise, Municipal Courts have the jurisdiction to canvass the propriety and justice of the order and to afford redress in case of impropriety, injustice or illegality. And for this purpose the State has no advantage over a private subject, for both must appeal to the same law for the justification of their act or conduct. So Stephen says : " Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals." [3]

608. Where then the legality of an act is called in question against a servant of the Crown by a British subject, it is not enough for the defendant to plead that it was an act of State ; he must also show that it was lawful in accordance with the law of the country in which the act complained of was committed,[4] any unlawful interference with the person and property of the subject being actionable.[5]

609. So far, then, as regards the personal exemptions of executive officers of Government. The liability of judicial officers to criminal prosecution has already been discussed elsewhere. (S. 77)

610. Suspension of Civil Law.—Turning next to the exemption of persons from criminal prosecution on account of justifiable acts, the question may be regarded from the following standpoints : (*i*) When the act is defended, not under the ordinary law, but on the ground of emergency ; (*ii*) when the act is defended under the ordinary law, but under exceptional circumstances ; and (*iii*) when it is defended on the ground of private defence. As regards justification on the ground of public emergency, sufficient has been said before as to when the use of force is justifiable for the suppression of lawlessness in a given locality. But the question here is, in what circumstances and how far is the suspension of ordinary law, and its supersession by military law justifiable. Now, martial law is neither more nor less than the will of the General who commands the army ; in fact, martial law means no law at all. Therefore, the General who declares martial law, and commands that it shall be carried into execution, is bound to lay down the rules, regulations and limits according to which his will is to be carried out.

611. Whenever a country is in open rebellion and the power of the civil authorities cannot be exercised, and the country is in the occupation of the military force, the suspension of civil law follows as a matter of course, for there can be no law when the power to enforce it is gone. In such a case therefore, resort must be had to martial law, in its widest sense.

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(1) Cf. *Secretary of State* v. *Kamachee*, 7 M. I. A. 476 (501). This view taken by the Supreme Court at Madras is not affected by fact that their judgment was reversed by the Privy Council.—*Ib.*, p. 529.

(2) *Per* Lord Kingsdown in *Secretary of State* v. *Kamachee*, 7 M. I. A. 476 (529).

(3) Stephen's Commentaries, p. 65. But the Sovereign possesses the power of dismissing its servants at pleasure on public grounds, and the persons so dismissed have no redress, though under the same circumstances they might have had redress, if their employer did not wield sovereign powers. This is a prerogative of the Crown justified on the ground of public necessity. It could scarcely be designated an act of State. *Grant* v. *Secretary of State*, 2 C. P. D. 445 (460, 463) ; *Chatterton* v. *Secretary of State*, (1895) 2 Q. B. 189 ; *Shenton* v. *Smith*, (1895) A. C. 229 ; *Dunn* v. *The Queen*, (1896) 1 Q. B. 116 ; *Mitchel* v. *The Queen*, (1896) 1 Q. B. 1321 (footnote) ; *Gould* v. *Stuart*, (1896) A. C. 575 ; *Jehangir* v. *Secretary of State*, 27 B. 189, 213.

(4) *Carr* v. *Francis, Times & Co.*, (1902) A. C. 176.

(5) *Fabrigas* v. *Mostyn*, 20 St. Tr. 229; *Gubick* v. *Carrington*, 18 St. Tr. 1029 ; *Walker* v. *Baird*, (1892) A. C. 491.

612. When Martial Law Justifiable.—" The proclamation of martial law is in fact no more than a declaration that, under circumstances of urgent public danger, the law is for a time suspended, and that for the safety of the State, the Government deems it necessary to set aside the ordinary rules of law by military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it. Courts-martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions by instituting an enquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But Courts-martial so assembled have nothing in common with the tribunals bearing the same name which, under the Mutiny Act, take cognizance of military offences. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with Courts-martial assembled for the punishment of rebels, under proclamation of martial law, without the sanction of any positive enactment. Sentences of such Courts add nothing to the legality of the punishments inflicted, and serve only to show that these punishments have not been inflicted, without due regard to the guilt of those who were subjected to them. Accordingly, it is the practice where martial law has been used, and punishments have been inflicted under it, that when the danger is over, the Legislature should be applied to for laws of indemnity for the security of those by whom these powers have been exercised, and for whom there is no legal warrant, however necessary it may have been to assume them."[1]

613. The power to proclaim martial law must, however, be exercised by the civil authorities, and that power they may possess either by delegation from the Crown, or by an Act of the Legislature. Possessing the power, it can only be put in use on an occasion of great and imminent emergency. It cannot be put in force in apprehension of—but only in the presence of—danger.

614. General Result.—The decided cases[2] establish three propositions of law, namely, (*i*) that the Governor has power in case of rebellion to suspend the operation of civil law, and to place the country under martial law, (*ii*) that an act may be warranted by martial law when it is unjustifiable by civil law, and (*iii*) that though on the restoration of peace an Act of Indemnity is ordinarily passed legalizing all acts committed during the period of disturbance, and though such an act is, in ordinary cases, sufficient to absolve all persons from criminal or civil liability, still it is not a sufficient answer to an act of gross oppression or brutal barbarity.

615. Emergency Legislation.—These principles have been followed by the Indian Government in the administration of this country, and the State Offences Act,[3] since repealed,[4] empowered—and the power vested in the Governor-General still empowers[5]—the Executive Government to proclaim any area subject to its jurisdiction as in a state of rebellion, and any person committing any crime against the State, or murder, arson, robbery, or other heinous offence against the person or property may, thereafter, be triable by a Commission whose sentence is final.[6] The Commission was, however, only empowered to pass a sentence warranted by law for such crime.[7]

616. Indeed, the rights of private persons during the existence of an insurrection do not necessarily involve suspension of all rights of person and property. They exist, as they existed before, but they are liable to be superseded by the higher interests of society, for the attainments of which they may be even encroached upon

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(1) Finlayson's Review of Authorities as to Suppression of Riot or Rebellion, p. 96.

(2) *Phillips* v. *Eyre*, L. R. 6 Q. B. 1 (16, 17) ; affirming L. R. 4 Q. B. 225 ; *Wright* v. *Fitzgerald*, 27 St. Tr. 759 (765).

(3) Act XI of 1857.

(4) By Act IV of 1921.

(5) S. 72, Government of India Act.

(6) *Cf.* Act XI of 1857, s. 4. Similar powers were conferred by the Martial Law Ordinances passed from time to time; *e.g.*, Ordinances II-V of 1921 dealing with the outbreak of lawlessness in Malabar.

(7) Act XI of 1857, s. 4.

or ignored : *salus populi est suprema lex.*[1] The position in such a case is not incomparable to that of a house on fire, when no one denies that it would be perfectly right to pull down neighbouring houses to arrest the progress of the fire. It is, indeed, the natural deduction from the primary law of society, based, as some philosophers term it, on the original compact, that every member of society shall, in the case of necessity, subordinate his individual welfare to the welfare of the community. So there are many cases in which individuals sustain an injury for which the law gives no action, as where private houses are pulled down or bulwarks raised on private property for the preservation and defence of the kingdom against the King's enemies.[2] So long, therefore, as the acts of the Executive Government were directed to the maintenance of order and preservation of peace, the private subject has no remedy, and it would be a sufficient defence to say that the act was considered in the circumstances justifiable. Nor can the conduct of those arraigned for acts done on the spur of the moment and at a time of great national danger be judged by the standard applicable and applied to ordinary cases, though there are naturally limits to this doctrine of irresponsibility, but those limits can only be reached if there is shown to be the presence of malice, cruelty or inhumanity manifestly unnecessary or uncalled for.[3]

617. Operation of an Act of Indemnity.—In order to prevent litigation of this nature it is the usual practice of all States to pass an Act of "grace, and general pardon, indemnity and oblivion," on the restoration of peace. Such an Act has necessarily retrospective effect[4] and is a sufficient defence[5] to all actions, whether civil or criminal, for liability arising under the general law. Of course, if the act sought to be idemnified were tyrannical and inhuman, the Crown has the right of veto which it may be moved to exercise on the advice of its Ministers.[6] But once an Act is passed, and duly assented to by the Crown, it is not for the Municipal Courts, to enquire into its propriety, though they are, of course, precluded from considering how far an alleged act was justified by it.

618. Right of Correction.—There remain other acts which may be justified by law. A moderate chastisement is, for instance, justifiable in the case of parents and persons in *loco parentis*. It is customary in this country *de jure maritiis*. The correction in each case must be administered to the person placed as childwife, pupil or apprentice, and in every case it must be moderate and inflicted with discretion. As Cockburn, C.J., said in a case : " A parent, or schoolmaster, who for this purpose represents the parents, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it is administered for the gratification of passion or of rage, or if it be immoderate and excessive in its degree, or if it be protracted beyond the child's power of endurance, or with an instrument unfitted for the purpose, and calculated to produce danger to life, or limb, in all such cases the violence is unlawful, and if death ensues, it will be culpable homicide."[7] This was the case of a schoolmaster who had caused the death of a boy by excessive beating. In another case, where the father beat a child two and a half years old with a strap, of which he died, Martin, B., said : " The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two and a half years old. Although a slight slap may lawfully be given to an infant by its mother, more violent treatment of an infant by its father would not be justifiable ; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner."[8]

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(1) " The safety of people is the supreme law."

(2) *Carter* v. *Thomas*, (1893) 1 Q. B. 673.

(3) *Per* Buller, J., in *Plate Glass Co.* v. *Meredith*, 4 T. R. 797 ; *see* s. 81, ill. (*b*).

(4) Act set out in *Phillips* v. *Eyre*, L. R. Q. B. 225 (226, 227).

(5) *Per* Willes, J., in *Phillips* v. *Eyre*, L. R. 6 Q. B. 1 (23).

(6) *Per* Cockburn, C.J., in *Phillips* v. *Eyre*, L. R. 4 Q. B. 225 (243).

(7) *Hopley*, 2 F. & F. 202.

(8) *Griffin*, 11 Cox. C. C. 402.

619. The question what degree of chastisement is appropriate depends upon the circumstances of each case. A father whose son had got into the habit of stealing, questioned him as to a theft clearly proved against him. He resolutely denied it, whereupon he beat him in a passion with a rope, of which he died. The father was struck with horror at the consequence, as his intention was only to punish him so as to cure him of his wickedness, and it washeld that though the beating was justifiable, it had been immoderate and the father was convicted of manslaughter.[1] In another case a girl, aged 15, was placed in the care of her aunt who made her work 14 or 15 hours a day. She was suffering from consumption, and could not turn out the requisite work, whereupon the prisoner gave her a severe beating, saying that she was sure that she was acting the hypocrite and shamming illness, and that she was not unwell. The surgeon said that death was due to consumption accelerated by her ill-treatment. And the question was whether the prisoner could not be convicted of murder, but the Court considered that having regard to the fact that the prisoner believed her to be sound, the offence was only manslaughter.[2] In a similar case the same view was taken of a master who had by privation and ill-treatment compassed the death of an apprentice placed under his care, as the ill-treatment was held to be prompted by a desire to cure the apprentice of his lazy and dirty habits.[3] So, again, where a person locked up his idiot brother in his house and kept him in a dark room without sufficient warmth or clothing, he was held not guilty of assault or imprisonment.[4] These are all cases in which a person placed in civil domination over another exercises his authority for the correction of another, and for that purpose uses force. In such cases, the questions to be considered are: (*i*) was the force employed reasonable? (*ii*) was it necessary? and (*ii*) was it used for correction? If these questions are answered in the affirmative, it is no offence if from any unforeseen cause death should ensue.

620. The authority of the schoolmaster to inflict reasonable corporal punishment is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from school. The law on the subject has been thus lucidly expounded by Collins, J., who said: "In my opinion the purpose with which the parental authority is delegated to the schoolmaster who is entrusted with the bringing up and discipline of the child, must, to some extent, include an authority over the child while he is outside the four walls of the school. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Very grave consequences would result if it were held that the parent's authority was exclusive up to the door of the school, and that then, and only then, the master's authority commenced; it would be a most anomalous result to hold that in such a case as the present the boy who had been assaulted had no remedy by complaint to his master, who could punish the assailant by a thrashing, but must go before a Magistrate and to enforce a remedy between them as citizens."[5]

Extent of Schoolmaster's Authority.

621. In contrast to these cases, may be mentioned those in which the persons in authority not only do not obtain protection of law for their act, but their position rather aggravates the crime. A master taking indecent liberties with his female pupil aged 13 would be guilty of assault notwithstanding his position and intention.[6] Cases could be multiplied if it were necessary, but they all illustrate the same principle, namely, that the act is only justifiable so long as it is a correction; when it is used for any other purpose it ceases to have the protection of law.

Limit of his Authority.

622. The Authority of the Captain at Sea.—The right of the Captain of a ship at sea to inflict corporal punishment upon a seaman for mutinous conduct rests upon the law of necessity. (§ 615). Of course, the predicament of a Captain

(1) *Connor*, 7 C. & R. 438.
(2) *Cheseman*, 7 C. & P. 455.
(3) *Self*, 1 East, P. C. 226, 227.
(4) *Smith*, 2 C. & P. 449.
(5) *Cleary* v. *Booth*, (1893) 1 Q. B. 465 (468, 469).
(6) *Nichol*, R. & R. 130; *M'Gavarson*, B. C. & R. 320.

placed before a mutinous crew is not better but worse than that of a Governor of a rebellious country. For while the Governor may consult his council of war and obtain protection from elsewhere, the Captain of a ship is placed in a position of imminent peril, and cut off as he is from the rest of the world, he has to act on his own judgment and under circumstances when the safety of his vessel and himself is all in all to him. His conduct is, therefore, to be judged not by the ordinary standard of men who act in cold blood, not of those who judge after the event, but of a reasonable man placed under the same predicament as the Captain.

623. Right of Arrest.—Another case for legal justification arises where a person circumscribes the liberty of another in the real or supposed exercise of a power conferred on him by law. The right of arrest is ordinarily possessed by police-officers in cognizable cases,[1] that is to say, cases in which a police-officer within or without the presidency town may, in accordance with the Second Schedule of the Code of Criminal Procedure or under any law for the time being in force, arrest without warrant.[2] So far as regards the offences dealt with in this Code, the Code of Criminal Procedure divides them for this purpose into either cognizable or non-cognizable, the difference between the two classes being that while a police-officer may on his own responsibility arrest in the one case, he cannot do so in the other. In the latter case he can only arrest on a magisterial warrant. The Procedure Code still deals with a class of cases in which any person may arrest with or without a warrant. In the case of offences under a special or local law, police-officers and others also possess similar power of arrest.

624. A police-officer may arrest without a warrant in the case of the following offences under the Penal Code :—

Ss. 109-120 (if the substantive offences are cognizable).
Ss. 131-136, 138, 140, 143-148.
S. 149 (if the offence committed is cognizable).
Ss. 150-153.
Ss. 157-158.
Ss. 170, 171.
Ss. 212, 216, 216A.
Ss. 224, 225, 225B, 226.
Ss. 231-263A.
Ss. 269, 270, 277, 279-283, 285, 286, 289, 291-294, 295-297.
Ss. 302-311, 317, 318.
Ss. 324, 333, 335-344, 346 348.
Ss. 353, 354, 356, 357, 363-369, 371-374.
Ss. 376 (rape on a person other than wife), 377.
Ss. 379-382, 392-402.
Ss. 406-414.
Ss. 419, 420.
Ss. 428-433, 435-440.
Ss. 447-462.
Ss. 467-471.

In the case of offences under other laws a police-officer may arrest a person without warrant, if the offence is punishable with death, transportation or imprisonment for three years or upwards. In any other case, the police may not arrest without a warrant.

Any police-officer may, without an order from a Magistrate, and without a warrant, also arrest persons mentioned in s. 54 of the Criminal Procedure Code.

Similar powers of arrest are given to officers in charge of police stations under ss. 54 and 55 of the Criminal Procedure Code.

A person committing a non-cognizable offence in the presence of a police-officer may be arrested if on demand he refuses to give, or gives a false name and residence till the true name and residence have been ascertained.[3]

Police-officers also possess power of arrest without warrant under certain special and local laws.[4]

(1) S. 4 (*f*), Cr. P. C.
(2) *Ib.*
(3) S. 57, Cr. P. C.
(4) Arms Act (Act XI of 1878) s. 12 ; Cantonments Act (Act XIII of 1889) s. 15 ; Criminal Tribes Act (Act XXVII of 1871) ss. 20, 26 ; Cruelty to Animals Act (Beng. Act III of 1869) s. 1 ; European Vagrancy Act (Act IX of 1874) s. 19 ; Excise Act (Act XXII of 1881) s. 27 ; Emigration Act (Act XXI of 1883) s. 82 ; Explosives Act (Act IV of 1884) s. 13 ; Fisheries Act (Act IV of 1897) s. 7 ; Forest Act (Act V of 1882) s. 51 ; Railways Act (Act IX of 1890) s. 13 ; Public Gambling Act (Act III of 1867) s. 13 ; Reformatory Act (Act VIII of 1897) s. 24 ; Salt Act (Beng. Act VIII of 1864) s. 24 ; Mad. Act 4 of 1889, s. 49; (Bom. Act II of 1890) s. 39.

Forest officers are also empowered to arrest a person "reasonably suspected of having been concerned in any forest offence punishable with imprisonment for one month or upwards if such person refuses to give his name and residence, or gives a name or residence which there is reason to believe to be false, or if there is reason to believe he will abscond."[1]

625. Limitation on the Power of Arrest.—As regards the power of the police, it will be observed that it has the absolute power of arrest in a cognizable case, but this power, though plenary, has to be exercised with discrimination. There must be at least a reasonable complaint or suspicion against a person of the commission of a non-bailable offence before he could be placed under restraint. "It seems to be generally supposed, and the supposition seems to be generally acted upon, that police-officers, in making enquiries into criminal cases, are limited by their own discretion as to what persons they may arrest and detain in custody. But so far from this being the case, the powers of a police-officer to arrest without a warrant are strictly defined by the Code of Criminal Procedure.

626. Under section 54 of the Procedure Code, the police are empowered to arrest a person reasonably suspected of being in possession of stolen property. Where it is so, a policeman must allege and prove grounds for his suspicions, otherwise he is not protected under this section. Where, for instance, a policeman questioned a person carrying clothes in a bag and upon receiving replies which he erroneously believed to be false, arrested him on a charge of being in possession of stolen goods, the Court held that the arrest was justifiable under this section.[2] But the same defence could not be availed of by a policeman who seeing a horse openly tied up without any attempt at concealment, at once jumped to the conclusion that it was his father's missing horse, and who thereupon at once arrested the owner and the person from whom he had purchased it; though, as a matter of fact, the lost horse had been previously found in another place.[3] This case may be distinguished from the last on the ground that, while in the one case there was an enquiry and the exercise of some judgment, in the other case there was no enquiry at all, and therefore, no facts elicited for the formation of a judgment. This principle may be aptly illustrated by the case of the court-peon who went with two of the decree-holders' men to arrest one *M*. A *palki* with closed doors was noticed to be coming out of the male apartment of *M's* house, whereupon the peon intercepted it and examined it in spite of the protests of its attendants. The peon being prosecuted under section 341, the Court held this section applicable on the ground that the coming of the *palki* from the direction of the male apartments of *M* gave the peon some reason to believe that it contained *M* who was trying to evade his arrest.[4]

Some Ground Required.

627. While the police possess abundant power of arrest, they are not free to choose their own procedure for effecting an arrest. The right procedure is laid down in ss. 46, 47, 48 and 50 of the Code of Criminal Procedure which must be strictly followed.

628. Execution of Warrants How Protected.—As regards the protection of the police acting under a warrant, police-officers are doubly protected. For not only are they protected under this section, but they have been exempted from criminal responsibility by the Police Act.[5]

629. While a man's house is his own castle, it cannot be used for harbouring criminals, and so both in England as well as in this country, the law has been and is that "where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before-mentioned having been previously made."[6] So a

Forcing Doors.

(1) Act V of 1882, s. 51.
(2) *Bhawoo*, 12 B. 377, *see* for a similar case *Lawrence* v. *Hedger*, 3 Taunt, 14.
(3) *Sheo Surun* v. *Mhd. Fasle*, 10 W. R. 20.
(4) *Kanailal Gowala*, 24 C. 885.
(5) Act V of 1861, s. 43, for similar provisions in the other local Poiice Acts *see* under s. 78.
(6) Foster Cr. L., 320.

constable may break open the door to keep the peace if a felony is imminent though not committed, as if there be an affray in a house with fear of bloodshed. "Where an affray is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence, fly to a house, and are immediately pursued by him, and he is not allowed to enter—in order to suppress the affray in the first case or to apprehend the affrayers in either case," the house may be broken open.[1]

What is Justifiable Force.

630. The amount of force that may justifiably be used to effect an arrest by a police-officer is defined by section 46 of the Criminal Procedure Code, which lays down that in the case of heinous offenders the police have the right of arresting a man dead or alive, but in other cases the police have no right to cause death in effecting the arrest. In either case, the police must not use more force than is necessary to effect the arrest, and in judging of what is the proper exercise of force, the question would be whether the means employed to stop the fugitive were such as an ordinarily prudent man would make use of who had no intention of doing any serious injury.[2] Merely excessive use of force, without malice, is not however criminal, though it may not be civilly excusable.[3] And while the Procedure Code condemns use of excessive force, or force resulting in death, still that section does not deprive the police of their right of private defence in exercise of which even death may be caused,[4] though the causing of death would be otherwise unjustifiable. Such a case may arise where the police encounter resistance, in which case they are entitled to repel force by force. Their first duty is to effect an arrest, and they are bound to effect it whatever resistance they may receive. They would be guilty of cowardice and a grave dereliction of duty if upon a mere show of resistance they desisted from arrest. They are employed to apprehend criminals, and it is their duty to apprehend them at the risk of their life. In this respect English Law is even more stringent, for it recognizes the right of the police to even kill the felon if he cannot be arrested alive.[5] But the right to kill is limited in this country to only offenders charged with offences punishable with death or transportation for life, that is to say, offences under sections 121, 132, 194, 302, 303, 305, 307, and 396, which are punishable with death; and sections 121, 121A, 122, 124A, 125, 128, 130-132, 194, 195, 222, 225, 226, 232, 238, 255, 302, 304, 305, 307, 311, 313, 314, 326, 329, 364, 371, 376, 377, 388, 389, 394, 396, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474, 475, and 477, which are punishable with transportation for life.

631. Thirdly, there are cases in which private persons may exercise the right of arrest.[6] Village watchmen or chaukidars are not police-officers within the meaning of the Procedure Code, and they have, therefore, no greater power of arrest than private persons.[7]

632. Duty of a Private Person.—It will be observed that there is no law under which a private person is bound to discharge the same duties as the police. Under s. 42 he is bound to *assist* a Magistrate or police-officer reasonably *demanding* his aid. Under s. 43, it is optional with him to assist or not in cases provided by that section. So under s. 59 it is equally optional with him to arrest a person committing an offence as therein described. In no case is the private person then entitled to play the policeman with an offender with, his duties being merely to assist the police if so required, or so disposed. In this respect English Law would appear to differ. For under that law, a private person has the same right of arresting a felon as the police, the only difference between their rights being that while the police may justify a wrongful arrest upon a reasonable suspicion, a private person cannot do so but must shew a felony committed.[8] And in the case of death in capture he will have moreover to shew

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(1) 2 Hawk P. C. 136.
(2) *Protab Chowkedar*, 2 W. R. 9.
(3) *Budrool Hossein*, 24 W. R. 51.
(4) S. 100, *post*.
(5) 1 Hale P. C. 489, 490; 1 Hawk P. C. 81, 1 East P. C. 298, 300; Foster Cr. L. 271.
(6) S. 41, 43, 59 Cr. P. C.
(7) *Kallu*, 3 A. 60; *Kalai*, 27 C. 366, *cf.* s. 45, Cr. P. C.
(8) *Samuel* v. *Payne*, 1 Dougl. 359; *Beckwith* v. *Philby*, 6 B. & C. 63'.; *Davis* v. *Russell*, 5 Bing. 344.

not only that the felony was committed, but that the person killed was the felon.[1] With respect to the right of a private person to arrest in the case of misdemeanour, the rule has been thus stated by Cockburn, C.J.,: "Where any one is found actually committing an offence, it is not necessary to wait till a warrant can be obtained if the arrest is effected actually on the spot, and the prisoner is forthwith brought before a Magistrate. It seems to be sometimes supposed that the right of private persons to arrest an offender committing a misdemeanour is limited to those misdemeanours which partake of the nature of a breach of the peace. But the more correct view appears to be that, excepting such crimes as consist of mere omission, or non-feasance, *e.g.*, neglecting to provide one's family with food, there is no distinction between one misdemeanour and another. In fact, all misdemeanours, with the possible exception of perjury and forgery, are breaches of the King's or Queen's peace, as appears from the old forms of indictments *contra pacem*."[2]

633. In order to justify an arrest, the police must shew one of two things, *first*, that the prisoner had committed the offence, or *secondly*, that the person arresting, knew or believed at the time that the person arrested had committed the offence. A constable was employed to guard a copse from which wood had been stolen, and for this purpose he carried a loaded gun. He saw the complainant coming out of the copse carrying stolen wood which of itself was a misdemeanour and challenged him, whereupon he ran away and the constable finding no other means of bringing him to justice fired and wounded him in the leg, for which he was indicted. It, however, appeared that the prosecutor had been twice before convicted of stealing wood, which aggravated his theft to a felony[3] and which, if known to the constable, would have justified the act. But Erle, J., told the jury that neither the belief of the prisoner, that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony unknown to him at the time constituted such justification, and this view was confirmed on appeal on the ground that though the act of the prosecutor amounted to a felony, still it was no justification for the shooting as the constable did not know of it at the time.[4] But where a person was indicted for wounding a constable with intent to prevent the lawful apprehension of himself, Talfour, J., held that to support the charge it was sufficient that the prisoner was lawfully apprehended, and it was immaterial whether the prisoner believed his apprehension to be lawful.[5] Whether apprehension in a given case was or was not lawful depends upon the facts of each case. Where a police-sergeant went to supervise the work of the accused, a police constable, with whom he had an altercation who thereupon assaulted the sergeant who left him, and returned with police-assistance, but the accused was not found. They returned again in two hours and found the accused at home. The sergeant told him to accompany him to the station-house, but he declined, whereupon the sergeant attempted to arrest him, and thereupon the constable severely wounded him. The jury found the constable guilty of wounding with intent to prevent his lawful apprehension ; but upon a case reserved, it was held that apprehension was not lawful, for the assault had been committed before and there being no probability of its renewal, the constable could not be arrested.[6]

634. The illustration appended to this section exemplifies the operation of this section in the case of private persons effecting an arrest in accordance with the rules of the Procedure Code. The right of a person to arrest *suo motu* is confined to cases described in section 59, that is, to cases in which a person commits a non-bailable and cognizable offence in his view, or where a person is a proclaimed offender. A private person has, therefore, no right to arrest a person on mere suspicion or information.[7] The fact that the person arrested had in fact committed a non-bailable and cognizable crime is in reality no defence to such an arrest, if the person

(1) 2 Hale P. C. 83 ; 1 East, P. C. 300 ; Foster Cr. L. 318 ; 1 Russ. 713.

(2) *Griffiths* v. *Taylor*, 48 L. J. App. (C. P.) 152.

(3) 7 & 8 Geo. IV, c. 29, ss. 39; 24 & 26 Vict., c. 96, s. 33.

(4) *Dadson*, 20 L. J. M. C. 57.

(5) *Bentley*, 4 Cox. C. C. 406.

(6) *Dears*, C. C. 358 ; *Marsden*, L. R. 1 C. C. R. 131.

(7) *Potadu*, 11 M. 480.

arresting had not witnessed the crime. But where he so witnessed it, he is protected though there may be facts behind his view which may place a different complexion upon the affair, and which, if known to him at the time, would not have justified his apprehension. A person lawfully arresting another may make him over to his servant for delivery to the police. For in such a case his original custody continues even whilst the person arrested is in charge of his servant.[1]

635. Where the accused had arrested a police constable and took him to the Magistrate, and it was found that the constable was caught in the act of abetting an extortion, an offence which is bailable, the Court acquitted the accused, holding that the act was covered by this section in that the accused had acted in the *bona fide* but mistaken belief that he had the authority to arrest the constable.[2]

636. Detection and Destruction of Postal Articles.—There are certain powers which special Acts confer upon departmental officers, the exercise of which are subject to the rules and restrictions contained in those Acts. Thus, for instance, the Indian Post Office Act[3] empowers a postal officer, in charge of a post office or authorized by the Postmaster-General in this behalf, to open or unfasten any newspaper or any book, pattern or sample packet, in the course of transmission by post, which is suspected to have been sent by post in contravention of any provisions of the Act relating to postage.[4] The Postmaster-General has further authority to authorize the opening and destruction of any postal article containing obscene, seditious, or grossly offensive matter.[5] The Governor-General in Council have also power to detain or take delivery of any postal article "on the occurrence of any public emergency, or in the interest of the public safety or tranquillity."[6] A certificate signed by a Secretary to the Government of India is conclusive on the point.[7] Acting under the power so conferred, the Government of India had caused to be detained a number of private letters of English tourists and Indian public men in the autumn of 1907, and on a question being raised in the House of Commons the act was held to be justifiable under this Act.

637. Acts Done under Civil Process.—Persons executing civil process are bound to strictly follow the rules laid down in the Code of Civil Procedure. These rules have now been relegated to the Schedules of the Civil Procedure Code, the terms of which are to be strictly complied with.[8]

638. Other Justifiable Acts.—Several instances occur of acts which the law would justify as done in the belief that they were warranted by law. A bigamous marriage contracted by the wife in the belief that her marriage with her husband has become dissolved by his apostacy is an instance of a mistake of mixed law and fact which the law condones.[9] Other similar instances are afforded by the seizure of his wife by the husband,[10] the pulling of a woman's hair by her lover,[11] the arrest of a person by a policeman who erroneously believed that the person arrested had committed a non-bailable offence.[12] It is said that the justification of "law" in this section excludes a special Act, such as the Forest Act which creates special offences for the protection of public revenue,[13] but this view has been combated elsewhere.[14]

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Accident in Doing a Lawful Act.

(1) *Potadu*, 11 M. 480; *Fakira*, 17 M. 103.
(2) *Ragunath*, (1920) Pat. 76; 54 I. C. 997.
(3) Act VI of 1898.
(4) *Ib.*, s. 23.
(5) *Ib.*, ss. 20, 23 (3)
(6) *Ib.*, s. 26.
(7) *Ib.*, s. 20 (2).
(8) Act V of 1905, Sch. I.
(9) *Narantakath*, 45 M. 986.
(10) *Ramlo*, 12 S. L. R. 29, 47 I. C. 807.
(11) *Mi Hia So*, 4 Bur. L. J. 268, 13 I. C. 189.
(12) *Reghunath*, (1920) Pat. 76.
(13) *Lewis*, 38 M. 773.
(14) *Kassim*, 15 I. C. (B.) 802.

Illustration.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and not an offence.

639. Analogous Law.—This section is closely analogous to the next section with which it should be studied. The main difference between these two sections appears to be that while under this section there should be the absence of both criminal intention as well as criminal knowledge, the next section postulates a case in which there is only the absence of criminal intention. The use of the two terms in this section, and the absence of one in the next, shews that the Legislature intended to make a distinction between them. And indeed there is a distinction, as has been before explained. (§§ 310–313).

640. Principle.—In so far as this section lays down that there can be no crime without a criminal intention, it states what is a transparent truism, for there is no such thing as crime in the abstract. No act is *per se* criminal unless the actor did it with criminal intent. It is, therefore, the correct maxim to say that *actus non facit reum, nisi mens sit rea,*[1] which only means that both the intent and act must concur in order to constitute a crime. The object of the repression of crime is to preserve order and peace in human society, and it is, therefore, only against human beings who are its component members that criminal law is directed. And as the object of criminal law is to punish only serious infractions of the rules of society, it follows that criminal law cannot punish a man for his mistake or misfortune. But accident is not of itself a defence to a civil suit, unless it was not only an accident but also a misfortune.

641. Meaning of Words.—"*Nothing.....done by accident*": The word "*accident*" does not mean here a mere chance. It rather means an unintentional and unexpected act. The words imply the idea of something not only not intended, but something which was so little expected that it came as a surprise. So the term "*misfortune*" means the same thing, with this fact superadded that it was as unwelcome as it was unexpected. "*The doing of a lawful Act in a lawful manner*" means that the act which originated another act must be not only lawful but performed in a lawful manner and by lawful means. "*And with proper care and caution,*" the propriety being judged by the nature of the act.

642. Accident when a Good Defence.—Accident and misfortune have a recognized place in criminal jurisprudence. They always afford a good defence to the charge of criminality.[2] But they are only a good defence in certain cases and under certain circumstances. They do not furnish an unqualified defence in every case in which the resultant act was unintentional or unexpected. In order that an act should be justifiable on the ground of accident it must be shown (*i*) that the act was an accident or misfortune, and (*ii*) that it was not accompanied by any criminal intention but that, on the other hand, (*iii*) it was the outcome of a lawful act, (*iv*) which was done in a lawful manner, (*v*) by lawful means and (*vi*) with proper care and caution.

643. What is an Accident?—Now, in the first place, what is an accident? Literally, the term means only a befalling of an event.[3] In ordinary parlance it means an event that takes place without one's foresight or expectation. And this is substantially the sense in which the term has been used here. It means here not only an event, or a thing which occurs, for every occurrence is not an accident. An accident is an occurrence out of the ordinary course,[4] which no man of ordinary prudence could anticipate or provide against. A misfortune is only an accident with attendant evil consequences. Now as both the words "accident" as well

(1) "The act itself does not make a man guilty, unless his intention were so."

(2) *Dwijendra*, 31 I. C. (C.) 164.

(3) From Lat. *Ad Cadere*, to fall.

(4) So held by Willes, J., in *Fenick* v. *Schimalz*, L. R. 3 C. P. 313 (316), in which the question was about the loading of a ship under a contract executed "in cases of riots, strikes, or any other accident beyond his control." To the same effect *Hamilton* v. *Pandorf*, 12 App. Cas. 518 (524).

as "misfortune" are here used necessarily in the sense of implying injury to another, the word " misfortune " differs from " accident " in that while the latter involves only injury to another, the former causes injury as much to the author as to another unconnected with the act. It is easy to conceive of a variety of cases of accident, but the accident, here spoken of as a defence to criminality, is an accident which causes injury to another, but causes it only in the manner here described. If *A* intending to poison *B* lays a bait for *B*, which *C* takes, and dies. Here *C's* death was an accident in the ordinary sense of the term. So it is in law. But *A* is nevertheless responsible for it in the same manner as if *A* had planned his death. And why? Because *A's* act in attempting to poison *B* was illegal, and there being one act illegal in the chain of events between the original act and the resultant effect, the effect is the same as if all the acts had been throughout illegal. So where a mother, being angry with one of her children, took up a small iron bar used as a poker and threw it after the child as he was running away from her, and it hit another child who was returning by the same way, in consequence of which he died, the mother was held to be guilty of manslaughter, although it appeared that she had thrown the poker merely to frighten the child with whom she was angry and she had no idea of the presence of the other child who was actually hit and killed. Commenting on these facts, Park, J., said: " If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful as an improper mode of correction—and strikes another and kills him, it is manslaughter ; and there is no doubt if the child at whom the blow was aimed had been struck and died it would have been manslaughter, and so it is under the present circumstances."[1] So if *A* and *B* conspire to assault *C* with their fists, and *C* receive a chance blow from the fist of either of them causing his death, both *A* and *B* are guilty of manslaughter, because their initial act was illegal. But if suppose in such a case instead of hitting *C* with fist either *A* or *B* were to suddenly lay hold of a weapon and therewith strike *C*, the other will not be liable for causing the death, as he could not be held responsible for an unlawful act not done in pursuance of the common design of them both.[2]

644. The exercise of a lawful right in an unlawful manner is an unlawful act taking away the defence afforded by the section. A person had trespassed into the house of the prisoner in his absence. On his return he desired him to leave, but he refused, which led to an altercation which excited the prisoner who gave him a kick, causing him an injury which occasioned his death. The prisoner being indicted for manslaughter, Alderson, B., said : " A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter."[3] The same view was taken in another case in which a person in sport threw stones down a coal-pit whereby a man was killed, though he happened to be a trespasser.[4] So there is nothing illegal in a friendly contest for the trial of skill or strength, but if a party take undue advantage of another and cause him injury, he will be criminally responsible.

645. Unlawful Games.—This is in cases where the game itself was lawful. But where the game itself was unlawful, then no consent would condone an injury therein committed. In England, prize-fights, public boxing matches and the like wherein combatants fight for lucre and not for sport are unlawful, and persons engaging therein are guilty of assault to which the consent of the persons to the interchange of blows affords no answer,[5] whatever may have been the agreement between the parties. In fact, the Courts have even gone the length of not only holding the actual combatants liable, but they have even held the spectators to be accomplices.[6]

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(1) *Conner*, 7 C. & P. 438.
(2) *Caton*, 12 Cox. C. C. 624.
(3) *Wild*, 2 Lew. C. C. 214.
(4) *Fenton*, I Lew. C. C. 179.
(5) *Boulter* v. *Clarke*, Buller's N. P. 16 ; *Mathew* v. *Ollerton*, Comb, 218 ; *Perkins*, 4 C. & P. 537 ; *Lewis*, 1 C. & K. 419 ; *Coney*, 8 Q. B. D. 534.
(6) *Murphy*, C. & P. 103, 1 Hale P. C. 439; *see* to the same effect, Fost. Cr. L. 350 ; *Coney*, 9 Q. B. D. 534.

Facts Negative the Defence of Accident.

646. The absence of criminal intent or knowledge alone does not therefore suffice. If it were sufficient, there was no criminal intent, or knowledge in any of the cases before cited. Indeed, the presence of these elements effectively rebuts any presumption of accident. For, as before remarked, an act could not have been accidental, if it had been intended or known. In practice, therefore, the cases relating to accident, presenting any difficulty, are those in which there is a question of unlawfulness or negligence at some stage. If the act was unlawful, and an injury is caused, it is an offence, whatever may have been the intention. So if a person give an improper quantity of liquor to a child and death ensue, it will be manslaughter, though the liquor may have been supplied for sport and without any criminal intention.[1] The goods of a debtor were seized by a person who was put in possession thereof. The debtors plied him with liquor, himself drinking freely, till he was drunk. The debtor then put him into a cabriolet and caused him to be driven about the streets. Within a couple of hours the man died. Lord Denman told the jury that the prisoner would be guilty of manslaughter, if he had driven him about the place, when the deceased was drunk, in order to keep him out of possession and thereby accelerating his death.[2] So the prisoner having the right to possession of a gun in the hands of the deceased, attempted to take it away by force, though he knew it to be loaded. In the struggle which ensued the gun went off accidentally and killed the deceased. Lord Campbell told the jury that though the prisoner was entitled to the gun, to take it away by force was unlawful; and that as the evidence showed that the discharge of the gun, though accidental, was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter.[3]

647. It is, however, evident that the case would have been one of pure accident, if the prisoner had not known that the gun was loaded. In one case, however, the prisoner had found a pistol in the street, which he had reason to believe was not loaded, having tried it with a rammer. He took it home and standing before his wife he pulled up the cock in sport and touched the trigger. The pistol went off and killed the woman. He was indicted and convicted of manslaughter, though it was found that the rammer was too short and had, therefore, deceived him. But this is a view which is not likely to be taken, should such a case again arise. Indeed, as Foster says: "Accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall among the nearest friends and relations."[4] Foster himself cites the case of a man who went with his wife to dinner at the house of a friend, carrying with him his loaded gun, which on arrival at the house he discharged and kept aside in a private place. After the dinner he found it there and carried it home, his wife carrying it a part of the way. On arrival at home he touched the trigger and the gun went off, killing the wife whom he dearly loved. It was found that a stranger had in the meantime handled the gun and returned it deposited in the place from where it had been taken. The prisoner was acquitted, on the ground that he had no reason to believe that the gun was loaded.[5]

648. Criminal Negligence.—This brings us to the subject of criminal negligence—a subject which has been already discussed elsewhere in another form (§§ 354-357). Cases of gun accident present differences due to the difference of views as regards the liability of persons handling dangerous weapons. It is sometimes said that a person handling a gun ought to know that it might be loaded. So he should, but what if he examined it and was satisfied that it was not, though this examination was defective. Such was the case of the man who had examined the gun with a short rammer. He was reasonably cautious, though he was held to be guilty. But, as remarked by Foster, J.: "The law in these cases doth not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and

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(1) *Martin*, 3 C. & P. 211.
(2) *Packard*, C. & M, 246.
(3) *Archer*, 1 F. & F. 351.
(4) Foster .Cr. L. 263 (264); 1 East P. C. 266.
(5) *Ib.*, 265.

ordinary in the like cases, be taken."[1] This is as true as it is supported by precedents. The amount of care and caution required depends upon the nature of the occupation and the amount of risk to human life. The instance of a chemist's apprentice negligently delivering laudanum, mistaking it for paregoric and thereby occasioning the death of a child, is an instance of negligence which may or may not be criminal according to the circumstances. So Bayley, J., told the jury that if they thought that there was negligence on the part of the prisoner, they were to find him guilty ; if not, they must acquit him.[2] So in another case, the prisoner was indicted for causing the death of two females passing along the causeway in Liverpool where he had been slinging a cask, which fell and caused the death. It appears that there were three customary modes of slinging casks there, one by slings passed round each end of the cask, a second by crane hooks, and a third by a single rope round the centre of the casks which was the manner in which the prisoner had slung it. The cask was hoisted up to the fourth story of a warehouse, and on being pulled endways, towards the door, it slipped from the rope, which it would not have done if it had been secured by any of the first two modes. Park, J., told the jury : " The double slings are undoubtedly the safest mode ; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him."[3]

649. Negligent Driving.—It is the duty of every person making use of a public way to so use it as not to cause injury to others who are equally entitled to use it. A person driving a cart has to see that persons walking on foot are not injured by his driving. And this liability continues whether the carriage way is or is not apart from a footpath, for a foot passenger has the right to walk on the carriage-way if he is so minded.[4] The amount of care required in driving or riding along a public highway depends upon the time of the day, its crowded state and the nature of the animals driven or ridden. The same care is not required in driving at daytime as is required when driving at night. Again, a street crowded with children or a busy thoroughfare demands more caution than a deserted road. So, while a quiet animal may be easily driven, one has to take care that an unmanageable animal does not get out of hands. So a person using the highway, has to acquaint himself with and observe the rule of the road.

650. Again, a public way is not a race course and persons have nc right to use it as such. If, therefore, carts race each other and run over a man killing him, they are both responsible for the death, for they were both using the road in an unlawful manner. Such was the case of Swindall and Osborne who were driving two carts loaded with pots from the potteries. On the way they got drunk and began to race with each other. It was night, and arriving at a toll-gate Swindall who appeared all along to have led the way, told the gate-keeper : " We have driven over an old man." The man died and they were indicted for manslaughter. For thel prosecution it was contended that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company and had concurred in jointly driving furiously along the road which was an unlawful act ; and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. For the prisoners it was contended that evidence showed that only one of the carts had run over the deceased, and the other was therefore entitled to an acquittal. But Pollock, C.B., said : " I think that is not so. I think the counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man whether he be the first or the last, he would be equally liable. The person who runs over the man would be a principal in the first degree, and the other a principal in the second degree." And referring to the condition of the deceased the Chief Baron said : " The prisoners are charged with contributing to the death of the deceased by their negligent and improper conduct ; and if they did so, it matters not whether

(1) *Foster*, Cr. L. 264 ; 1 East P. C. 266.
(2) *Tessymond's case*, 1 Lew. C. C. 169.
(3) *Rigmaidon's case*, 1 Lew. C. C. 180.
(4) *Boss* v. *Litton*, 5 C. & P. 407 ; *Grout*, 6 C. & P. 629.

he was deaf, or drunk or negligent, or in part contributed to his own death, for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view ; for there each party is responsible for any blame that may ensue, however large the share may be ; and so highly does the law value human life, that it admits of no justification where life has been lost and the carelessness or negligence of any one person has contributed to the death of another person."[1]

Contributory Negligence No Defence.

651. It is no defence in such a case that the deceased was guilty of contributory negligence.[2] On an indictment for manslaughter, it appeared that the deceased was walking along a road in a state of intoxication. The prisoner was driving a pair without reins. On seeing the deceased the prisoner called out to him twice to get out of the way, but from the rapid pace of the horse and his own intoxication he could not do so, and one of the cart wheels passed over him and he was killed. It was held that the prisoner was guilty of manslaughter, as it was his duty to so drive as to prevent any accident or injury that may occur, and that the intoxication of the deceased and his calling him out did not take away that responsibility.[3] In another case, the driver of a cart was sitting inside instead of at the driver's seat, and while he was sitting there, his cart passed over a child who was gathering up flowers on the road. He was held guilty of manslaughter, as by sitting inside the cart he was guilty of negligence.[4] So where two opposition omnibuses were racing each other, and a driver of one in whipping up his own horses frightened the horses of the other, which upset the omnibus, Patterson, J., said : "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses ; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them ; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable, for a man is not to say 'I will race along a road, and when I am got beyond another carriage I will pull up.' If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty, but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing ? and was the prisoner driving as fast as he could, in order to get past the other omnibus ? and had he urged his horses to so rapid a pace, that he could not control them ? If you are of that opinion you ought to convict him."[5]

652. The plea of contributory negligence was again strongly urged in a case where a man deaf from his childhood was run over by the prisoner's cart, and it appeared that at the time he had been walking in the middle of the road in spite of repeated warnings, whereupon Rolfe, B., said : "Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that if any one should drive so rapidly along a great thoroughfare leading to a large town as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law, and, if death ensues from the injuries thus inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased."[6] The learned Judge then went on to add that there was a wide distinction between a civil action for pecuniary

(1) *Swindall*, 2 C. & R. 230.
(2) *Per* Lush, J., in *Jones*, 11 Cox. C. C. 544.
(3) *Walker*, 1 C. & P. 320.
(4) *Knight's case*, 1 Lew. C. C. 168.
(5) *Knight's case*, 1 Lew. C. C. 168.
(6) *Longbottom*, 3 Cox. C. C. 439.

compensation for death arising from negligence, and a proceeding by way of indictment for manslaughter. In the one case liability of one depends upon the balance of negligence, whereas in the other, negligence is punished; but, if there be contributory negligence, it is taken into account in awarding the sentence.

653. The crowded state of a road was urged as a plea in extenuation in a case in which Perrin, J., however, told the jury that "this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public."[1]

654. So while a person is not bound to observe the rule of the road, he is bound to use additional precaution if he uses the wrong side, for he ought then to know that he then runs a greater risk of causing accidents.[2]

Servants' Negligence.

655. Allied to the subject of contributory negligence is the subject of negligence of servants. If the master and servant engage in a dangerous trade, and the master is guilty of some negligence, which alone, however, was insufficient to produce the mischief, the fact that the negligence of the servant, superadded to that of the master, had caused the injury, would not render the master criminally liable for it. It was so held in a case in which the prisoner was the maker of fireworks which he stocked on the premises, contrary to statute. During his absence, by the negligence of one of his servants, the fireworks became ignited and set fire to a neighbouring house, the occupant of which was burnt to death. Willes, J., convicted the master of misdemeanour holding that, if he had not stocked the fireworks contrary to the statute, the fire would not have occurred. But on a case reserved, the prisoner was acquitted, Cockburn, C.J., holding that, though the prisoner was guilty of illegal act, it was not necessary and immediate cause of the death, since, superadded to his negligence, there was the negligence of the servant.[3] But this was a case of negligence of the servant. The case could have been differently decided, if the servant had been guilty of a wilful act, as in the case of the baker who was held liable, because his servant, to his knowledge, had mixed noxious materials in his bread.[4] In another case, it was suggested that even in a case of negligence of servant, if it could be shown that the injury was well within the contemplation of the master, he would be liable.[5]

Civil Liability.

656. As already observed, a person may not be civilly liable and yet he may be criminally prosecuted. (§ 652). These cases are, however, those which stand on the border land between civil and criminal law. It is sometimes said that accident of itself is not a defence to civil suit, but this is certainly not the view of civil law. As Parke, B., said: "When the act is that of the servant in performing his duty to his master, the rule of law we consider to be is that the only remedy in that case is against the master, and then only is maintainable, when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master.....In all cases where a master gives the direction and control over a carriage, or animal or cattle to another rational agent, the master is responsible in an action on the case for want of skill or care of the agent—no more."[6] So where the servant was driving his master in a carriage and the horses took fright at the barking of a dog and bolted, knocking down the plaintiff who was in the highway, it was held that the injury was purely accidental, and as it could not be attributed to the negligence of the servant, neither the master

(1) *Murray*, 5 Cox. C. C. 509.
(2) *Pluckwell* v. *Wilson*, 5 C. & P. 375.
(3) *Bennett*, Bell. C. C. 1.
(4) *Dixon*, M. & S. 11.
(5) *Lister*, 26 L. J M. C. 196.
(6) *Sharrod* v. *London and North-Western Ry. Co.*, 4 Ex. 580 (586).

nor the servant was liable for damage.[1] So where the defendant who was one of a shooting party fired at a pheasant, but one of the pellets from his gun accidentally glanced off the bough of a tree and accidentally wounded the plaintiff who was a servant engaged to carry cartridges and game for the party. The jury found that the defendant was not guilty of any negligence in firing as he did, and it was, therefore, held that the defendant could not be held liable for damages.[2] But the civil and criminal liability of a person on account of negligence is, therefore, based on the same considerations. The difference is one of degree and not of kind.

657. Accident in Doing an Unlawful Act.—The prisoner went out to shoot porcupines with the deceased. They agreed to take up certain positions in the jungle and lie in wait for game, which was done. After a while the accused heard a rustle, and believing it was a porcupine, he fired in that direction, but the shot penetrated the heart of his companion who died immediately. The accused was shooting with an unlicensed gun, but it was held that the case was one of pure accident under the section and that the accused was entitled to be acquitted[3] The judgment in this case gives no reason for acquittal, but it is clear that it draws a distinction between *malum in se* and *malum prohibitum*, that is to say, whenever it is said that a person causing injury in an unlawful occupation is responsible for the result, what is implied by the unlawfulness of the occupation is something more than what is prohibited by law for the purpose of revenue or census. It implies something which is prohibited because it is essentially wrong.[4] In other words, where a statute renders the doing of a thing illegal for some purpose, it cannot be referred to for anything wholly unconnected with the purpose.

658. So when a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. For instance, where a shipowner was carrying the plaintiff's sheep, but omitted to pen them as required by the Contagious Disease Act, 1869, in consequence of which they were washed overboard, it was held that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to prevent them against perils of the sea, the plaintiff could not recover.[5] As Pigott, B., put it : " If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as the case stands on this declaration, the answer to the action is this : Admit there has been a breach of duty ; admit there has been a consequent injury, but for an altogether different purpose ; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose."[6]

659. The accused was engaging in a fight, in which a woman intervened to prevent, whereupon the accused aimed a blow at the woman, but it accidentally fell upon and killed the infant she was carrying. It was held that this section afforded no defence, as the accused had attempted to assault the woman which was in itself a wrongful act.[7]

660. These cases, by no means exhaustive, are sufficient to explain the operation of negligence in the formation of crime. Other cases will be found cited in the commentary under section 52 (§§ 354-363).

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(1) *Holmes* v. *Mather*, L. R. 10 Ex. 261 ; the same view has been taken by Denman, J., in *Stanley* v. *Powell*, (1891) 1. Q. B. 86, in which all the cases on the point have been reviewed.

(2) *Stanley* v. *Powell*, (1891) 1 Q. B. 86.

(3) *Timappa*, 3 Bom. L. R. 678.

(4) 1 Hale P. C. 475 ; 1 East. P. C. 260; Foster Cr. L. 259.

(5) *Gorris* v. *Scott*, L. R. 9 Ex. 125 ; *Ward* v. *Hoebres*, 4 App. Cas. 13.

(6) *Ib.*, p, 130.

(7) *Jageshar*, 74 I. C. 533.

Act likely to cause harm, but done without criminal intent, and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.—**It is a question of fact in such case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.**

Illustrations.

(*a*) *A*, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B* with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat *C* with only two passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C* and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down *C*.

(*b*) *A* in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A's* act, *A* is not guilty of the offence.

661. Analogous Law.—This section recognizes the doctrine of self-preservation, since it speaks of prevention of harm to person or property, which may be of the offender or of any other person. The authors of the Code gave an instance of a smith forced by dacoits to open a door which he did, to avoid his own torture and death. But the case would be different if he had belonged to a gang of dacoits and had then been forced to open the door which he was unwilling to do. A thief who steals, because he would otherwise starve, has similarly no excuse for doing so; if he were excused, it would let in a large body of men to prey upon society and thus destroy the very foundation of society itself.

662. Principle.—This section only gives legislative sanction to the doctrine of salvage common in the law of all nations. Indeed, it is a doctrine of necessity which has, since the sacrifice of Iphigenia, found ready recognition in all mundane transactions. It sanctions the doing of an evil so that good may come. It permits the infliction of a lesser evil in order to avert the greater evil. The two illustrations appended are based upon that assumption. The section requires that the act done should be without "criminal intention," but the word "intention" is here evidently used in a somewhat narrower sense and as distinguished from knowledge. Its primary meaning is the aim or resolution of the mind to produce an effect upon the sensible world. Its secondary meaning is the presumption which law makes of such a resolution from action accompanied by knowledge of the consequence. The section only requires that "criminal intention" in the first sense shall be absent, for intention in the second sense was certainly present in the mind of the Captain in illustration (*a*) who knowingly runs down boat *C* to save his own (*See* s. 24). His motive was certainly not to run down *C*, but motive is not always the same thing as intention (§ 205). The antithesis of intention and motive may in practice create difficulties. But the Legislature has wisely excluded cases of deliberate mischief from penal immunity, though the boundary line between knowledge and intention may sometimes be invisible. The conditions imposed by the Legislature for penal immunity in any case is that the act which constitutes an offence should not have been so intended, but what should have been intended is the prevention of some imminent injury. The explanation leaves the determination of this question to the jury, and rightly so, for the question depends upon how a

reasonable man would have acted under similar circumstances. According to Bentham, harm can only be justified if it is established, (*a*) that it was inflicted to avert a greater evil, (*b*) that other means were less effective or more costly, or (*c*) that the means employed were most efficient.[1]

663. Meaning of Words.—"*With the knowledge that it is likely to cause harm*": As to the meaning of the term "knowledge" here, *see* s. 24, "*Without any criminal intention*": The word "intention" here means the purpose or design of doing a prohibited penal act (§ 662). "*And in good faith*," for the meaning of which *see* s. 52. "*Preventing or avoiding other harm*": The harm caused need not be necessarily less than the harm averted, though this question would become material when judging of the good faith of an act. Moreover, it is a question upon which depends the justifiability of the act otherwise criminal, as the explanation appended explains.

664. Necessity as a Defence to Criminality.—As has been already remarked, this section is grounded on the wide doctrine of necessity (§ 662). It is the universal law that all good involves some sacrifice. The ploughman who sows his seed in the expectancy of an abundant harvest is probably appealing to the same law of necessity as led Agamemnon to make the sacrifice of Iphigenia. The captain who capsizes a boat to save his own, a person who dismantles houses to arrest the progress of fire, appeal to the same law of necessity as those who deal blow for blow, or even take away another's life to save their own :[2] *Necessitas vincit legem.*[3] How far the Indian Legislature has thought fit to sanction this doctrine will be manifested from this section. It places no limit on the extent of the injury that may be caused, and the question may be whether this injury may extend to the slaughter of a fellow-being to assuage hunger. Such a question arose in England, and it forms the leading case on the point. There three seamen and a boy, the crew of an English yacht, were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. They had no food and no water in this boat and in order to save themselves from a certain death they put the boy to death and fed on the boy's body, when they were picked up by a passing vessel.

665. It was certain that if they had not fed on the boy's body they would have died before they were picked up. It was also probable that the boy killed would have succumbed earlier than the three remaining seamen. In fact the slaughter of some one was imminently indispensable to save the lives of the rest, and the question was whether the prisoners who had killed and eaten the boy were guilty of murder, and it was so held by Lord Coleridge, C. J., with the concurrence of the other four Judges. In so holding the learned Chief Justice, however, laid some stress upon the fact that the boy was selected for the sacrifice unfairly and without his consent. But on the question of the right of a person to take another's life to save his own, the judgment was equally explicit. It laid down that law does not recognize in man the absolute necessity of preserving his life. And that as regards morality it recognizes the duty of sacrificing it for the sake of saving another life. It is further admitted that there was in this case no such excuse unless the killing was justified by what has been called "necessity." But the temptation to the act, which existed there, was not what the law has ever called necessity, nor is it to be regretted.

666. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so "To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty in case of shipwreck, of a captain to his crew, of the

(1) Bentham's Principles of Penal Laws.
(2) s. 100, *post*.
(3) "Necessity overcomes law."

crew to the passengers, of soldiers to women and children.....these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all it is to be hoped in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity for preserving one's life. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown-up men? The answer must be 'No'—

> "So spake the Fiend, and with necessity,
> The tyrant's plea excused his devilish deeds."

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for Judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fitted to dispense it.

"It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, or allow compassion for the criminal to change or weaken in any manner the legal definition of crime."[1]

667. Grove, J., fully concurred with this judgment and added: "If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."[2] This was the case, it will be noted, of a person who had deliberately killed another for food. And it was a case in which the victim had not been a consenting party. If suppose the boy and the three men had cast lots for the life of one of them, would the case have been different? Evidently not, for such was the case supposed by Sir James Stephen of sailors who had to cast lots to throw some of them overboard to save themselves and to which Lord Coleridge referred in these terms: "The American case[3] cited by my brother Stephen in his Digest from Warton on Homicide, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a Court in this country."[4]

668. The principles deducible from the leading English case are then the following: (*i*) Self-preservation is not an absolute necessity; (*ii*) No man has a right to take another's life to preserve his own; (*iii*) There is no necessity that justifies homicide. The last requires an explanation. When it is said that no necessity justifies homicide,

Necessity Justifying Homicide.

(1) *Per* Lord Coleridge, C. J., in *Dudley and Stephens*, 14 Q. B. D. 273 (287, 288). The Court passed the sentence of death on the prisoners, but that sentence was afterwards commuted to one of six months' imprisonment. (*Ib.*, p. 288, note 2.)

(2) *Ib.*, p. 288, note 1.

(3) This was the case of *Commonwealth* v. *Holmes*, cited in Wharton's Homicide, p. 237.

(4) *Dudley*, 14 Q. B. D. 273 (285).

what is implied is that no private necessity justifies it, that is to say, such necessity as conservation of one's life, as distinguished from public necessity or even necessity when it is a justification. So Lord Hale said : " The necessity which justifies homicide is of two kinds : (*i*) the necessity which is of a private nature; (*ii*) the necessity which relates to the public justice and safety. The former is that necessity which obliged a man to his own defence and safeguard." [1]

669. In other words, homicide is justifiable only in self-defence[2] and when it is necessary for the good of society—as in the case of war. It is justifiable in no other case. But these cases naturally refer to death when it is the result of direct volition and violence. The same principle cannot be extended to where a person puts another's life in jeopardy to save his own. Such a case is assumed in illustration (*a*), where a captain runs down the boat *C* with two passengers, imperilling their life for the sake of saving the passengers of his own boat. Such a case presents some analogy to the case supposed by Lord Bacon of two ship-wrecked persons clinging to a plank not large enough to support both, on which one pushes off another to save himself upon which he is drowned.[3] Sir William Blackstone thinks this is not a crime on the ground of self-defence " since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of each other's life." [4] Both in this case as well as in the case of the captain of the illustration, there was no direct bodily harm, but harm nevertheless, which jeopardized life. Harm to this extent is in extreme cases evidently justifiable.

670. But the section puts no limit on the harm that may justifiably be done in any case. It makes it a question of fact to be decided in accordance with the circumstances of each case. This view was evidently enacted, following the report of the English Criminal Law Commissioners, who had recorded the following opinion : " We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principle of law to the circumstances of the particular case." There can be no doubt but that this opinion has been embodied in the explanation, the effect of which is to leave the question of necessity as a defence to criminal liability for determination in each case. All the same the English precedents show how far the doctrine of necessity has received the sanction of English Law, and how far it will receive sanction if a similar question comes up for decision in this country.

671. Dangerous Method of Detecting Crime.—The question what injury a man may justifiably inflict upon another for the preservation of his own property is one upon which the section sheds no certain light. That any harm including death may be caused in self-defence is of course clear.[5] But the question here, is, what harm he may cause voluntarily, not in defence of threatened injury to his property, but to safeguard it against possible injury. The question arose and was decided in a case in which one Dhania Daji owned some date-trees at Tithal from which the toddy was being constantly stolen. In order to detect the unknown thief, he put into certain of the pots some of the juice of the milkbush. This toddy was purchased from a boy (whether he was or was not the thief is not clear from the report of the case) by some soldiers who drank it and thereupon they were seized with vomiting and purging and a burning sensation in the throat. Medical aid was immediately at hand and the use of the stomach-pump relieved the sufferers. The owner was then prosecuted under s. 328 of the Code for administering poison or causing it to be taken with intent to cause hurt, and he was convicted by the Court whose short judgment, however, gives no reason for their view. It, however, states that " the case does not come within the provisions of s. 81 of the Indian Penal Code, which applies only to acts done without any criminal intention to cause harm." [6]

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(1) 1 Hale P. C. 478.
(2) S. 100, *post*.
(3) Bacon's Elements, c. 5; Hawk P. C. 73.
(4) 4 Black Comm. 186.
(5) *Dhania Daji*, 5 B. H. C. R. 59.
(6) *Dhania Daji*, 5 B. H. C. R. 59.

There was no criminal intention in the present case, though there was the intention to cause harm and as that was alone sufficient to justify a conviction under s. 328, the case was perhaps rightly decided. But if the offence had turned on the presence of criminal intention, there can be no doubt that Dhania had no such intention.

672. Indeed, the true reason why the case is not saved by this section is that stated in the explanation, namely, the harm to be prevented was neither so great nor so imminent as to have justified Dhania in doing the act which he knew might cause widespread harm. In short, the trap laid was unjustifiable on the ground of its great risk. If the risk had not been so great, the act would not have been criminal. Indeed, the fixing of an electric burglar alarm which gives a nocturnal intruder a rude shock and holds him in its grip is not an offence but a legitimate precaution which any householder might think fit to adopt. Indeed, if Dhania had mixed a less deleterious drug to attain his object, he could not have been convicted under s. 328.

673. On this principle Jardine, J., justified a kick given by a sentry on duty to a police Chief Constable while attempting to force his guard in front of a house on fire, which he was doing in the discharge of his duty, but which the sentry did not know, as the Chief Constable was not in uniform. So Jardine, J., said: "The kick would be justified under s. 81 of the Penal Code as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle, that the man is excused by that section, who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Bostan (the accused) did not know the official character of the Chief Constable, and as this ignorance was a mistake of fact and not of law, he must be dealt with as if the Chief Constable were an ordinary citizen."[1] So where the accused, a member of the Governor's Council, was tried for imprisoning and deposing Lord Pigot, Governor of Madras, on the ground that he had, by his arbitrary and unconstitutional conduct, brought public business to a stand-still, Lord Mansfield in convicting the prisoner, observed: "In England it cannot happen, but in India you may suppose a possible case; but in that case it must be imminent extreme necessity. There must be no other remedy to apply to for redress: it must be very imminent, it must be very extreme; and in the whole they do, they must appear clearly to do it with a view to preserve the society and themselves, with a view of preserving the whole."[2]

674. The cases falling under this section must be distinguished from those in which the act is justified on the ground of self-defence. The two classes of cases have often been dealt with as if they were reducible to the same principle.[3] But they are entirely distinct and distinguishable, and a given case may be defended on the ground of "private defence," though it may be indefensible under this section. And there may be cases which are defensible on either ground. Such was held to be the case of one who had locked up a person found drunk and disorderly on a public way.[4]

Self-defence.

Act of a child under seven years of age.

82. Nothing is an offence which is done by a child under seven years of age.

675. Analogous Law.—"Infants under the age of discretion," wrote Blackstone, "ought not to be punished by any criminal prosecution whatever.[5] What the age of discretion is, in various nations, is a matter of some variety. The civil law distinguishes the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till 7 years age, *pueritia*, from 7 to 14, and *pubertus* from 14 upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from 7 to 10½ was *aetas infantiale proxima*, from 10½ to 14 was *actas pubertiati proxima*. During the first stage of infancy and the next

(1) *Bostan*, 17 B. 626.
(2) *Stratton*, 21 St. Tr. 1046 (1224).
(3) 1 Russ, Crimes, pp. 847, 848.
(4) *Gopal Naidu*, 46 M. 605 (631), F. B.
(5) Hawk, P. C. 2.

half stage of childhood, *infantia proxima*, they were not punished for any crime.[1] During the other half stage of childhood, approaching to puberty, from 10½ to 14, they were indeed, punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law. During last stage (at the age of puberty, and upwards), minors were liable to be punished, as well capitally, " as otherwise."[2] The rule of the civil law as to the absolute and qualified immunity of infants has found its way into the system of most countries. So under the laws of England "under 7 years of age, indeed, an infant cannot be guilty of felony,[3] for then a felonious discretion is almost an impossibility in nature; but at 8 years old he may be guilty of felony. Also, under 14, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appears to the Court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death."[4] As regards rape English law presumes that a boy under 14 is incapable of committing that offence, but under the Code, while a boy under seven is held totally irresponsible for that or any offence, there is no presumption of non-culpability in the case of a boy under 14, it being a question of fact in each case whether the offence of rape, or indeed, any other offence has been committed.[5]

676. The exemption made here in favour of infants of below 7, does not extend to offences under special or local laws.[6] So an infant below 12 may be convicted of an offence under the Indian Railways Act,[7] and he may be sentenced to whipping, the Court having the discretion of binding over the father or guardian against repetition of the offence by the infant. So an infant may be punished under other Acts which are enacted to preserve public health, order or sanitation, and in fact, any offence of which *mens rea* is not an essential ingredient.

677. Principle.—This section and the next lay down a rule which, owing to its origin to the civil law, had long since become established in the criminal systems of all civilized countries. An infant below 7 is absolutely *doli incapax*. In the ordinary course of nature a person of such age is absolutely incapable of distinguishing between right and wrong. There may be an occasional example of exceptional precocity, but such cases must indeed be rare, and law cannot take notice of such freaks. After attaining the age of 7 the absolute immunity of infants is qualified, and infants between 7 and 12 are criminally liable, if it is shown that they have attained the requisite degree of understanding to discriminate between right and wrong. It will be seen that the age of qualified immunity has, so far as regards this country been reduced from 14 to 12,[8] as it was considered that children born in the tropics sometimes attain the requisite understanding at that age. This fact is recognised by the Indian Majority Act,[9] which has fixed the age of 18 as the ordinary period for attaining majority, which is thus 3 years less than the age of majority under English Law.

678. Meaning of Words.—" *Nothing is an offence which is done by a child*," *i.e.*, so far as the child itself is concerned. If an adult employs a child below 7 years to commit an offence, he is liable, though the child is not.

679. Privilege of Infancy.—An infant under 7 years can do no wrong. He can commit no crime as he is incapable of understanding the consequences of his acts. If therefore a child is accused of an offence under the Code, proof of the fact that he was at the time below 7 years of age is *ipso facto* an answer to the prosecution.[10] It is not then open to the prosecution to prove precocity of intellect, or any fact to rebut the presumption of innocence, which is then irrebuttable. In England, the law in this respect is slightly different, depending as it does upon the distinction there drawn between a felony and a misdemeanour. An infant under 12 is there

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(1) Inst., 3-20-10.
(2) 4 Black. 22.
(3) 1 Hale P. C. 27.
(4) 4 Black. 23.
(5) *Paras Ram*, 37 A. 187; cf. *Gopal Naidu*, 46 M. 605, F. B.
(6) S. 42, *ante*.
(7) Act IX of 1890, s. 130.
(8) S. 83.
(9) Act IX of 1875.
(10) *Lukhini Agradanini*, 22 W. R. 27 (28).

said to be privileged only in case of non-feasance,[1] but for misdemeanour accompanied with force and violence, as a riot or battery, he is not immune.[2] So he may be, it is said, convicted of a forcible entry[3] or cheating.[4] But no cases have been recorded of the conviction of a child below 7, and the absolute rule here enacted is then practically the modern English rule, under which it is settled that an infant below 7 cannot be convicted of a felony. And therefore, a person cannot justify taking such an infant into custody and taking him before a Magistrate on the ground that he had been caught stealing a piece of wood.[5]

680. It will be seen that, while this section speaks of " under seven" and the next section of " above seven," the two sections make no provision for an infant of 7 years. But such an infant should be dealt with under this rather than under the next section. In a case the jury having found and in fact having committed an act which would, if he were an adult, be homicide, pardon was granted because it was found that at the time of the commission of the act he was under seven.[6] He would be entitled to an acquittal under the Code.

680-A. Where an adult purchased from a child, aged 6 years, two pieces of cloth worth fifteen annas for an anna, and it appeared that the child had taken them from the house of a third person, it was held that, as the child could not steal, the receiver could not be convicted under s. 411 of the Code, but nevertheless, he might be convicted of criminal misappropriation, if he knew that the property belonged to the child's guardian, and dishonestly misappropriated it to his own use.[7]

681. Though a child below 7 years is incapable of committing an offence, a person may employ it as an innocent agent for the commission of a crime, in which case, the adult will be responsible in the same way as if he had himself committed the crime. If suppose in the case last cited the accused had asked the child to fetch him the clothes, which he had done, he would have been guilty of theft though he could not be convicted as a receiver. So again, an adult abettor of a child under 7 may be convicted of abetment, though the child abetted was by law incapable of committing an offence.[8] A person may, for instance, employ a child below 7 to set fire to another's house, or to murder another by administering him poison. In such case the abettor would be punished though the child could not.

Act of a child above seven and under twelve, of immature understanding.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.

682. Analogous Law.—Under the Civil law the period of qualified criminal responsibility is fixed between 7 and 14, which is also the rule adopted in England. But this section fixes the shorter period ending with 12 years, which was approved by the Law Commissioners who wrote : " With reference to the precocity of children in the East, the rule of the Indian Code, which fixes the age of twelve as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper."[9] The age of 12 years was the age of possible discretion under the ancient Saxon law.[10] The effect of this section as distinguished from the corresponding English rule is thus explained by the Law Commissioners : " It would seem from this (*i.e.*, the section) that maturity of understanding is to be presumed in the case of such a child, unless the negative be proved on the defence. By the English Law, in the case of a child from 7 to 14 years of age, incapacity to commit a crime is to be presumed until the contrary be proved. After 14 years capacity is to be presumed until the contrary be proved."[11]

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(1) 1 Hale P. C. 20.
(2) *Ib.*
(3) 4 Bac. Aler, 591.
(4) Bac. Ab. Infancy H.
(5) *Marsh* v. *Loader*, 14 C. P. (N. S.) 535.
(6) 1 Hale P. C. 27.
(7) *Makbulshah*, (1885) 1 Weir 740.
(8) S. 108, Exp. 3, Illus. (*a*), (*b*).
(9) First Report, s. 117.
(10) 4 Black. 23.
(11) 4 Black. 23; so held in *Lukhini Agradanini*, 22 W. R., 27 (28).

683. Principle.—Under English law, as already observed, (§ 682) the privilege of a child aged between 7 to 14, is absolute, while it is qualified in this country, the reason being that cases are known to occur when a child under 14 is found to have attained sufficient maturity of understanding to be able to judge the nature and consequence of his crime, though in awarding the sentence, regard would necessariiy be had to his tender age.

684. Meaning of Words.—"*Who has not attained sufficient maturity of understanding*" means maturity of understanding sufficient to "*judge of the nature and consequence of his conduct on that occasion.*" The consequences of his conduct here spoken of do not mean the *penal* consequences, but the natural consequences which flow from a voluntary act, such for instance, as that, when fire is applied to an inflammable substance it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt.[1]

685. Qualified Privilege of Children between 7 and 12.—Under Civil law a person under 18 is incapable of entering into a contract. Under the Code a person below 7 is incapable of committing a crime; and a person above 7 and below 12 may or may not be able to commit a crime according to his individual intelligence. Full criminal responsibility commences after 12, though civil liability does not commence till a person has completed his eighteenth year. Law thus presumes earlier development of the faculty to understand criminal responsibility than civil rights. And this is in accordance with the practical experience of mankind. For discrimination between right and wrong does not require the same exertion of the mind as the recognition of civil rights and duties. Lord Hale records the case of a girl of 13, who was burnt for killing her mistress; and one boy of 10, and another of 9 years old, who had killeed their companions, were sentenced to death, and the boy of 10 years actually hanged.[2] And another boy of 8 years old was tried at Abingdon in the fifteenth century for firing two barns, and he was hanged as it was proved that he had malice, revenge, and cunning.[3] And so in still another case a boy of 10 was hanged for murdering his bed-fellow,[4] on the ground that after committing the act, he had actually hid himself, from which it was evident that he could discern between good and evil, and *malitia supplet ætatem*.[5] Two parish children aged 10 and 5 were left in bed together. On the parishioner's return the girl aged 5 was missing, and the boy being questioned stated that the girl had been helped by him to put on her clothes and she then left he knew not whither. Subsequently he confessed to having cut her in various places with a large knife because she had been used to foul herself in bed and had done so that morning which was incorrect. His story was otherwise circumstantially corroborated. He was accordingly convicted, but his sentence was reprieved on his promising to enlist in the navy.[6]

686. There is thus nothing against the possibility of an infant of below 12 years of age committing a crime, but in convicting an infant of such tender years the Court requires strong and unimpeachable testimony about the facts constituting the crime, and as he is deemed *ex presumptione juris* to possess no discretion, it further requires evidence of it.[7] The second requirement is dispensed with by the section as here enacted, but the rule as to strict proof still remains, and it has been insisted on the trial of infants of tender years. It is necessary, says Lord Hale, speaking of infants between the years of 7 and 12, that very strong and pregnant evidence should be given to convict one of that age.[8] Though it has also been pointed out that in construing this section the capacity of doing that which is wrong is not so much to be measured by years, as by the strength of the offender's understanding and judgment, the circumstances of a case may disclose such a

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(1) *Lukhini Agradanini*, 22 W. R. 27 (28).
(2) *Alice de Waldborough's case*, 1 Hale P. C., 26, 27.
(3) *Dean's case*, 1 Hale P. C., p. 25, note (*u*).
(4) *Spigurnal's case*, 1 Hale P. C., 26.
(5) "Malice makes up for age."
(6) *York's case*, Fost. Cr. L. 70.
(7) 1 Hale P. C. 27; 4 Black 23.
(8) 1 Hale P. C. 27, 28; 1 Hawk. P.C.C., I, s. 1, note (1); 4 Black. 23.

degree of malice as to justify the application of the maxim *malitia supplet ætatem*.[1] In the case in which these observations were made, the facts found were these: The prisoner, a girl of about 10 years, had been 10 or 12 days before the act abused by her father-in law and her husband, who had attempted to strike her. She took up a *dao* (a sharp cutting instrument) and struck her husband, while he was asleep, with it on the neck, causing an incised wound 2 inches long by ¾ inch broad and from ½ to 1 inch deep, which caused his death. After the assault the prisoner ran away and concealed herself. The Court noted her presence of mind and ingenuity in Court, and judging from her demeanour in Court, and her concealment after her deed, it came to the conclusion that she was *doli capax* and she was accordingly convicted of murder and sentenced to transportation, the Court, however, adding an earnest solicitation for the reprieve of her sentence in excess of 7 years.[2]

687. In another case, the prisoner, a girl under 12 had set fire to her neighbour's house, because the latter had threatened her mother, and the question was whether the prisoner could be tried for arson. The High Court, to whom the reference was addressed on the preliminary question, remarked that the age of the prisoner was no element in considering the propriety of proceeding with the trial, that it was a fact which the prisoner had to establish in defence, in the same manner as the plea of insanity or other incapacity.[3] And in considering the question of the maturity of understanding sufficient to judge of the nature and consequence of the prisoner's conduct, all that the Court had to consider was the natural consequences which flow from a voluntary act, and not the penal consequences that flow therefrom. In other words, where a child is being tried for murder all that the accused need know to be criminally responsible is that death or grievous hurt would ensue from a blow given, or, in the case of arson, that when fire is applied to a substance it will catch fire.[4]

688. In cases arising under this section the sole question that arises is: Was the accused capable of understanding the nature of his act?[5] This may be proved by the nature of his act, his subsequent conduct and his demeanour and appearance in Court. Instances have been given where the Courts have inferred maturity of understanding from the fact that the offender had taken pains to conceal himself after the act. Pre-meditation may evince intelligence as where the girl wife sought the favourable opportunity of attacking her husband while he was asleep. Where a child of 9 years of age took a necklace valued at Rs. 2-8 from another boy and immediately pledged or sold it to another for five annas, the Court considered his conduct, displaying sufficient intelligence to hold him guilty of theft.[6] But if in such a case the accused had sold or pledged the necklace in the vicinity of the theft, it would rather shew defect of intelligence rather than otherwise. And so it was held by Prinsep and Hill, JJ., in a case in which the accused, a boy aged 9, was at 3 A.M. found in the compound of the Commissioner of Patna with a brass pot offering it for sale. The pot belonged to a constable in the compound, and the boy was therefore convicted of its theft. But the High Court remarked that "the fact that he offered it for sale very soon after taking it, and in the same locality is remarkable, and would seem to throw some doubt whether he understood the nature and consequences of his act,"[7] to which might be added that it was still more remarkable that he should have been found offering it for sale at 3 A.M. In another case, the accused, a girl of 10, a servant of the complainant, picked up his button worth eight annas and gave it to her mother, whereupon she was convicted and sentenced to a month's imprisonment, under s. 381, but the High Court quashed her conviction holding that there was no finding by the Magistrate that the accused had attained maturity of understanding sufficient to judge of the nature of her act.[8]

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(1) "Malice makes up for age." *Aimona (Mt.)*, 1 W. R. 43.
(2) *Aimona (Mt.)*, 1 W. R. 43 (44).
(3) *Lukhini Agradanini*, 22 W. R. 27.
(4) *Lukhini Agradanini*, 22 W. R. 27 (28).
(5) *Mukimuddin*, 27 C. 133; *Marimuthu*, 1 I. C. (M.) (807).
(6) *Begaragi*, 6 M. 373.
(7) *Makimuddin*, 27 C. 133.
(8) *Marimuthu*, 1 I. C. M. 807; following *Mohimuddin*, 27 C. 133.

689. Of course, the nature of the act complained of often offers a fair indication of the capacity and intelligence of the accused. A boy under 12, may, for instance, be conceivably capable of committing theft, arson or even murder. But he is incapable of committing rape. So in regard to rape Lord Hale has laid down a rule that a boy under 14 is under a physical incapacity to commit the offence.[1] "There is," says Lord Coleridge, C. J., "*præsumptiones juris et de jure*, and Judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence."[2] And the same learned Judge went on to say that a person could not be guilty of an attempt to commit an offence which he is physically incapable of committing,[3] though in such a case the prisoner may be convicted of common assault,[4] or even an indecent assault.[5] And so in another case a girl of 10 years of age who had married another man during the lifetime of her first husband who was thereupon prosecuted for bigamy, was held not to have attained sufficient maturity of intelligence to judge of the nature and consequence of her second marriage. In this case the marriage was negotiated and caused to be performed by the mother of the accused, and there was nothing to suggest that she had herself brought about her second marriage by concealing the fact of her first marriage, or that she otherwise understood that what she was made to participate in was illegal or improper.[6]

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Act of a person of unsound mind.

690. Analogous Law.—The last two sections deal with the deficiency in will due to tender age. This section deals with a deficiency of will due to weak intellect. "The second case of a deficiency in will," wrote Blackstone, "which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.*, in an idiot or a lunatic, for the rule of the law as to the latter, which may easily be adopted also to the former, is that *furiosus furore suo punitur*."[7] In criminal cases, therefore, idiots and lunatics are not chargeable with their own acts, if committed when under these incapacities: no, not even for treason itself. Also if a man in his fond memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence. If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English Law, had the prisoner been of sound memory, he might have alleged something in stay of judgment of execution."[8]

691. These provisions are not novel to this country for they find place in the Code of Criminal Procedure.[9]

692. Assuming that the three compartments of the mind are those controlling cognition, emotion and the will, this section only exempts one whose cognitive faculties are affected. As such the section has been regarded as too narrow and out of date, inasmuch as it makes no provision for a case where one's emotion and the will are so affected as to render the control of the cognitive faculties ineffectual.[10]

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(1) 1 Hale P. C. 631.
(2) *Groombridge*, 7 C. & P. 582; *Philips*, 8 C. & P. 736; *Waite*, (1892) 1 Q. B. 600 (601).
(3) *Waite*, (1892) 1 Q. B. p. 601, *per* Hawkins, J. in *Williams*, (1893) 1 Q. B. 320 (321, 322).
(4) *Waite*, (1892) 1 Q. B. 600 (601); *Williams*, (1893) 1 Q. B. 320 (321).
(5) *Williams*, (1893) 1 Q. B. 320 (321).
(6) *Godi*, (1896) U. B. J. 876.
(7) "A mad man is punished by his madness alone." The same meaning is conveyed by the maxims "*Furiosis nulla voluntas est.*" ("A mad man has no will") and *Furiosus absentis loco est*" ("A mad man is like one who is absent").
(8) Hale P. C. 34.
(9) Ss. 464-475, Act V of 1898.
(10) *Kader*, 23 C. 604; followed in *Chajju Mal*, (1909) P. L. R. 94, 4 I. C. R. 985.

693. Principle.—Jurists have given various reasons for the exemption of lunatics from criminal responsibility. It has been said that a mad man is best punished by his own madness. So it has been said that if a mad man commits an offence he shall not suffer for the act, because being deprived of memory and understanding by the hand of God, he is regarded as having broken the mere words of the law, but not the law itself. The reason, however, why a mad man is exempt is that his acts being unintentional and involuntary, no Court can correct them by punishment. Being deprived of free-will a mad man is not placed even in a worse predicament than an infant under 7 years. For while the latter can at least control and regulate his acts, the former cannot. Being a victim of his impulses his acts are involuntary as they are unintelligent. It is idle to talk of his possessing *mens rea* for even his mind is not his own. He is therefore in all ages a fit object of commiseration ; but a society has to be protected even against the attack of maniacs, the Procedure Code provides for his detention to prevent mischief. But his detention is not his sentence.

694. It will be observed that the burden of establishing "unsoundness of mind is cast upon the defence."[1] This is in accordance with reason. For as Rolfe, B., told the jury in a case : "Every man committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. A man going about the world marrying, dealing, and acting as if he were sane, must be presumed to be sane till he proves the contrary. The question therefore would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind."[2] But while it is so as a strict matter of law, since the Court has to find the *mens rea*, it is not precluded from considering the plea if the materials for it are sufficiently on record.[3]

695. Meaning of Words.—"*Who at the time of doing it*" : In order to rely on the defence of insanity under this section it must be shown that the accused was insane at the time of the commission of the offence. His insanity, antecedent and subsequent, would of course be relevant to prove his mental state at the time of the offence, but this alone is directly relevant to the case.[4] The section only deals with what constitutes an offence, and what does not. It therefore only speaks of mental irresponsibility at the time of the act. His subsequent incapacity does not affect his crime, though it affects his trial, and the contingency has been therefore provided for in the Procedure Code.[5] "*By reason of unsoundness of mind*" : This is equivalent to *non compos mentis* ; the words "lunacy or madness" have been avoided as they may differ in degrees and kind. The unsoundness of mind here spoken of may be temporary or permanent, or due to any cause. An idiot, a person *non compos mentis* by sickness, a lunatic or a person naturally mad or one whose reason is clouded by alcohol is a person so unsound, provided that his unsoundness makes him blind to the nature or criminality of an act.

"*Incapable of knowing the nature of the Act*" : This phrase differs from that used in s. 83, where the words used are "the nature and consequences of his conduct" (§ 684). It means nothing more than that the person doing the act was not aware that what he was doing was wrong. So the Court in a case told the jury : "The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequence of the act he was committing, or, in other words, whether under the influence of a delusion or of a diseased mind, he was really unconscious at the time that the act he was committing was a crime."[6] The use of the word "knowing" is significant and implies that in order to exempt a person from criminal responsibilities, insanity must have affected his cognitive faculties. If it merely affected his emotion, or will, leaving his cognition substantially unimpaired he cannot plead

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(1) *Ram*, 50 I. C. (C.) 991 ; *Mantajali*, 55 I. C. (C.) 477; *Buzlur Rahman*, (1929) C. 1.
(2) *Layton*, 4 Cox. C. C. 149.
(3) *Tincourie*, (1923) C. 460.
(4) *Golla*, 22 I. C. (M.) 737 ; *Chajju Mal*, (1909) P. L. R. 94, 4 I. C. 985.
(5) S. 466, Cr. P. C.
(6) *Oxford* 9 C. & P., 555 ; s. 102, Indian Evidence Act ; *Kader Nasyer*, 23 C. 604.

exemption, though it may be a case of extenuation.[1] Such was the case of the accused who was afflicted with a form of lunacy known as *folie circulaire*, a malady in which lucid intervals alternated with complete insanity. It was found that at the time of committing murder he was insane but sane enough to know perfectly well that he was committing a crime. He was sentenced to transportation, but the Court directed that he should be watched and the case reported if necessary to the Local Government for the exercise of its power of clemency.[2]

696. What is " Unsoundness of Mind ".—A person of "unsound mind" is under certain circumstances held to be exempt from criminal responsibility. The Code does not define " unsoundness of mind." It assumes that the phrase will be understood. But it is one of those phrases which every one professes to understand, but few will dare to explain. The term "unsoundness of mind" has been undoubtedly used here, as it has been by Sir James Stephen, as equivalent to insanity. But insanity, lunacy, unsoundness of mind, mental derangement, mental disorder, madness and mental alienation or aberration have been indiscriminately applied to those states of disordered mind in which a person loses the power of regulating his actions and conduct according to the ordinary rules of society. " In all cases of real insanity, the intellect is more or less affected—hence the term *intellectual insanity*. In a medical sense this implies a deviation of the mental faculties from an assumed normal or healthy standard. In an insane person there may be no bodily disease, but his language and habits are changed, the reasoning power which he may have enjoyed in common with others is lost or perverted, and he is no longer fitted to discharge those duties which his social position demands. Further, from perversion of reason, he may show a disposition to commit acts which may endanger his own life or the lives of those around him. It is at this point that the law interferes for his own protection, and for that of society.[3]

697. As already observed, insanity not only affected the cognitive faculties but also the other compartments of the mind, *viz.*, the emotion and the will. However, in law, insanity is understood to mean a mental condition in which, either from the existence of delusions, or from incapacity to distinguish between right and wrong, with re gard to any matter under action, there is no individual responsibility. It is only withe insanity of this kind that we are concerned. It is said that for this purpose, insan persons may be divided into four kinds : (*i*) a lunatic, (*ii*) an idiot, (*iii*) one *non compos mentis* by sickness, or (*iv*) by drink.[4] A lunatic and an idiot may be permanently so, or they may be subject to only temporary and occasional fits of the malady. A person suffering from a total alienation of the mind is called " insane " or " mad," the term " lunatic " being reserved for one whose disorder is intermittent with lucid intervals. Insanity is again sub-divided into (*a*) *dementia a nativitate*,[5] and (*b*) *dementia accidentalis vel adventitia*,[6] persons drunk being spoken as suffering from *dementia affectata*.[7] Leaving alone for the present this form of " madness " dealt with in the next section, the three other forms of madness call for notice under this section.

698. A person mad from birth is, of course, wholly irresponsible for his acts and his case presents no difficulty.[8] It is only persons who do not suffer from permanent insanity, or who suffer from partial insanity which leaves still some reason and understanding, that present the greatest difficulty. Speaking of partial insanity, Hale says, that it is the condition of very many, especially melancholy persons,

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(1) *Lakshman*, 10 B. 512 ; *Venkatasami*, 12 M. 459; *Muthusawmi* M. 53 I. C. (M.) 828 ; *Razai Mia*, 22 C. 817 ; *Kader*, 23 C. 604, *Mantajali*, 55 I. C. (C.) 477 ; *Chajju Mal*, (1909) P. L. R. 94, 4 I. C. 985 ; *Anandi*, 45 A. 329 ; *Lachman*, 46 A. 243 ; *Ramzan*, (1918) P. R. (Cr.) 30, 48 I. C. 492 ; *Bugwati Prashad*, 74 I. C. (A.) 69.

(2) *Lachman*, 46 A. 243.

(3) Taylor's Medical Jurisprudence (4th Edn.) p. 474.

(4) Co. Lit., 247 ; *Beverey's case*, 4 Coke 124.

(5) "Madness from birth."

(6) Madness which is accidental or adventitious.

(7) Sib. : " Affected or pretended madness"—madness by drunkenness so called. Co. Lit., 247 ; 1 Hale P. C. 32 ; 1 Hawk P. C., c. 1, s. 6.

(8) Curiously such a person is called an "idiot " in law, 1 Hale P. C. 34.

who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of reason. "Doubtless most persons that are felons of themselves and others are under a degree of partial insanity, when they commit these offences; it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the Judge and Jury, lest on the one side there be a kind of inhumanity to ward the defects of human reason, or, on the other side, too great an indulgence given to great crimes."[1]

699. What kinds and degrees of privations or perversion of understanding exempt a man from liability to legal punishment are therefore questions of some nicety. As Tracy, J., told the jury: "If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed my Lord Onslow, he is exempted from punishment; punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a mad man, a person that hath no design, can have no example. This is on one side; on the other side, we must be very cautious; it is not every frantic and idle humour of a man, that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption; therefore it is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a mad man as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast, such a one is never the object of punishment"[2]

True Test stated.

700. But this statement of the law probably carries the doctrine too far, for if the prisoner, in committing the act, was deprived of the power of distinguishing between right and wrong with relation to that act, it was not necessary that he should not have known what he was doing.[3] Such a person is undoubtedly of "unsound mind" within the meaning of the section. That term then has been used to embrace the case of a person who, moved by an irrational impulse, committed the act without knowing that it was a crime. It is used here to denote mental irresponsibility arising from want of capacity, whether temporary or permanent, natural or supervening, whether arising from disease or existing from the time of birth, or whether it was the result of habitual indulgence in liquor or intoxicating drugs. But the insanity here spoken of is something more than a passing phase of a normal mind, as for instance, a temporary insanity or loss of self-control induced by a single drinking bout, or ganja smoking which can scarcely be designated a temporary insanity, as being momentary it may call in the aid of sections 85 and 86 but is not to be treated as insanity here described.[4] Thus, an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and a person who is mad or delirious are all persons of "unsound mind."

701. There are numerous degrees of insanity. It has been said that not every little cloud floating over an otherwise enlightened understanding will exempt from criminal responsibility; nor, on the other hand, will every glimmering of reason over the darkness of a troubled mind, subject the unfortunate being to the heavy pains provided for wilful wrong doing.[5] In order to render a man irresponsible for his acts the Code prescribes two tests, namely, (*i*) that his unsoundness must have reached that degree that he was "incapable of knowing the nature of the act," or (*ii*) that it had precluded him from understanding that the act he was doing was wrongful.[6] These two elements need not be simultaneously present, in each

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(1) 1 Hale P. C. 30.
(2) *Edward Arnold*, (1724) 16 St. Tr. 695 (764, 765), followed in *Tola Ram*, 29 P. L. R. 104.
(3) *Earl Ferrers*, 19 St. Tr. 886.
(4) *Vithoo*, 7 N. L. R. 185, 13 I. C. 916; *Maung Gyi*, 7 L. B. R. 13, 20 I. C. 411.
(5) *Harkha*, (1906) A. W. N. 193.
(6) *Bazlur Rahman*, (1929) C. 1; Ans. to Qs. 2 and 3 in *McNaughten's case*, *ib.*; *Kurma Urang*, (1928) C. 238.

case, nor indeed, are they invariably so present. For it is easy to conceive of a case in which a person may be perfectly conscious of the nature of his act, though he lacks the capacity to see that it was wrongful. A person killing another, believing that his act was done by the immediate command of God, is an example. Here the person killing knew that his act will result in death, but he did not know that that act was wrongful. Other instances will have to be presently considered (§ 702). So much is, however, clear that in laying down the two tests the Code follows the current of English cases, in which a similar doctrine has been laid down. So the fifteen Judges consulted by the House of Lords replied : " If under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."[1] The accused, in a case, was proved to be subject to insane delusions to the effect that he believed at times that he was surrounded and attacked by persons from whom he tried to escape. One day he became subject to a passing delusion that the priest of a Buddhist monastery was keeping his sisters and daughters in the monastery, but for this he had apologized to the priest whom he, however, later on attacked inflicting eight cuts from the effects of which he died. It being proved that the accused was a known mad man and had no conceivable motive for the crime, the Court acquitted him of murder holding that he did not know the nature of the act or that it was wrong.[2]

Mental Delusions.

702. These are cases of delusions in which there is a mistake of fact, as where a person kills another but thinks that he was breaking a jar or thinks that by doing so he is sending the person slain to heaven.[3] In such cases the rule is the same, whether the person was under a mistake of fact, or in delusion. As in the one case so in the other, the Court places him as regards responsibility, in the same situation, as if the facts with respect to which the mistake was made or delusion existed, were real.[4] The twofold test, therefore, follows the two-fold functions of the human mind namely, reason and emotion. The function of the former or the faculty of thought is performed in cognition, perception or judgment : of the latter in moral sentiments and affections, the propensities and the passions. These two functions belong to two different compartments of mind, and one may be diseased while the other is normal.[5] The two classes, it will be seen, relate solely to the domain of reason, they exclude all cases of emotion. A Ghazi plunging his knife into the heart of a Kafir may truly believe that the deed will secure him the peace of Heaven, but he knew that his act will result in death—indeed it was so intended and he further knew that his act was contrary to law. He may be a religious maniac, but he cannot be exempted from punishment, because his case does not fall within the exemption.

703. Indeed, such a case is amply met by the reply of the Judges to the first question of the Lords.[6] Cases of human sacrifice and of murder of supposed witches (s. 302) offer other examples. So where a man sacrificed his own son to the God Mahadeo in pursuance of a vow that if the son were born he would offer Ganges water and do *puja*, and because, as he alleged that though the son came, wealth had not accompanied its birth, as a protest against which he had cut his own throat, it was held that he could not but be convicted of murder, though his act may have been prompted to some extent by his religious enthusiasm or even hallucination.[7] The accused, in another case, had confessed that he had seen the deceased (a lad aged 8 years who was his brother-in-law) arrange a clandestine meeting between his wife and a young man whom he actually saw enter his wife's apartment sometime before midnight, and again leave it after a considerable interval, and in consequence of

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(1) *McNaughten's case*, 1 C. and K. 130 ; *Muhammad Hussain*, 15 O. C. 321, F. B., 18 I. C. 641; *Townby*, 3 F. & F. 839.

(2) *Inga*, 4 Bur. L. T. 267, 13 I. C. 385.

(3) *Kader Nasyer Shah*, 23 C. 604 (607); followed in *Ramzan*, (1918) P. R. (Cr.) 30, 48 I. C. 492.

(4) *Ghinua*, (1918) Pat. 57, F. B.

(5) *Ghatu Pramanick*, 28 C. 613.

(6) *McNaughten's case*, 1 C. & K, 130.

(7) *Bishendharee Kahar*, 7 W. R. 64.

what he saw he had not had a wink of sleep until he killed him. It was held that the accused actually believed that he had ocular proof of his wife's infidelity, and that the estimate of his guilt must be made upon the basis of actual existence of the facts in regard to which the delusion existed, and since the accused had acted under the immediate influence of such provocation, his guilt was greatly mitigated under exception 1 to section 300.[1] In another case, the prisoner killed his uncle, by hacking him on the head and neck with a sword, after which he rushed about brandishing his weapon shouting "Victory to Kali," and he attempted to strike other persons including his own father, and the question was whether he was guilty of murder. It appeared that the prisoner was a young man of weak intellect. The motive actuating the offence was trivial and inadequate. When the paroxysm had passed off, during the police inquiry he appeared to be rational, but immediately afterwards he developed aphasia, attempted to commit suicide, and was undoubtedly insane from that time for a period of five years. It was held that the facts warranted, a finding that the prisoner was suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword and was by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and that therefore he was not guilty of murder.[2]

704. "Run Amuck."—Persons who "run amuck" probably suffer from similar insane delusions. Fancying some wrong, exaggerating the importance of some grievance, real or imaginary, the soldier takes up his gun and commences to fire at people indiscriminately. All these are cases of homicidal mania, the importance of which calls for separate notice.

705. Homicidal Mania.—Homicidal mania or monomania is commonly defined to be a state of partial insanity, accompanied by an *impulse* to the perpetration of murder, from which it is also sometimes called impulsive or paroxysmal mania. There may or may not be evidence of *intellectual* aberration, but the main feature of the disorder is the existence of a destructive impulse which, like a delusion, cannot be controlled by the patient. This impulse, thus dominating over all other feelings, leads a person to destroy those to whom he is most fondly attached, or any one who may be involved in his delusion.[3] It sometimes seizes a man all of a sudden, sometimes it is long-felt but concealed and restrained: there may be merely signs of depression and melancholy, low spirits and loss of appetite, as well as eccentric or wayward habits, but nothing to lead to a suspicion of the fearful struggle that may be going on within the mind. "As in suicidal mania, many of those who are in habits of daily intercourse with the patients have been first astounded by the act of murder, and then only for the first time led to conjecture that certain peculiarities of language or conduct, scarcely noticed at the time, must have been symptoms of insanity. Occasionally the act of murder is perpetrated with great deliberation, and apparently with all the marks of sanity."[4] Taylor goes on to observe that these cases are sometimes rendered difficult by reason of the fact that there may be no distinct proof of the existence, past or present, of any disorder of the mind, so that the chief evidence of the disorder is the act itself.

Sympathetic Affection.

706. But medico-legal writers are agreed that there are no hallucinations or illusions in this form of insanity[5] which is simply a perversion of the moral sentiments. But inasmuch as the mental powers are seldom unaffected when the moral feeling is so disordered, the derangement of the latter necessarily implies some derangement of the former. Indeed, the perversion of moral feeling is generally observed to be a precursor of mental derangement, though not to the same extent. Homicidal mania, as such, has therefore no recognized place in this exception. And in this respect the English Law is identical.[6] In other words, neither under this section, nor under the rules of English Law can a person plead exemption from criminal liability merely

(1) *Ghatu Pramanik*, 28 C. 613.
(2) *Shibokoeri*, 10 C. W. N. 725.
(3) 2 Taylor's Med. Jur. (4th Ed.), 564.
(4) *Ib.*, 477.
(5) *See* Somnambulism, *infra*.
(6) 3 Stephen's Cr. L. 126.

on the ground that he was prompted by an involuntary impulse to commit the crime.[1] But there are cases in which the intellect is so far affected as to bring the case of the prisoner within the exception here enunciated. For this purpose homicidal maniacs may be divided into three classes ; (*i*) Where the propensity to kill is connected with absurd irrational motive, or actual delusion; (*ii*) where it is connected with no known motive ; (*iii*) where it is committed *without interest*, without motive, and often on person loved by the perpetrator.

707. Of course, this classification takes no note of crimes committed from a motive, *e.g.*, of revenge, for, in such cases, there is premeditation, and cognition. They are not, therefore, cases in which there is any room for doubt as to the criminality of the perpetrator. The three degrees above described are, on the other hand, cases in which there may or may not be culpability. For instance, where a married woman killed her husband immediately after an apparent recovery from a disease which caused a great loss of blood and brought on insane delusions of the senses, which had been renewed at the time of the murder, it was held that she had not been in such a state of mind at the time of the act as to know its nature or be accountable for it.[2] So in another case, a married woman, fondly attached to her children and apparently most happy in her family, poisoned two of them without any motive. It appeared that there was insanity in her family, and it was held that the woman had acted in a paroxysm of insanity which deprived her of the power to perceive the consequence of her act, and she could not, therefore, be convicted.[3]

708. In another case the mother, who was suffering from the after-effects of delivery and religious despondency, got up one night and drowned four of her children in a cistern. She afterwards confessed that she could not sleep at night, and that between 12 and 1 o'clock, a black shadowy figure appeared and suggested to her that they could be out of danger if they were in Heaven. It was further suggested to her mind that it was better for them to die young than to grow up wicked and that she could easily put them into the cistern, whereupon she acted.[4] Other cases have occurred in which the filicide confessed to having had the same sensation of darkness or a black spectre brooding over them just before the perpetration of the act.[5] In such cases not only is there no motive for the act, but there could be no possible motive having regard to the known relations between the perpetrator and the deceased. But if this were all, the section would offer no defence. Besides the want of motive, there were circumstances in these from which the Court was justified in inferring that the persons accused were insane and unconscious of the fact that the act committed by them was wrong.

709. In the *second* class of cases the desire to kill is connected with an irresistible impulse, and no *known* motive. Where that is the only case, it is obviously insufficient to justify exculpation. As Bramwell, B., told the jury : " It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any reason for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But the circumstances of an act being *apparently* motiveless, is not a ground for which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act. A morbid and restless, but resistible, thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—

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(1) *Maung Gyi*, 7 L. B. R. 13, 20 I. C. 411.
(2) *Law*, 2 F. & F. 836.
(3) *Vyse*, 3 F. & F. 247.
(4) *Wilson*, 1 Stephen's Cr. L. 91.
(5) *Brough*. 2 F. & F. 838 ; *Hayes*, 1 F. & F. 666.

that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine: Did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?[1]

Partial Delusions.

710. The fact that the prisoner was suffering from partial delusion is no ground for exoneration if he was then possessed of sufficient sense to know that his act was wrong or that it would result in loss of human life. So where the prisoner who was sleeping in the same hut with the deceased and the latter's father and brother, got up at dawn and seized an axe which was in the hut, struck the deceased, and then ran away, throwing the axe in the jungle close by, and went to his house about two miles distant where he stayed till the next day when he was arrested, and brought before a Magistrate to whom he confessed, saying that on the night of the occurrence he had seen the deceased who was his brother-in-law, a lad of 8 years, having a private conversation with another who gave him a rupee which he carried to his wife. That another then entered the hut, where his wife was and returned after some time, whereupon he was smitten with such shame that he could get no sleep and that out of rage and a feeling of disgrace he had lost his senses when he killed his brother-in-law. It was found that the accused could not have seen what he had confessed, that the wife, of the accused was but a girl of 11, and had not even attained puberty, that the accused had at the same time no other motive. The accused was undoubtedly suffering from a delusion and he actually believed that he had ocular proof of his wife's infidelity. He was accordingly convicted of murder, though it was suggested that the Government might consider the question of reducing the sentence.[2]

711. So where the prisoner and his wife were seen walking along a road, the prisoner chiding her, and then all of a sudden he fired a pistol at her and she fell, whereupon he pulled her up and they proceeded a few yards, when he pushed her down and inflicted a second wound on her throat with a knife. He then ran away till he was overtaken and arrested by an onlooker to whom he stated that he had had a misfortune and had cut his finger. He would not tell what he had done with the pistol and knife, but said: "I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas." The prisoner had threatened to murder his wife before, on whom he had made a previous attack. At the same time the murder was committed without secrecy, whereupon Rolfe, B., told the jury: "The conclusion seemed irresistible that the prisoner was to some extent labouring under a delusion, but he was not exempted from responsibility because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But whether that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion. As to his sanity on the point involved in this case, and, in this view of the matter, there were two circumstances in the evidence of great importance: these were, the want of motive for the commission of the crime, and its being committed under circumstances which rendered detection inevitable. They could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he had satisfied them that he was not capable, at the time, of appreciating his acts."[3]

Impulsive Insanity.

712. In the *third* class, the impulse to kill is *sudden*, instantaneous, unreflecting, and *uncontrollable*. The act of homicide is perpetrated without interest, without motive, and often on persons who are most fondly loved by the perpetrator. This has been called impulsive insanity. "It is said that on particular occasions men are seized with irrational or irresistible impulses to kill, to steal, or to burn, and under the influence

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(1) *Hayes*, 1 F. & F. 666; *Brough* 2 F. & F. 838. *Ramzan*, (1918) P. R. 30, 48 I. C. 492; *Dhani Bux*, 9, S. I. R. 171, 32 I. C. 671: *Naga Khan Hla*, (1914) U. B. R. 3. D. Q. R. 28, 26 I. C. 1007.

(2) *Ghatu*, 28 C. 613, *Seat Ali*, 41 I. C. 142; *Ghinua*, (1908) Pat. 57, 43 I. C. 423. *Bazlur Rahman* (1929) C. 1.

(3) *Layton*, 4 Cox. C. C. 149.

of such impulses they sometimes commit acts which would otherwise be most atrocious crimes. It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred and have been acted on. Instances are given in which the impulse was felt and resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse was really *irresistible* as well as unresisted. If it was *resistible*, the fact that it proceeded from disease would be no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder ; it would not be the less murder if the same irritation and corresponding desire were produced by some internal disease.[1] The great object of the criminal law is to induce people to control their impulses ; and there is no reason why, if they can, they should not control insane as well as sane impulses.[2] The proof that an impulse was irresistible depends on the circumstances of the particular case. The commonest and strongest cases are those of women who, without motive or concealment, kill their children after recovery from child-bed."[3] This is called puerperal mania and is a recognised malady, known to the medical science.[4] Taylor says that in most of these cases women are fully aware of the nature of the act, and that it is contrary to the laws of God and man; they even make efforts to resist it, but they are unable to control their actions like persons in a normal state.[5] In this form of insanity the will-power is then affected. But insanity affecting emotions and the will is not entitled to exceptional treatment. (§§ 725-728).

713. Other forms of impulsive insanity induce the person affected to other forms of crimes. The morbid mania leading to impulsive acts of incendiarism without any motive is a condition recognized by medico-legal writers,[6] though it is not recognized by law. So the morbid propensity for thieving is known as kleptomania, a mania which is said to show itself in females labouring under disordered menstruation, or amongst those who are far advanced in pregnancy—the motive being a mere wish of possession. In this form of the malady, however, the person stealing is perfectly conscious of the act and of its illegality, as is evidenced by the precaution taken before and after the theft.[7] Another form of mania owing its origin to the primary disturbance of the functions of the brain from disease, is that called erotomania, in which the person affected gets possessed of uncontrollable amorous ideas, which are then as predominant as religious ideas in some cases of religious melancholia. Persons of both sexes are subject to this disorder, which is said to be due to some defect in the sexual organs.[8] Persons so affected are perfectly conscious of the nature of their acts, and they are therefore amenable to criminal law both here as well as in England.

714. Dipsomania or Drunkenness.—Allied to these monomanias, is the mania caused by alcoholism. Drink as a rule is no excuse for crime, as the next section lays down. But the question here to be discussed is not that raised by that section, but that which is the outcome of the present exception. That intemperance is not infrequently only the sign of insanity, or one of its symptoms, is now recognized ; that intemperance may lead to total deprivation of self-control, or at all events delusions induced by excess, as in *delirium tremens* rendering the individual irresponsible for his actions, is also possible. So it has been held that though mental incapacity produced by voluntary drunkenness is no defence under the next section, still, if voluntary drunkenness causes a disease which produces such incapacity then this section applies though the disease may be of a temporary character.[9] So where the accused Bheleka Aham, while proceeding towards his field one day, met a boy returning home whom, without speaking a word, he killed with a single stroke of the *dao* as he passed him. There was no motive for the crime and it appeared that

(1) *Laxaman Dagdu*, 10 B. 512.
(2) *Kader Nasyer* 23 C. 604.
(3) Stephen's Cr. L., p. 95.
(4) 2 Taylor's Med. Jur., p. 589.
(5) *Ib*. p. 590.
(6) Taylor's Med. Jur., p. 591.
(7) Taylor's Med. Jur., p. 593.
(8) *Ib*, pp. 593, 594.
(9) *Bheleka Aham*, 29 C. 493.

the accused had exhibited symptoms of insanity since six or seven days previously. His replies to the police were incoherent and meaningless. The evidence showed that the accused was addicted to intemperate habits by excessive use of opium whereupon the Court held that the accused was irresponsible for the act, as at the time he killed the boy, he was incapable of knowing the nature of his act.[1]

715. The law in England is the same. Voluntary drunkenness is no excuse there. It is, on the other hand, considered an aggravation. Still, if a person addicted to drink commit a crime, the question about his intemperance is always relevant as reflecting upon intention, or upon his criminality. So in a case of attempted suicide, Jervis, C. J., said : " If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself ? "[2] And so if drunkenness produces a condition of mind in which the sense of discrimination between right and wrong is obliterated, the question is relevant, for on the existence of that sense depends his criminal responsibility. Excessive drinking causes the derangement of mind known as *delirium tremens*. It commences with tremors of the hands, and the individual suffers from hallucinations and illusions sometimes of a horrid kind referring to past occupations or events. The patient acquires a predisposition to commit murder or suicide, especially the latter. In *delirium tremens* there is a formed disease of the brain, while voluntary drunkenness merely produces a temporary disturbance of its functions.[3] In countries where and amongst classes in which drunkenness is common, this form of *dementia* is frequently raised as a defence. But in order to be sufficient it must establish a condition of positive and well defined insanity. Where it lacks that degree of proof, drunkenness is not an answer to a crime though it may be taken into account as an extenuating circumstance.

716. Somnambulism.—Medico-legal writers regard somnambulism as also a form of insanity in which the mind is subject to hallucinations and illusions, though except in very extreme cases, in which there is a sudden access of insanity, the person is not likely to commit a heinous crime like murder, without recovering from the delusion. In crimes committed in this state of semi-consciousness, the person usually mistakes one person for another, or believes himself surrounded by robbers, or is haunted by imagined feelings of wrong. Taylor mentions several cases of crimes committed during sleep. In one case the prisoner suddenly awoke at midnight, and saw before him, as he believed, a frightful phantom. He twice called out " Who is that ? " but receiving no reply, and imagining that the phantom was advancing upon him, he seized a hatchet which was beside him, attacked the spectre, and it was found that he had killed his wife. He was tried for murder, but acquitted on the ground that he was not at the time conscious of his actions.[4] In another case an itinerant pedlar, given to sleep-walking, and in the habit of moving about the country armed with a sword stick, was while asleep on the high road roused by a passer-by. The pedlar suddenly awoke, drew his sword and stabbed the man who soon afterwards died. It was pleaded for him that he had committed the act believing himself to have been attacked by robbers. He was, however, convicted of manslaughter, presumably because he was conscious when he stabbed the man.[5] In another case the prisoner, a woman, had stabbed at night her son-in-law sleeping in the same room with her. There was evidence of previous malice and the knife with which the wound had been inflicted bore the appearance of having been recently sharpened, and the prisoner must have reached over her danghter who was sleeping in the same bed with the deceased. These facts were held to negative the suggestion of unconsciousness, and the prisoner was convicted.[6] In one case the prisoner committed an act during sleep which was the result of voluntary drunkenness, but his act was held to have been done in a state of unconsciousness and he was acquitted. In that case the prisoner and the deceased were two soldiers, and the former had been arrested for drunkenness and put to bed. The deceased went to awaken him, when

(1) *Bheleka Aham*, 29 C. 493.
(2) 4 Black. 26 ; Co. Litt., 247.
(3) Taylor's Med. Juris., p. 600.
(4) *Bernard Schedmaizig*, 2 Tay, Med. Jur., p. 600.
(5) *Milligan*, 2 Tay, Med. Jur., p. 600.
(6) *Jackson*, 2 Tay, Med. Jur., p. 600 ; *Minchin, ib.*

the prisoner suddenly kicked out, and his boot struck the abdomen of the deceased, causing rupture of the intestines and death. The prisoner did not awake, and appeared then to be quite insensible and he was on that ground acquitted.[1]

717. Insanity as a Defence to Criminality.—The plea of insanity is a defence to criminal responsibility. It must be therefore established by the defence,[2] either from facts alleged or proved by the prosecution, or independently by the defence. Insanity is a medico-legal question. It comprises not only all degrees of mental disorders expressed by the terms partial insanity, impulsive insanity, moral insanity, monomania, pyromania kleptomania and the like, but it presents considerable difficulties in investigation, and, requiring as it does highly specialized mental capacity for observation, it is a defence which is readily available, but which it is not always easy to establish. At the same time, while true cases of insanity are rare, when they do occur they present problems which baffle even specialists in mental diseases.

718. The present section does not refer to insanity in all its stages. It only allows such insanity to be a defence as is sufficient to deprive the person of his reason so that he is unable to "know the nature of the act." In England where all criminal trials are held by a jury, the question does not present the same difficulties. The juries are entitled to pronounce their verdict without giving their reasons. Accordingly, they do not regard the question from the same standpoint as a judge in this country who has to discharge the double functions of Judge and jury, and give his reasons for his judgment, which, again, is subject to confirmation, appeal or revision.

719. When the prisoner is tried by a jury, the latter do not as a rule trouble themselves with the niceties of law or the perplexing problems that a given case may present. They usually ask themselves the question, "Could any man in his senses have done such an act?" and their verdict depends upon the answer they are able to give to that question. Such a question, indeed, presents itself to the unaided Judge even in this country, but it is not the only question he has to answer, nor is it the sole test by which he judges of the criminal responsibility of an accused before him. It will, therefore, be the purpose of the present discussion to present a summary of the subject so far as it has a bearing on a person's criminal responsibility.

720. It has been before stated that criminal responsibility depends upon criminal intent (§ 661). In other words, wherever there is no criminal intention, there is as a rule no criminal liability. Now, the absence of criminal intention may arise from a variety of causes—mistake, immaturity of understanding due to youth, or absence of understanding due to insanity. Now, insanity may be temporary or permanent, total or partial. It may have, again, some bearing on a person's criminal act, or none at all. Barring certain exceptional cases to be presently considered, insanity is a disease or disorder of the mind which deprives the man of his reasoning faculties, and makes him a victim to its uncontrollable impulses. Now, as the brain is the organ of the mind, and it is invisible, the only manifestation of mental disorder is presented by the outward acts and conduct of the individual. Even when laid bare either experimentally in the lower animals, or in the human subject by the operation of disease, by accident, or by surgical measures, the passages of motion from place to place and the intimate molecular changes by which its functions are exerted cannot be observed. The utmost that can be observed is a difference in the amount of blood suffused in the vessels of the part, and the effects of injury, in the shape of paralysis or other disability, when the patient is dead, and if the brain is examined microscopically, we can, indeed, observe an extraordinary complexity and delicacy of structure, and we can often distinguish changes in this structure which we know, or reasonably infer, to be the results of the disease."[3] This is all that can be known. The

Physical Changes in Deranged Mind.

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(1) *French*, 2 Tay, Med. Jur., p. 160.
(2) *Razai Mia*, 22 C. 817; *Bahadur*, 9 L. 371; *Ram*, 50 I. C., (C.) 991; *Mantajali*, 55 I. C. 477; *Bazlur Rahman* (1929) C. 1,
(3). Mercier's Criminal Responsibility, p. 83.

disordered working of the structure cannot be seen, for the working ends with death "and although we may justly infer, when we see a nerve-cell or nerve-fibre shrivelled or swollen, or distorted or disintegrated, that it must, during life, have performed its functions badly or not at all; yet, in the absence of all exact and specific knowledge of what that function is, we are unable to connect in any rational way the changes found after death with the symptoms observed during life.

721. We may be sure that a cell that has burst and extended its nucleus, and a fibre that is severed and broken into lengths, did not, during life, transmit motion in normal amounts or directions, and did not add thereto or subtract therefrom, and did not modify in normal ways the direction of such motion as reached them. But this very general reasoning does not enable us to understand why the patient during life should have been excited or stuporous in conduct nor why he was elevated or depressed in mind. It gives us no inkling of the reason that he entertained delusions, still less of the character of the delusions. We are reduced to suppose that a patient, who has a delusion that he is prosecuted by some unseen and incomprehensible agency, has a change of structure in a part of his brain; and that another patient who has a delusion that the whole world is his own private property, has a change of a different character in that part of his brain, or a change of the same character in another part of his brain, or a change of different character in a different part of his brain. But this is all conjecture.

Sensual Observation Impossible.

722. Our knowledge does not enable us to associate any specific kind of change with any specific kind of delusion, nor can we even say that any particular change of structure is necessarily associated with delusion at all, nor, conversely, that delusion is necessarily associated with any particular structural change, nor with any discernible structural change. And what is true of disorders of mind is equally true of disorders of conduct."[1] "Unsoundness of mind" cannot, therefore, be the subject of ocular inspection or demonstration. It can only be known by its outward manifestations. By the language and conduct of the man, his thoughts and emotions are read. According as he conform to, or contrast with, the practice of people of sound mind, the large majority of mankind, we form our judgment as to his mental soundness. For this reason evidence is admissible to show that his conduct and language at different times and on different occasions indicated some morbid condition of his intellectual powers; and the more extended the view of his life, the safer is the judgment formed of him.

Evidence of Insanity.

723. Everything relating to his physical and mental history is relevant. Evidence as to insanity in his parents and immediate relatives may also be pertinent[2]. It is never allowable to infer insanity in an accused person from the mere fact of its existence in his ancestors. But when testimony directly tending to prove insane conduct on the part of the accused himself has been given, evidence of his family antecedents is admissible as corroborative of that testimony.[3] But the plea of general insanity though admissible, is not a complete answer to a charge. As the section lays down, in order to be effective as a defence, it must be an insanity by reason of which the person was incapable of knowing the nature of the act. So it is stated by Alison that "to amount to a complete bar of punishment, either at the time of committing the offence or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts."[4]

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(1) Mercier's Criminal Responsibility, pp. 83, 84.

(2) *Bahadur*, 9 L. 371.

(3) *Per* Cox., J. in *United States* v. *Guitean*, 1 Cox. C. C. 103; *Anandi*, 45 A. 329; *Bhagwati Prasad*, 74 I. C. (L.) 69, *Nga Pyau* 4 Bur. L. J. 267, 13 I. C. 385. *Per* Maule, J., in *Tucker*, 10 Fed. Rep. 161,

(4) Principles of the Criminal Law of India, p. 654.

724. The inquiry is then narrowed down to this: Was the accused not in possession of his understanding at the time of the act,[1] so that he could not discern that he was doing a wrongful act? The expression used in the section is "knowing the nature of the act," which would at first blush seem to imply that only insanity which affects the cognitive faculties is a defence to criminal responsibility. Instances of unsoundness of mind of this description would be such as these: A person strikes another and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin, and sending him to Heaven. Here he is incapable of knowing, by reason of insanity, that he is doing what is morally wrong, or he may, under insane delusion, believe an innocent man, whom he kills, to be a man that was going to take his life, in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land.[2]

725. But insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions and the will by which our actions are performed. The question whether the exemption here made is confined only to cases of insanity affecting cognitive faculties, or also to those affecting emotions and will, was raised but not decided in a Calcutta case,[3] in which, however, it was held that, if insanity affects a person's emotions and will, it is difficult to say that it does not affect also his cognitive faculties. But the Court was "not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. To take such a view as this would be to go against the plain language of s. 84."[4] In this case it appeared that the accused Kader was a cultivator, and had his house and property destroyed by fire, since when he complained of pain in the head and spoke to himself: when the pain was particularly severe, he did not answer when spoken to; that on one occasion he was seen eating potsherds. He played and went about with children much more than was to be expected from a man of his age; and it was found that he was fond of a boy Abdul whom he subsequently murdered without any sane motive. But it appeared that the accused had observed some secrecy in committing the murder. He had tried to conceal the corpse, and he had hid himself in a jungle. On these facts the Court was called upon to determine his criminal responsibility. The Court found that the accused was suffering from mental derangement of some sort, but having regard to the circumstances attending the act, it was constrained to hold that the accused was not, on that account, "incapable of knowing the nature of his act."[5] Finally, however, though constrained to uphold the conviction, the Court recommended the case to the Local Government for mercy.

726. The same course was adopted in another case. The accused Lakshman was suffering from fever, and feeling annoyed with the cries of his two children, aged three years and one year, he took the younger child out of the cradle and cut her throat with a hatchet on the threshold of the inner room. The other child was at the door of the house. He seized her also, and cut her throat in a similar manner, and then went to bed, and fell asleep. The accused had shown no previous symptoms of insanity. He had had fever since five days prior to the day of murder and on that day he had high fever; and the Court had thus to consider the criminality of the accused in the light of this section. It was conceded that if the case had to be decided by medical tests, the accused would have had to be acquitted. But the question was whether that test was legitimately applicable. It was held that it was not, and the Court finally held that unless the act be shown to have been committed in a state of delirium, the accused must be found to be guilty. In other words,

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(1) *Subbigadu*, (1925) 49 M. 1238. (Sanity at the trial immaterial).
(2) *Kader Nasyar Shah*, 23 C. 604.
(3) *Kader Nasyar Shah*, 23 C. 604.
(4) *Ib.*
(5) *Ib.*

the criminality of the accused was to be judged by the sole test of his consciousness of the nature of his act. As, however, there was no evidence of delirium, the Court confirmed the conviction, but commended him to the mercy of Government.[1]

727. The same view was taken in a parallel case disposed of by the High Court at Madras.[2] In that case one Venkatasami was prosecuted for the murder of a child, his brother's wife, probably, as the medical evidence showed, during the paroxysm of intermittent fever, evidently in the belief that he was surrounded by objects intending to harm him. In that belief he had previously killed a goat with a thrust, and seizing the sword which was handy, he stabbed the child probably without knowing that he was killing a person whom he loved. It appeared in evidence that the accused had acted very strangely a short time before the murder. He had abused his parents, and had stabbed the goat. The rest was medical evidence which in the opinion of the Court did not amount to more than that there was the possibility of a sudden attack of homicidal mania. But the Court held that, judging by the judicial tests which it was bound to apply, it could not find that what the accused was doing was wrong within the meaning of this section.[3] But in another case one Dil Gazi had for no reason cut his wife's throat with a *dao*. It appeared that for about a month and a half previously to the deed the accused had ceased attending to his crops or his cattle, saying that the paddy would grow by itself; he chased and abused people, and said that he wanted to die as he thought people were going to loot his house; that he climbed up a tree saying his pillow was there, and that he cut himself on the arm with a *dao*; that from about the same time the accused had harboured a delusion that armed men would come to his house and take away his wife, and that he was under that delusion on the evening of the occurrence. It also appeared that after the murder, the accused made no attempt to escape or offer resistance or to conceal his act. On these facts the Court said: "In view of the uncertainty that always exists as to how far diseased state of mind extends, and in view of the difficulty, that is never absent from cases like this, of obtaining any trustworthy evidence, we find that the facts on record prove that the unsoundness of his mind prevented his knowing the nature of his act, and that it was wrong."[4] The difference between this case and those previously cited would appear to be the presence of symptoms of mental aberration from which the clouding of his cognitive faculties might well be inferred.

728. This difference in view marks the difference between the medical and legal standpoints from which insanity is viewed. (*i*) For while a Court of law commonly looks for "some clear and distinct proof of mental delusion or *intellectual* aberration existing previously to, or at the time of, the perpetration of the crime,"[5] a medical man recognizes that there may be delusion, springing up in the mind suddenly, and not revealed by the previous conduct or conversation of the accused[6] (*ii*) so the tests employed by the medical man to detect the insanity are different from those employed by the lawyer. He infers insanity from the absence of motive, of any attempt to escape, and of any accomplice. The fact that the person was *conscious* of the crime is immaterial. On the other hand, the legal test of the existence of insanity is "conduct". A lawyer means by madness "conduct of a certain character," while a physician means by it "a certain disease one of the effects of which is to produce such conduct."[7] The medical man says that an act without motive is the act of a madman. But motive is neither an important nor a recognized test of insanity.

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(1) *Lakshman Dagdu*, 10 B. 512.
(2) *Venkatasami*, 12 M. 459; *Muthuswami*, 53 I. C. (M.) 828.
(3) *Venkatasami*, 12 M. 459, following *Laxman*, 10 B. 512; followed in *Kader Nasyar*, 23 C. 604; *Dhani Bux*, 9 S. L. R. 271, 32 I. C. 67.
(4) *Dil Gazi*, 34 C. 686; *Mani Ram*, 8 L. 114; *Tola Ram*, 102 I. C. (L.), 774.
(5) *Burton*, 3 F. & F. 772.
(6) *Ib.*
(7) Stephen's Cr. L. 87.

729. Partial Lunacy.—Partial lunacy would be judged by the same tests, *viz.*, whether the accused was so bereft of reason as not to know the nature of his act.[1]

730. Irresponsibility must be at the time of Doing the Act.—In order to sustain the plea of irresponsibility it must be shown, not that the prisoner was insensible at some other time, though it is not immaterial, but that he was insensible so as to be irresponsible at the time of the commission of the crime. So Lord Justice Clerk Hope told the jury in one case : " A man must believe, not that the crime is wrong in the abstract (for most madmen do admit murder to be wrong and punishable in the abstract), but that the *particular act*, committed under the influence of the motive which seems to have prompted it, was not an offence against the law; one may know that in the abstract the act is punishable, and yet believe that his particular act is not in law a crime and not punishable."[2] The fact to be primarily determined is then the state of the prisoner's mind *at the time of the doing of the act*, and it is its "unsoundnesss" at the time that is an answer to his criminality. But how is the state of his mind at the time to be determined ? Direct evidence may be forthcoming as to his overt acts, but it cannot speak of the state of his mind. It will therefore, have to be judged not only by his contemporaneous acts, words and conduct. but also his pre-disposition and his prior and subsequent acts and conduct. As the fact to be inquired is his mental power of cognition at the time, all facts tending to throw a light on it are relevant. The usual method adopted in such inquiry is (*i*) to place the accused under medical observation, (*ii*) to let in evidence as to the prisoner's antecedents, (*iii*) to observe and note his demeanour in Court, (*iv*) to see if his crime was supported by a motive, or (*v*) circumstances which postulate cognition, such as (*vi*) preparation, (*vii*) the choice of weapon, and the manner of using it, (*viii*) attempts at concealment, either before or at the time of the act, or afterwards, (*ix*) the circumstances attending the commission of the crime, such as the choice of time, place and opportunity, (*x*) the assistance of an accomplice, and (*xi*) the statements made immediately after the crime. These points require separate consideration.

731. Pleading and Proof of Insanity.— As has been already observed, the plea of insanity is an exception, and as such, it is a plea which must be taken and proved by the defence.[3] But this is scarcely a rule which the Courts will enforce in every case.[4] Indeed, its rigorous observance may in the very cases in which the defence is most helpless, lead to injustice. For prisoners in this country are, as a rule, undefended, and an insane prisoner is *prima facie* incompetent to plead his insanity. Indeed, the very plea, if taken, would establish his sanity. He is, therefore, naturally thrown on the mercy of the Court whose duty is then to afford him all possible assistance. The first thing, though perhaps not the most important thing, is to place a prisoner suspected of insanity under medical observation. But it must be remembered, that a medical witness cannot be expected to depose about the *past* condition of the prisoner's mind. That must be the subject of non-medical evidence. The medical evidence is given as of an expert,[5] and as such, it is subject to the reservations and limitations to which such evidence is usually subject. In this connection the Civil Medical Officer is the recognized expert in all cases involving any kind of medico-legal question. But medical officers trained to general duties are usually as learned, in the subject they are called upon to depose about, as any layman, and the present writer has met cases in his practice, in which the counsel employed in the case knew more about the special subject requiring expert

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(1) *Lord Ferrer's case*, 19 St. Tr. 947 *Arnold's case*, 8 St. Tr. 317; 16 St. Tr. 764 (765) ; *Bellingham's case*, Collis. Add. 636 ; *Oxford*, 9 C. & P. 533 ; *Oxford*, 5 C. & P. 168 ; *Oxford*, 9 C. & P. 525 ; *Hadfield's case*, Collis, 480; *Poochee*, 3 W. R. 9; *Southey* (1865) 4 F. & F. 864 ; *Leigh*, (1866) 4 F. & F. 916.

(2) *James Gibson*, (1844) 4 Brown 232.

(3) S. 105, Indian Evidence Act (I of 1872); *Ram Sunder Das*, 50 I. C. (C.) 991; *Manta Jali*, 55 I. C. (C.) 477; *Niaz Ali*, (1904) A. W. N. 2; *Chandra Lal*, 21 A. L. J. 776; *Irapa*, (1898) B. U. C. 818; *Bazlur Rahman*, (1929) C. 1; *Mani Ram*, 8 L. 124 ; *Bagga*, (1931) L. 276.

(4) *Tincourie*, 27 C. W. N. 290.

(5) S. 45, Indian Evidence Act (I of 1872).

advice than the senior surgeon whose services were requisitioned for the purpose. So the Earl *Shaftesbury* said in the *Windham case*: "He did not know that medical gentlemen (he said it with all respect), unless they had made insanity their special study, were more qualified to judge of the soundness or unsoundness of mind than any person of common sense and practical knowledge of the world. Mere opinions and scientific speculations ought no longer to be adduced in the courts as testimony. Whatever evidence was given by a medical man should be facts, and judgments based on these facts." In cases of insanity the testimony, to be at all useful, is required of a specialist in mental diseases, and it may be doubted if the testimony of any other medical practitioner is relevant. However, assuming that such testimony is available, the points to which the attention of a medical witness should be directed are worthy of notice.

732. The lawyer's standpoint in judging of the criminality of an offender on the ground of insanity is different from that of the medical man, since the lawyer is merely concerned with asking himself the question whether the prisoner knew that what he was doing was wrong, whereas the medical man does not care what the prisoner thought, only so long as his act was the result of an uncontrollable impulse.[1] But, as regards the absence of secrecy and accomplice, both the lawyer and the medical man take the same view, since secrecy and co-operation of an accomplice are evidence of intelligence and not of lunacy. It has been held that a medical witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the prisoner.[2] The question, whether on given facts the prisoner should or should not be pronounced insane, is one of fact, which it is for the jury to decide and not for the medical witness to depose about.[3] The proper function of the medical witness is as an expert to give his opinion as to whether the facts proved furnish proof of the existence of delusion. He may be able to say in looking to the previous habits and mode of life whether there has been any change of habits or character indicative of insanity. The Judge may, for instance, place certain facts proved or assumed and ask the medical witness if, in his judgment, they were indicative of insanity on the part of the prisoner at the time of the alleged act.[4] A medical man may be questioned whether certain proved acts, appearances and conduct are in his opinion symptoms of insanity,[5] though he cannot be asked if the evidence given establish a case of insanity, for that is the very thing the Judge or the jury have to decide.[6] The expert may be asked as to the state of the prisoner's mind but not as to his responsibility, which is again a matter for the Judge or the jury to decide.[7] Where, for instance, a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit, though there is nothing before or after the act to indicate it.[8] In examining medical experts it must not be forgotten that the physician and the jurist view insanity in relation to criminal responsibility from different standpoints (§§ 725-728). And the examination of a medical witness must, therefore, be directed to elucidating points relevant from the standpoint of the jurist. In other words, as the jurist is concerned with only one aspect of insanity—the insanity of the *mind*—the only questions relevant would be those calculated to prove or disprove that form of insanity. Other questions are however not necessarily irrelevant, for, as has been seen, there may be cases in which the insanity of other faculties, emotions and the will, re-acts upon the mind and produces what may be called intellectual insanity.

Medical Witness.

733. Questions to Medical Witness.—The following therefore, appear to be the appropriate questions that may be put to a medical witness in cases of suspected insanity :—

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(1) *Burton*, 3 F & F. 732.
(2) *Doe* v. *Bainbridge*, 4 Cox. C. C. 454.
(3) *Wright*, R. & R. 456; *Searle*, 1 M. & Rob, 75; *Bainbridge* v. *Bainbridge*, 4 Cox. C. C. 454.
(4) *Frances*, 4 Cox C. C. 56.
(5) *John Wright*, R. & R. 456.
(6) *Searle*, I M. & R. 75.
(7) *Richards*, I F. & F. 87.
(8) *Richards*, 1 F. & F. 87.

1. Have you examined. . . .?
2. Have you done so on several different occasions, so as to preclude the possibility of your examinations having been made during lucid intervals of insanity ?
3. Do you consider him to be capable of managing himself and his personal affairs ?
4. Do you consider him to be of "unsound mind," in other words, intellectually insane ?
5. If so,do you consider his mental disorder to be complete or partial ?
6. Do you think he understands the obligation of an oath ?
7. Do you consider him, in his present condition, competent to give evidence in a Court of law ?
8. Do yo consider that he is capable of pleading to the offence of which he now stands accused ?
9. Do you happen to know how he was treated by his friends (whether as a lunatic,an imbecile, or otherwise) prior to the present investigation and the occurrences that have led to it ?
10. What, as far as you can ascertain, were the general characteristics of his previous disposition ?
11. Does he appear to have had any previous attacks of insanity ?
12. Is he subject to insane delusions ?
13. If so, what is the general character of these ? Are they harmless or dangerous ? How do they manifest themselves ?
14. Might such delusion or delusions have led to the criminal act of which he is accused?
15. Can you discover the cause of his reason having become affected ? In your opinion was it congenital or accidental ?
16. If the latter, does it appear to have come on suddenly or by slow degrees ?
17. Have you any reason for believing that his insanity is of hereditary origin ? If so, please specify the grounds for such an opinion, and all the particulars bearing on it, as to the insane parents or relatives of the accused ; the exciting cause of his attack ; his age when it set in ; and the type which it assumed.
18. Have you any reason to suspect that he is, in any degree, feigning insanity ? If so, what are the grounds for this belief ?
19. Is it possible, in your opinion, that his insanity may have followed the actual commission of his offence, or been caused by it ?
20. Have you any reason to suppose that the offence could have been committed during a lucid interval, during which he could be held responsible for his act ? If so, what appears to have been the duration of such lucid interval ? Or on the contrary, do you believe his condition to have been such as altogether to absolve him from legal responsibility ?
21. Does he now display any signs of homicidal or of suicidal mania or has he ever done so to your knowledge ?
22. Do you consider it absolutely necessary, from his present condition, that he should be confined in a Lunatic Asylum ? or again—
23. Do you think that judicious and unremitting supervision out of as asylum might be sufficient to prevent him from endangering his own life, or the lives or property of others ?

734. Test to Feigned Insanity.—The defence of insanity raises the question of feigned insanity, a subject in which the co-operation of a specialist has to be necessarily requisitioned. Indeed it is only after prolonged and critical observation made when the prisoner feels that he is unobserved, that even a specialist can definitely say whether the insanity pleaded is natural or feigned. The principal points to consider when feigning is suspected would appear to be the following :—

1. When did the prisoner first exhibit signs of insanity ? Before or after the commission of the crime ? It is a fact taught by human experience that insanity is usually pretended *after* the commission of the crime, and that where the prisoner is shown to have done so, it may be regarded as a badge of fraud, though it is by no means conclusive, for cases have occurred when the first symptom was only noticed after the commission of the crime. And indeed, cases are on record when the intellectual aberration was sudden, but in such case it was almost invariably preceded by some great moral shock or other very obvious cause. But, as a rule, *dementia* comes on slowly, and is obviously dependent on organic changes, such as old age, apoplexy, paralysis or hemiplegia, or it is a consequence of recurrent mania or monomania. As this form of insanity consists in an entire abolition of all mental power the discovery of any connected ideas, reasoning or reflection, either by language, writing or gestures, would at once show that the case was not one of real *dementia*.[1]

2. A person feigning admits his insanity, but a person really insane will never admit it, but will, on the contrary, endeavour to establish his sanity. "It may be safely held that a person feigning insanity will rarely, if ever, try to prove himself to be sane ; for he runs the great risk of satisfying others that he is sane, a conclusion which he rarely desires to avoid. But there is no better proof in general, that the insanity (supposing other evidence of it to be strong) is real, than keen and eager attempts by the accused to prove that he is sane, and strong and indignant remonstrances against being held to be insane, although they would protect him against trial and punishment."[2]

3. Insane persons sleep but little, and the sleep is disturbed. An impostor sleeps as soundly as a healthy person.

4. An impostor acts his part only when he thinks he is observed. He takes rest when he thinks he is by himself. A madman's impulses are spasmodic and continue by day and night. An impostor may therefore be detected by watching him unawares.

(1) 2 Taylor's Med. Juris., p. 509. (2) 2 Taylor's Med. Juris., p. 508,

5. The external appearance of a pseudo-lunatic is in contrast with that of a maniacal patient. There is about the eyes in mania a restlessness which cannot fail to attract attention. Especially is this noticeable when the conversation is turned on matters affecting the prisoner. A person simulating insanity will at once show by his countenance and especially by the movement of his eyes that there is an intelligent understanding of the conversation affecting him.

6. Insanity may also be detected from handwriting. As there is no memory in *dementia*, it commonly happens that the same words are written over and over again. "No person in a state of confirmed *dementia* can write a connected sentence, because before the last part of the sentence is completed, the first is forgotten. In imbecility we may meet with every variety of mental defect, but the state of the mind is generally indicated by the expression of the thoughts in writing."[1] It is said that this often serves to detect the existence of a delusion when other means fail. But inasmuch as persons otherwise insane have been known to compose coherent writing, and since all but the most raving lunatic have lucid intervals, this test is one which is not of itself conclusive.[2]

7. Eccentricity and unusual habits may be genuine or assumed. But mere weakness of character, mere liability to impulse, good or bad, mere imprudence, recklessness, and eccentricity, to which might be added immorality, do not constitute unsoundness of mind, unless in looking fairly at the whole evidence, there was a good reason to refer them to a morbid condition of the intellect. They may furnish evidence of unsoundness, but they do not constitute it.

735. Other Evidence of Insanity.—Besides medical evidence, other evidence is also admissible in proof of insanity. Such evidence may consist of facts tending to show that the act of the accused was without motive, and perpetrated under conditions and circumstances which any sane man would have guarded against. The conduct of the accused before the commission of the alleged crime is, as has been before observed, always highly relevant, for it shows not only that the accused was probably not feigning insanity, but that the act complained of must have been unintentional, because the prisoner had been bereft of reason even before the commission of the act. As regards motive, it should be observed that in the view of criminal law the mere absence of motive is never sufficient to exculpate a crime (§ 215), but where insanity is concerned, the want of motive is regarded as some proof of the want of intention, and when that fact is corroborated by evidence of an independent character of the previous insanity of the prisoner, the Court would be justified in acquitting him. So where the prisoner murdered his wife and mother, at the same time wounding his child, and it appeared that he had had previous attacks of insanity and the act complained of was without any motive, the Court felt constrained to acquit him in spite of the dubious testimony of the medical officer.[3]

736. The evidence that the prisoner had prior to the act exhibited symptoms of insanity is relevant, though he may be perfectly sane at the time of the trial, for the question to be considered is the state of the prisoner's mind at the time of the act,[4] not his state of mind at the time of the trial, though the latter fact is also relevant for the purpose of procedure.[5] The mere facts that the conduct of the accused had been of late in some respects unusual, and that his father was insane were in one case held to be insufficient to establish the exception,[6] and these facts by themselves would be insufficient to establish it in any case. But though insufficient, they are not irrelevant, and indeed, in an inquiry touching the prisoner's mind at the time of the act, there can be nothing irrelevant that relates to his physical and mental history. For this purpose, evidence as to insanity in his parents and blood relations is relevant as not affording independent proof of his insanity, but as corroborative of other testimony as to the insanity of the accused. In other words, evidence of ancestral insanity is corroborative of the evidence of the prisoner's insanity. It has been before observed that the plea of insanity is one which must be raised and proved by the accused. The evidence given should be not only unequivocal but clear and distinct.[7]

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(1) 2 Taylor's Med. Juris., pp. 538, 539.
(2) *Ib.*, p. 540.
(3) *Sheikh Mustaffa*, 1 W. R. 19.
(4) *Pursoram Doss*, 7 W. R. 42; *Jugo Mohan*, 24 W. R. 5.
(5) Ss. 464, 465, Cr. P. C.
(6) *Jeeva Amtha*, B. U. J. 10; *Arzao Bebee*, 2 W. R. 33.
(7) *Stokes*, 3. C. & K. 185.

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737. When the absence of any motive, preparation or purpose for a criminal act is admitted or evidence of some mental derangement such as melancholy or excitement, or of very extraordinary conduct has been given, or other index of disease of the brain appears in the case, the Court ought to use the means pointed out in the various provisions of law, so as to find out as much as possible about the mental state of the accused.[1] The Court may for the purpose of the trial presume insanity from the appearance of the accused.[2] But the Court must have legal evidence on record before it can take the plea into consideration as an answer to the charge. It is not because a man commits a very horrible murder, or because he commits it while labouring under strong passions and feelings, that therefore the world is to assume that he must have been insane when he committed the deed. Where, for instance, it appeared that the accused had, in a sudden fit of jealousy, exhibited intense rage and grief, rolling on the ground in his passion, his eyes being red or bloodshot and his skin being hot, and he struck down his wife calling aloud that he had killed her and then voluntarily gave himself up to a Chowkidar that he might be dealt with according to the law for what he had done, upon which the Court observed ; " It may be that, if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them, might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind, for there is not one of them which might not, in the natural course of events, have been found to exist in the case of a man who was perfectly sane, but was labouring under the influence of great grief and passion.[3]

738. The law presumes every person at the age of discretion to be sane unless the contrary is proved ; so if a lunatic had lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed during derangement.[4] The accused has, therefore, to prove not only that he was a lunatic, but that his act was committed during lunacy and not in a lucid interval. Where partial delusion or the existence of mental disease is established, it may not be sufficient to exempt a person from criminal responsibility, though mental weakness caused by disease is an extenuating circumstance affecting the sentence. And so while a mental derangement a year prior to the act was in itself insufficient to exonerate the prisoner, still it was a fact calling for further scrutiny.[5] In order to offer a complete answer, the evidence must prove an alienation of reason perverting the moral sense.[6]

Act of a person incapable of judgment by reason of intoxication caused against his will.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law : provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

739. Analogous Law.—In laying down that drunkenness excuses a crime, the section provides that the drink must have been administered to him without his knowledge or against his will. This is in accordance with the English Law, under which it is settled that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime,[7] but it is, on the other hand, an aggravation of the crime. " As to artificial voluntarily contracted madness by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence rather than as an excuse for any criminal misbehaviour."[8] A drunkard, says Sir Esward Coke, who

(1) *Nepal*, (1886) B. U. J. 229 ; *Nga Po Tho* (1896) P. J. L. B. 249.
(2) Ss. 464, 465, Cr. P. C.
(3) *Nobin Chunder Banerjee*, 20 W. R. 70.
(4) *Babe*, (1881) B. U. J. 172 ; *Irapa* (1898) B. U. J. 818 ; *Sheodin*, (1901) A. W. N. 132 ; *Niazali*, (1904) A. W. N. 2 ; *Nabinchandra Banerjee*, 20 W. R. 70.
(5) *Arzao Bebee*, 2 W. R. 33.
(6) *Nobin Chunder Banerjee*, 13 B. L. R. 20.
(7) Co. Litt., 247 ; 1 Hale P. C. 32 ; Hawk. P. C. c. 1, s. 6.
(8) Co. Litt., 247 ; Plowd, 19 ; 4 Black, 26,

is *voluntarius dæmon*, has no privilege thereby, but what hurt or ill soever he doth, his drunkenness does aggravate it : *nam omne crimen ebrietas et incendit, et detegit*. It has been observed that the real use of strong liquors and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway,would make an Italian mad. A German, therefore, says the President Montesquieu,[1] drinks through custom, founded upon constitutional necessity ; a Spaniard drinks through choice, or out of the mere wantonness of luxury ; and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and in more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted,that he who committed a crime,when drunk, should receive a double punishment," one for the crime itself and the other for the ebriety which prompted him to commit it.[2] The Roman Law,indeed, made great allowances for the vice : *Per vinum delapsis capitalis pœna remittitur*.[3] "But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another."[4]

740. Principle.—Since criminal intention is the foundation of all criminal responsibility, it follows that a person drunk is in the same predicament as a person temporarily insane. Indeed, such state has been termed *dementia affectata*—a form of lunacy in which the functions of the mind are temporarily suspended. But since no man can be permitted to wear the cloak of immunity by getting drunk, the rule justly excepts cases of voluntary drunkenness. But while such drunkenness is never an answer to a crime, it is relevant in determining the question of intention and for that purpose it is permissible to prove in defence that the prisoner was suffering from a habitual and fixed frenzy brought on by drunkenness.[5]

741. Meaning of Words.—"*Who at the time of doing it*": The state of the prisoner's mind to be inquired about is at the time of the act, for it is only the mind as influencing his act that is relevant. "*Incapable of knowing the nature of the act, etc.*"; These words are the same as occur in s. 84. "*The thing which intoxicated him*," *i.e.*, the intoxicant, such as, alcohol, opium or the laughing gas. "*Without this knowledge*," not necessarily without his *consent*. For a person may have been imposed upon, in which case he may have consented to taking the intoxicant. "*Or against his will*": This means *by force*.

742. Operation of Drunkenness.—In all ages and in all countries, voluntary drunkenness is regarded as offering no answer to a charge of criminality. Indeed, in some countries drunkenness is regarded as by itself a crime, so that the wrongful intent to get drunk coalesces in law with the intent of the act done when drunk.[6] But the true position of the law seems to be to ignore the fact of drunkenness altogether. It says to the offender : We do not care whether you were drunk or not ; if you were so, it was your own act; you cannot plead your own fault; we pay no regard to the fact.[7] Drunkenness is, therefore, neither an aggravation[8] nor a palliation of the crime.[9] It is immaterial that the drunkenness had deprived a person of his self-restraint. It was a state which he could have foreseen, and it was at any rate the consequence of his voluntary act.[10] Drunkenness is then never an excuse, but when drunkenness becomes a disease, it is then a defence, not because it is drunkenness, but because it is a disease.[11] But in order to relieve a person from criminal responsibility, it must produce a disease of the mind such as *delirium tremens*.[12] So Lord Hale said : "Although simple frenzy occasioned immediately

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(1) Sp. L. b. 14, c. 10.
(2) Puffendorf's Laws of Nature, b. 8, c. 3.
(3) Ff. 49, 16, 6.
(4) Plow. 19 ; cited *per* 4 Black, pp. 25, 26.
(5) 1 Hale P. C. 32.
(6) Bishop's Criminal Law, 482.
(7) Collet's Comments, p. 16.
(8) *Zoolfkar Khan*, 16 W. R. 36.
(9) *Ram Sahoy Bhar*, (1864) W. R. 24.
(10) *Bodhee Khan*, 5 W. R. 79 ; *Bheleka Aham*, 29 C. 493.
(11) *Bheleka Aham*, 29 C. 493.
(12) *Davis*, 14 Cox C. C. 563.

by drunkenness is no excuse, yet if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed frenzy thereby caused, puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first."[1] So Savage says: "A person, say, is given powerful stimulants masked or concealed in some way, or being weak, or suffering from an old injury to the head, an amount which formerly would not have affected him, now produces a great effect; in a state of acute alcoholism he commits a crime, and doubtless would be considered not guilty; but if he has experienced several times the danger which he incurs by taking stimulants even in small quantities, and yet continues to indulge, and then perpetrates a crime, he may justly be considered responsible, even though it may be proved that by inheritance, or in consequence of the injury to the head, he is especially liable to be affected by stimulants. Next, if in consequence of intemperance he becomes slowly affected by mental disorder, and in a state of *delirium tremens* he commits a crime, he will probably not be considered fully responsible. If instead of *delirium tremens* alcohol produces chronic insanity or general paralysis of the insane, and in this condition of genuine insanity he does harm, he will not be considered responsible for his acts."[2]

743. It has been stated in the last article (§ 742) that insanity producing delusion leads to crime, in which the plea of insanity is sufficient. Such insanity may arise from drunkenness or any other cause. But a delusion arising from drunkenness short of insanity is never a defence to a crime in this country, though it appears to be otherwise in England.

744. For as Stephens, J., remarked: "Any disease, which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, may fairly be said to prevent a man from knowing that what he did was wrong."[3]

745. Drunkenness when a Defence.—But while voluntary drunkenness is, as such, never a defence, still when habitual drunkenness produces frenzy, that fact becomes material for the purpose of showing how it was produced, and when its existence is established, it will excuse a crime, even though it was caused by voluntary drunkenness.[4] Drunkenness is also relevant in considering intention. As Jervis, C. J. said: "If the prisoner was so drunk as not to know what she was about, how can you say that she *intended* to destroy herself."[5] So Coleridge, J., in one case told the jury that "drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."[6] So in the case of attempted murder, Paterson, J., told the jury that "although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.[7] So Baron Alderson said: "If a man chooses to get drunk, it is his own voluntary act: it is very different from a madness which is not caused by any act of the person. That voluntary species of madness, which it is in a party's power to abstain from, he must answer for. However with regard to intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would, if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness

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(1) 1 Hale P. C. 32.
(2) "Insanity," p. 465.
(3) *Davis*, 14 Cox. C.C. 564. *see* §§ 714-715.
(4) 1 Hale P. C. 32.
(5) *Moore*, 3 C. & K. 319; To the same effect, Stephen, J., in *Doherty*, 16 Cox. C. C. 306 (308), quoted in 1 Penal Law (4th Edn.) § 804, p. 557.
(6) *Monkhouse*, 4 Cox. C. C. 55.
(7) *Cruse*, 8 C. & P. 541.

can have no effect on the consideration of the malicious intention of the party."[1]

Excuses Intention but Not Knowledge.

746. Now as regards the section it will be noticed that while it recognizes the distinction between "intent" and "knowledge" which are the constituents of most offences under the Code, it lays down no more than that a voluntary drunkenness is no excuse for not possessing the *knowledge* of an act, but it says nothing of the *intention*. Consequently, where an offence requires that an act shall be done with a particular intention, voluntary drunkenness is an excuse, though it is no excuse where the degree of mentality necessary for the completion of an offence is limited by "knowledge" as distinguished from an "intention."[2] Moreover since voluntary drunkenness merely creates the presumption of knowledge, such knowledge would not lead to further presumption of intention, since where intention is presumed from knowledge, it is presumed from actual knowledge and not when knowledge is merely a legal fiction.[3]

747. The net result of drunkenness as affecting mental responsibility as regards crime may then be thus stated :—

(1) Drunkenness caused without one's knowledge or against one's will excuses the crime (s. 85).

(2) Voluntary drunkenness is an excuse only as regards "intention," so that it is a complete excuse in crimes requiring the presence of an "intention" to complete a crime.[4]

(3) But voluntary drunkenness is no excuse for a crime which requires the presence merely of "knowledge" as distinct from an "intention."

(4) In any case though a voluntary drunkenness is no excuse for knowledge it does not imply actual knowledge giving rise to the inference of presumed intention.

How Far Excuses Intention.

748. Now since an intention is always a material element in the composition of a crime, the effect of this view would seem to be that though voluntary drunkenness is not a self-sufficient defence, it is yet an element which the Court cannot ignore in judging of the culpability of an act. This was the view taken by Sir Henry James to whom the conflicting views of the Judges had been referred to for opinion. After expressing his inability to quote any general or definite rules on the subject of the extent to which drunkenness can excuse crime, or ought to increase or mitigate punishment, he summarises his own views to the effect that in determining the legal character of the offence committed, drunkenness may be taken into account—

(*i*) Where it has established a condition of positive and well-defined insanity.

(*ii*) If it produces a sudden outbreak of passion, occasioning the commission of crime under circumstances, which, in the case of a sober person, would reduce the offence of murder to manslaughter.

(*iii*) In the case of minor assaults and acts of violence it never can form any legal answer to the charges preferred, but it may either aggravate or mitigate the character of the act committed—probably aggravate it.

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(1) *Meakin*, 7 C. & P. 297, followed in *Waryam Singh*, 7 L. 141 (147) : *Patrick Carrol*, (1835) 7 C. & P. 145, but *contra* in *John Thomas*, 7 C. & P. 817; *Pearson*, 2 Lewin 144.

(2) *J. M.*, (1910) U. B. R. 17, 8 I. C. 469; *Nga Ba*, (1911) 1 U. B. R. 105 ; *Nga Tun Bau*, 5 Bur. L. T. 175, 17 I. C. 300, P. C.; *Tu*, 4 L. B. R. 306 ; *Nga Hla Agun*, 12 I. C. (Bur.) 85; *Rex* v. *Meade*, (1909) 1 K. B. 895 ; *Director* v. *Beard*, (1920) A. C. 479 (499) followed in *Jugadi Mallah*, 8 Pat. 911; *Mandaru Gadaba*, 38 M. 479 ; *Devasikamani*, (1928) M. 196, *Bishan Singh*, (1929) L. 637. This distinction in the language of the section appears to have been overlooked in *Waris Ali*, 7 N. L. R. 180, 13 I. C. 919 ; *Karim Khan*, (1909) P. W. R. 4, 1 I. C. 100.

(3) *Abdul Karim*, S. J. L. B. 650 ; *Nga Ba Gyan*, (1911) 1 U. B. R. 105 ; *Mandaru Gadaba*, 38 M. 479.

(4) *Director* v. *Beard*, (1920) A. C. 479 (499-502). followed in *Sheru* (1926) L. 232 ; *Muthu Goundan*. 1931 M. W. N. 113.

(*iv*) As to the effect that should be given to drunkenness when determining the amount of punishment to be inflicted, no general rule can be laid down. Its existence may be considered, and may tend either in the direction of increasing or diminishing the punishment.[1] That some such discriminating view should prevail in the enlightened criminal jurisprudence of all countries appears to be incontestable. Suppose, for instance, a man has in his pocket some base coins which he keeps for amusement. He gets drunk and instead of paying out in current coin he puts his hand in the wrong pocket and pays in a coin which is counterfeit. Can it be said that such a man stands on the same footing as another who passes a counterfeit coin knowingly and intentionally, and yet if the section be closely construed, that would appear to be the consequence.[2]

Involuntary Drunkenness.

749. So far then as regards voluntary drunkenness. Turning now to involuntary drunkenness, two questions arise : (*i*) when may drunkenness be said to be involuntary ? and (*ii*) what is its effect upon crime ? The first question seems simple, and has been disposed of by the section with the words "that the thing which intoxicated him was administered to him without his knowledge or against his will." This description would cover the case of a man made drunk through stratagem or the fraud of another, or through ignorance or coercion practised by his friend or foe, as if a person be drugged by his enemies or given to eat or drink such a thing as causes frenzy, or his unskilful physician give him to drink, in all of which cases the person intoxicated may be said not to have been a free agent, and, therefore, not responsible for the consequences of his act.[3] Whether drunkenness in a given case was voluntary or involuntary is a question of fact to be decided upon the proved facts of each case. In some cases drunkenness may have been partly voluntary and partly involuntary, as where a person once drunk is given more to drink when he has either lost the power of resistance or under circumstances which precludes his knowledge of it. What is his criminal responsibility in that case ? It is submitted that in so far as his helplessness was brought on by his involuntary act he could not be held responsible for his act.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

750. Analogous Law.—This section would at first blush, appear to have been enacted in antagonism to the prevailing doctrine of the English Law. But that does not appear to be really the case. It gives the drunken man the knowledge of the sober man when judging of his action but does not give him the same intention. Consequently, it does not render him liable to be dealt with as if he had the same intent. The omission to make any express provision in this section as to the intention of a drunken man is not accidental, but appears to have been dictated by the sense that it would have carried the legal fiction too far. Where, therefore, intention is a constituent of an offence, the question must be dealt with on the general principles of law, which are the same both here and in England. The drunkenness may be and should be taken into consideration on the question of intention[4] (§ 751).

751. Principle.—Voluntary drunkenness does not afford a defence that the knowledge required to complete an offence was wanting, though it may be used to show that any "intent" if required was absent. The section, it will be seen, draws a distinction between the presumption as to knowledge and presumption as

(1) "*Times*," 4th Jan. 1892.
(2) *See*, however, s. 86 and Comm.
(3) 1 Hale P. C. 32.
(4) *Director* v. *Beard*, (1920) A. C. 479 (501-502) ; *Nga Tun Bau*, 5 Bur. L. T. 175, 17 I. C. 800 ; *Tincouri*, 27 C. W. N. 290, (1923) C. 460 ; *Mandru*, 38 M. 479.

to intention, and though, ordinarily, intention is to be inferred from knowledge, still it is not to be inferred when the knowledge is merely a legal fiction.[1]

752. Meaning of Words.—"*With a particular knowledge or intent*": The two words "knowledge" and "intent" are not necessarily synonymous here. "*Shall be liable to be dealt with*," which probably means the same thing as "*shall be dealt with*." "*As if he had the same knowledge*," but not necessarily the same *intent*.[2] The last word has been advisedly omitted.

753. Presumption of Knowledge Not Resulted by Drunkenness.—A large number of offences in the Code expressly require that in order to complete a particular crime, an act should have been done with a particular "knowledge" or "intention." Thus, for instance, murder is defined to be only culpable homicide "if the act by which the death is caused is done with the intention of causing death."[3] Where, however, death is caused by an act with the knowledge of causing death it is usually only culpable homicide.[4] The words "knowledge" and "intention" do not, therefore, imply the presence of the same ingredient. According to the rule here enunciated, it is permissible to rebut a charge of murder by reference to drunkenness, but it would not be permissible to rebut a charge of culpable homicide on the same ground, for the section declares that in spite of drunkenness the same knowledge shall be presumed. But the rule has not been construed so strictly, for it has been held that though voluntary drunkenness cannot excuse the commission of an offence, yet when the question is whether the act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated could not be overlooked.[5] This is also the accepted view in England,[6] and it is commendable to reason. *A* went into *B's* house having a *dah* in one hand and called out to him to give him money, threatening to cut up *B* and his wife, He kicked at the doors and slashed them, but when the doors gave way he fell down. Meanwhile *B* and his wife had fled out of their house. *A* was charged with attempted robbery armed with a deadly weapon. It was found that *A* had been drinking toddy before the commission of the offence. It was held that his drunkenness did not prevent the accused from forming in his mind the dishonest intention necessary for extortion, though it was doubtful whether his ebriety would have enabled him to rob *B*.[7] In another case the accused who was a confirmed ganja smoker was convicted of the murder of a boy for which there was no motive. The accused did not plead insanity under s. 84 but nevertheless the Court held his case to fall under this section and exempted him from the extreme penalty of the law.[8]

Act not intended and not known to be likely to cause death or grievous hurt done by consent.

87. Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and *Z* agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if *A*, while playing fairly, hurts *Z*. *A* commits no offence.

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(1) *Director* v. *Beard*, (1920 A. C. 479 (500-502); *Abdul Karim*, (1892) S. J. L. B. 650; *Waryam Singh*, 7 L. 141.

(2) *Nga Sein Gale*, 12 R. 445.

(3) S. 302.

(4) S. 299.

(5) *Boodh Das*, (1866) P. R. 41; *Ram Sahoy Bhur*, (1864) W. R. 24; *Mandru* (*Re*), 38 M. L. J. 221, 479; *Nyo Hla Aung*, 4 Bur. 12 I. C. 85; *Sheru*, (1926) L. 232.

(6) *Doherty*, 16 Cox C. C. 306; *Cruse*, 8 C. & P. 541 (546); *Monkhouse*, 5 Cox. C C. 557; *Moore*, 3 C & K. 319; *Gambu*, 1 F. & F. 90; *Nga Tun Bau*, 5 Bur. L. T. 175, 17 I. C. 800.

(7) *Nga Tun Bau*, 5 Bur. L. T. 175 17 I. C. 800.

(8) *Tincourie*, (1923) C. 460; *Jaimal Singh*, (1933) L. 294.

754. Operation of Consent on Criminality.—Under the law of the Romans, who had borrowed their ethics from the Greeks, consent was a complete answer to any charge including even murder. This remained the law till the advent of Christianity which taught the sanctity of human life, the doctrine of which was echoed by the Prophet of Islam. Christianity in its turn, had borrowed the tradition from the Jews who regarded suicide as a crime and committed his body to an unhallowed grave. In England, the denial of the right of Christian burial to a suicide has been abrogated by Statute,[1] though such person is buried with an abbreviated service not touched by the Statute. This section adopts the view of the Law Commissioners who instanced the case of a surgeon who had to perform an operation involving the risk of life, but with an even chance of the patient's recovery, or of one who fired at a wild beast attacking a man whom he intended to save, though there was a danger of his killing him by the shot. There were also cases of sport, *e.g.*, boxing and duelling in which both parties consent to suffer harm; but since duelling involves the risk to life it is excepted, otherwise this section and the next two formulate a rule in accordance with the modern notion of life.

755. Apart from this and the two ensuing sections, several Acts, *e.g.*, the Factory Act and the Workmen's Compensation Act have further limited the operation of consent as an exoneration of the employer from his civil liability for compensating the workmen, even though they might have agreed to take the risk. Where such risk does not involve obvious peril to life or suffering of grievous hurt, it would be a good defence to the employer's criminal liability under the Code, though it would not exempt him from civil liability.

756. Principle.—As already stated (§ 754), the common and the canomical law both recognize consent as a good defence to the causing of injury. They both assume that everyone is the best Judge of his own interest, and therefore, it presumes that no one can consent to that which is hurtful to that interest. The doctrine so far is simple and perfectly intelligible, and it is, indeed, the outcome of that natural liberty to which every man is entitled, and the curtailment of which, to be justifiable, must proceed from manifest public policy or obvious necessity. The restrictions made in this and the following sections are dictated by these considerations for, beyond a certain stage, they regard presonal injuries from a different ethical standpoint, and it is, therefore, that, while on the one hand, law will not suffer a person to consent to their infliction, nor on the other hand, when inflicted, is the party aggrieved permitted to compound them with the felon.

757. Meaning of Words.—"*Not intended to cause death or known to be likely to cause death*": These words have been used to define murder[2] and culpable homicide,[3] hurt[4] and grievous hurt.[5] "*By reason of any harm which it may cause*": Such harm may result even in death, but it should not have been *intended* or known to be likely. Any hurt short of grievous hurt may have been intentionally caused. "*Above eighteen years of age*": That being the age of majority, is also necessarily fixed here as the age of consent fixed in this country.[6] "*Who has given consent*" "Consent" is nowhere defined in the Code, though it has been defined in the Indian Contract Act[7] as follows: "Two or more persons are said to consent when they agree upon the same thing in the same sense"; it is negatively described in s. 90. Consent is the manifestation of the will in concurrence of an act. It implies the use of judgments, free will and physical action. "*Express or implied*": Acquiescence is implied consent. It may be inferred from act, as well as conduct. If *A* challenges *B* to a boxing match, and *B* accepts the challenge, both *A* and *B* impliedly consent to the infliction and sufferance of mutual injuries though the infliction of such injuries may not have been made the subject of an express covenant. Such is the case contemplated in the illustration.

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(1) (1882) 45 & 46 Vict., c. 19, s. 2.
(2) S. 300.
(3) S. 299.
(4) S. 321.
(5) S. 322.
(6) S. 3, Indian Majority Act (Act IX of 1875).
(7) S. 13, Act IX of 1872.

758. Consent as a Defence to Criminality.—Consent, as already seen, has the effect of exonerating or extenuating a criminal act in the following cases :—

(*a*) Harm short of grievous hurt may be caused by consent in any case ;

(*b*) Even harm resulting in death may be caused, if it was not so intended, but was intended for his benefit ; and in such case, even consent (s. 92) is unnecessary where it is not possible.

759. But these sections evidently refer only to the operation of consent on personal injuries. They have no reference to offences relating to property, and sexual relations. But consent plays an equally important part in these cases, and the present discussion will not be complete without reference to them. It may then be generally stated that, in addition to the two cases above set out, there are other cases in which consent is either a material element in the composition of the crime, or where it has the effect of neutralizing it. Theft and rape may be given as examples of the former, and adultery of the latter. There are other offences, such as wrongful confinement, in which consent is an essential ingredient. Consent, moreover, plays a conspicuous part not only in determining the nature of the offence, but also in justification of an act otherwise criminal. It is a ground of mitigation even in the case of homicide. And as consent may be either express or implied, the subject assumes a degree of complexity into which it is useful to enquire.

Consent Defined.

760. In the first place, therefore, what is consent? It is undoubtedly the concurrence of wills. But besides concurrence of wills, its chief essential constituent is consciousness or knowledge of the act consented to. So on a charge of indecent assault on a boy of eight years, the Court told the jury that " knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to the act."[1] So where a person consented to the performance of a surgical operation upon himself with great reluctance, the only information communicated to him being that if he submitted to it, he would be cured, the Court held that a person could hardly be said to accept a risk of which he was not aware, and that therefore there was no case for exceptional treatment unless it were shown that the patient was aware of the risk and accepted it.[2] So in another case the fact that the force applied was a form of initiation of a voluntary society, which the party assaulted had agreed to join, was held to be no defence if he did not know beforehand that that was the part of the ceremony.[3] Knowledge of the act and its probable consequences is therefore the first requisite of consent.[4] And since there can be no knowledge without consciousness, it follows that consent without consciousness is impossible. So sexual intercourse with a female put under chloroform or rendered otherwise unconscious is rape, the question of consent being immaterial.[5] So where in such case the consent was obtained by fraud, misrepresentation or coercion, the result was held to be the same as if there never had been any consent.[6] The consent required is therefore free consent, or the free exercise of the will of a conscious agent.[7] Where therefore a child just above ten years of age yielded to her father, there was held to be no consent, for as Lush, J., told the jury : " Consent means consent of will, and if the child (just above ten years of age) submitted under the influence of terror, or because she felt herself in the power of the man, her father, there was no real consent."[8]

Consent in Criminal Law.

761. So Sir James Stephen defines consent in criminal law to mean "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.[9] And he goes on to add that "consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature."[10]

(1) *Lock*, 12 Cox. C. C. 244.
(2) *Sukaroo*, 14 C. 566.
(3) *Bell* v. *Hensley*, 3 Jones 131; *State* v. *Williams*, 75 M. C. 134.
(4) S. 90, *post* and Comm.
(5) *Camplin*, 1 Cox C. C. 229 ; *Ryan*, 2 Cox, C. C. 115 ; *Dee*, 15 Cox C. C. 579.
(6) *Case*, 4 Cox C. C. 220, *Flattery*, 13 Cox C. C. 388 ; *Dee*, 15 Cox C. C. 579.
(7) *Woodhurst*, 12 Cox C. C. 443 ; *Dee* 15 Cox C. C. 579.
(8) *Woodhurst*, 12 Cox C. C. 443.
(9) Dig. of Cr. L., Art. 224.
(10) *Ib*,.

This view has become established in America where Orton, J., enunciated the principle as follows: "When the mind is subjugated as well as the body, so that the power of volition and the mental capacity to either consent or dissent is gone, then the act may be said to be against the will"; and so also it may be said to be without consent. But when the mind is left free to exercise the will, and to consent or dissent, then by consent responsibility for the act is incurred; where there is no such mental capacity, the quality of the act is indifferent, there can be no consent or dissent, and consequently no responsibility. The physical power may be overcome and the utmost resistance be unavailing; yet the mind may remain free to approve or disapprove, consent or dissent."[1] Of course, consent may be free, but it may have been brought about by fraud, misrepresentation or coercion. A person may have consented to a game with a sword in ignorance of the fact that it was tipped with poison: the wife may consent to intercourse with her husband in ignorance of the fact that he was suffering from a foul disease,[2] in both of which cases the effect is the same as if there had never been any consent at all.[3]

762. Implied Consent.—But so long as there is consent, and the consent is free, it is not necessary that it should be express or articulate. For it may be *implied* or given by implication, or inferred by conduct. So there may be and are cases in which silence implies consent. A modest girl may even signify her consent to her lover's proposal by a "No" uttered so as to denote a modest but real "Yes": *Non quod dictum, sed quod factum in jure inspicitur.*[4] So where a customer enters a tradesman's shop and picks up goods exhibited for sale, there is implied consent (*a*) to enter, (*b*) to handle goods, and (*c*) to appropriate them at the stated or reasonable price. So again, where a person has been a welcome visitor in the past, he may well assume consent to his continued visits, unless he has had reason to believe otherwise. The term "implied consent" is then, so far as regards the criminal law, used to signify either (*a*) consent by acts and conduct, or (*b*) consent presumed though never given or in any way signified. The examples above given illustrate the first sense; illustration (*m*) appended to s. 378 of the Code may fitly illustrate the other sense. "*A*, being on friendly terms with *Z*, goes into *Z's* library in *Z's* absence, and takes away a book without *Z's* express consent, for the purpose merely of reading it, and with the intention of returning it. Here it is probable that *A* may have conceived that he had his implied consent to use *Z's* book. If this was *A's* impression, *A* has not committed theft." Why not? because *A* had *Z's* implied consent to enter his library, and lend himself any book he required therefrom. In this case "implied consent" was only a fiction. It was really no consent at all, but only the probability of obtaining one. In other words, in imputing consent to *Z* in the case supposed, law presumes consent because, having regard to human conduct and probabilities, it was highly probable, indeed, so probable that its existence may be assumed. It is, however, an assumption all the same, and as such, a fiction, and being a fiction, its scope must be narrowly watched. For while it is true that there are facts which have to be assumed in human conduct, it is also true that human conduct is not invariable, and does not present uniformity. It must, therefore, be clearly established, by evidence from which the Court may be entitled to say that either the consent was not given owing to accidental causes or that it was given by acts or conducts or the only way in which it could have been given.

763. The question whether there was such a consent in a given case is therefore a question of fact dependent upon the circumstances of each case. A large number of cases are to be found in the reports in which the only phase of the question illustrated is that which relates to consent to a sexual intercourse. In such a case express consent is seldom to be looked for, and the only consent possible is implied consent which may be inferred from non-resistance and previous intimacy. It is sometimes said that the resistance required to overcome the imputation of consent

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(1) *Whittaker* v. *State*, 50 Wis. 518.
(2) *Clarence*, 23 Q. B. D. 58.
(3) S. 90; *Jaladu*, 36 M. 453 (456, 457); *Soma*, (1916) P. R. 17 (Cr.).
(4) *Croft* v. *Lumley*, 6 H. L. C. 722.

must be to the utmost of her power,[1] but there is neither reason nor authority in support of this view. For a woman may find resistance unavailing and even more harmful, and she may therefore not resist more than is essential to express her entire disapproval. And, indeed, more may not always be possible,[2] for the woman may be paralyzed from fear and terrorized into submission, or she may have been overpowered by actual force, or by the number of accomplices, or from her own want of strength.

764. Of course, consent cannot be inferred from mere passivity without something more. For a person may be aware of a plot to commit a crime, and he may take no action to defeat it. He may be quiescent and passive, but is he held to have acquiesced in the nefarious act? It is said that the mere fact that facilities for the commission of an offence are afforded is no indication of consent.[3] But one fails to see why it is not. Of course, if the facilities were afforded to facilitate detection, there is an explanation which is inconsistent with the presumption of consent. But without anything to suggest a definite intention, the usual indicia will undoubtedly lead to the usual inference. Suppose, for instance, that expecting a burglary a person puts out the lights, the question whether the person was or was not privy to the burglary depends upon the intention with which the lights were extinguished. If the person blowing out the light was a maid servant, her conduct would, to say the least, be suspicious. If she had, moreover, left the entrance door unbolted, she could not but be justly suspected of complicity. But if suppose the person putting out the lights and leaving the entrance door unbolted were the owner, his conduct would be attributed to very different motives.[4] He may, for instance, be presumed to have laid a trap for the burglar; but that would be the natural, though not the only presumption, for if the furniture had been heavily insured against burglary, it may be that the owner was plotting to defraud the insurance company.

765. Another class of cases in which implied consent is inferred is that in which the risk of harm is obvious and visible. Such trades, for instance, as involve the handling of machinery or acids or explosives or the like, naturally offer risks which persons engaged therein are presumably aware of and which they have impliedly consented to.[5] Apart, from the special provisions of protective enactments, the presumption arising out of service taken is that the servant consents to the hazards involved in his service. And he cannot complain on the ground that the chances of his risks might have been minimized if his employer had taken greater precaution. "Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."[6]

Doctrine of Obvious Risks.

766. Trap to Detect Crime.—The laying of traps is a perfectly justifiable method of detecting crimes. One may have marked property in such a position that if stolen it may be indentified; another may offer illegal gratification in coins or notes marked for the same purpose; a third person may play an accomplice and assist in the commission of a crime, but the criminal cannot in any case contend that those facts in any way mitigated his crime.[7] So it was s aid in an American case that "the fact that *B* was willing to assist in and facilitate the detection and arrest of a criminal does not amount to a consent to the commission of the crime, nor will the mere fact that there was a detective with, (apparently assisting), the appellant in the commission of the crime constitute a defence.[8]

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(1) *People* v. *Morrison*, 1 Parker Cr. R. 625; *People* v. *Dohring*, 59 N. Y. 374.
(2) *Hallet*, 9 C. & P. 751.
(3) 1 Wharton's Cr. L., 164.
(4) *Egginton*, Leach C. C. 913; 1 Steph. Cr. L., p. 257.
(5) Employers' Liabilities Act, 1880; *Membery* v. *Great Western Ry. Co.*, 14 App. Cas. 168; *Yarmouth* v. *France*, 19 Q. B. D. 647; (661) *Thrussell* v. *Handyside*, 20 Q. B. D. 359.
(6) *Sullivan* v. *India Manufacturing Co.*, 113 Mass. 396.
(7) *Egginton*, Leach C. C. 913
(8) *State* v. *Stickney*, 53 Kan. 308.

767. The principle underlying this and similar cases has not been stated, but it is obvious. No person can justify an illegal act on the ground of consent. If it were otherwise, the assistance received from abettors and accomplices would be a material element in mitigating the crime. But it is not. So no consent can atone for a public wrong. There are, however, some offences in which consent operates as a condonation of the crime. Such an offence is adultery,[1] which, however, is not even a crime in England. Other offences affecting human life, limb or liberty, are also affected by the presence or absence of consent. In fact, such offences may be generally sub-divided into two clauses *viz* : (*a*) those in which non-consent is necessary to constitute the crime, and (*b*) those which are complete independently of non-consent, but of which consent is a sufficient justification. As instances of the former may be mentioned rape[2] and theft ;[3] as instances of the latter may be mentioned hurt caused during employment or in a game. In the former case the very criminality of the act depends upon proof of non-consent, which must then be established by the prosecution ; while, in the latter case, consent or its absence is not necessary for the constitution of the crime, though consent has the effect of negativing it. This and the other following cognate sections only deal with consent in its second operation, and it is to this aspect of the subject that the present discussion is primarily confined.

768. Operation of Consent on Crime.—Instances have been already given of offences in which consent has the effect of negativing criminality. It has been said that where the offences are of a public character, consent does not vary their nature or affect their penalty. Such are offences against the State[4] those relating to the Army, Navy and Air Force[5] or those affecting the public tranquillity[6] offences by or relating to public servants, which cannot be minimized by consent ; indeed, in cases of the receipt of illegal gratification, in which money is received by consent, the consent in no way affects the crime. Offences against public justice,[7] and those relating to stamps, coins,[8] weights and measures[9] are for the same reason independent of consent. On the other hand, consent may mitigate or even excuse some of the offences described in Chapter X.[10] Offences relating to religion are necessarily dependent upon consent, while those affecting the human body depend upon consent only in cases covered by this and the next two sections. It will thus be seen that the value of consent varies in the inverse ratio with the gravity of the crime. And in the case of public crimes it has no place at all. And even in other cases its operation is controlled by public policy.

769. So the question whether harm caused in a game is or is not justifiable does not depend merely upon consent, but upon the lawfulness of the game. If the game was unlawful, which means if it was one against public morality or public policy, then the hurt caused therein even by consent is punishable ; or, in other words, consent is no defence to an illegal act, when it is both illegal and injurious to the public. So where persons who engage in prize-fights which are illegal commit assault upon each other and are so punishable in spite of their consent.[11] But hurt legitimately caused in manly sports and pastimes entered into for health or recreation, as fencing, boxing, football, single sticks wrestling by consent, playing at cudgels, fencing, archery and the like is justifiable in accordance with the rule here enunciated. But the reason that hurt is justifiable even in these games is because the causing of hurt is inevitable but is not the primary object of the game. If, therefore, the game is made a pretex for causing hurt, it becomes the primary object, and it is not then justifiable, since it is necessary that even in a legitimate game proper caution and perfect fair play should guide both parties.

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(1) ; S. 497, *post* ; *Marris* v. *Marris*, 2 Sw. & Tr. 530 ; *Ellyatt* v. *Ellyatt*, 3 Sw. & Tr. 504 ; *Adams* v. *Adams*, 1 P. & D. 333.
(2) S. 375, *post*.
(3) S. 378, *post*.
(4) Ss. 121-130.
(5) Ss. 131-140.
(6) Ss. 141-160.
(7) Ss. 191-229.
(8) Ss. 230-263A.
(9) Ss. 264-294A.
(10) Ss. 172-190.
(11) *Murphy*, 6 C. & P. 103; *Boulter* v. *Clarke* 1 Buller's N. P. 16; *Mathew* v *Ollerton*, Comb. 218 ; *Perkins*, 4 C. & P. 537; *Lewis*, I C. & K. 419; *Coney*, 8 Q. B. D. 534 (549).

770. Unlawful Games.—As regards unlawful games, the question depends not so much on the antiquity or popularity of the games as upon their nature and the risk they involve to life and limb. The mere use of force does not render a game illegal unless the force employed involves danger to life and limb. A gladiatorial contest which made the Roman's holiday would undoubtedly be regarded as wholly illegal nowadays. The modern Spanish bull-fight, though a national institution in Spain, would be condemned as illegal in this country. A tilt or tournament was, once upon a time, the favourite pastime of Englishmen, but it was nevertheless held to be illegal even though it may have been commanded by the King, for even the King's commandment would not justify or excuse a person who killed another in a tournament, because the commandment itself was illegal.[1] So fencing with naked swords is illegal though playing with foils is legal so long as the buttons are at the end of the foils. Duels are, of course, illegal, and all taking part in them are equally guilty as aiders and abettors,[2] though it can no longer be maintained that mere presence constitutes the spectators as aiders and abettors.[3]

771. Manly sports and pastimes are encouraged because they afford healthy exercise and develop a martial spirit, and they are not illegal merely because they expose the participants to some risk of harm. But law can tolerate no contest in which the risk of harm is out of all proportion to the advantage derived from the game. And this is especially the case where persons employ deadly weapons or where the game is played in a manner involving the breach of peace. It is for this reason that prize-fights are condemned.[4] Indeed, it may be laid down as the one test of legality in such cases that, if bodily harm is not the motive on either side, the game is legal. But its legality will be seriously shaken if the weapons employed are deadly or dangerous, or the game is played from mercenary motives and draws a large crowd, or being in itself a perfectly fair game, persons engaged therein do not observe its rules, but whether through heat or anger inflict upon each other more injury than would be fair in a friendly contest.[5] So while there is nothing unlawful in sparring, it becomes illegal if the combatants fight on until they are so weak that a dangerous fall is the result.[6] So while wrestling is perfectly legal it would be an assault, if after a combatant cries truce or is vanquished, the other continues to pummel him and thereby causes injury.

772. Extent of Justifiable Harm.—Assuming then that there is consent and it was given for a lawful purpose, the amount of justifiable injury that may be inflicted must not exceed the limit prescribed by the section, the measure of which is not the actual harm but the harm intended or foreseen. In this connection two points call for notice. *First*, the legality of the extent of harm is judged not by the consent given, but by the intention and knowledge of the person causing it. If he intended or knew that death or grievous hurt would be the result of the harm, he is liable for whatever harm may have been caused independently of any consent of the other party. One person may request another to kill him, but he has no right to kill him by request. The question then, being dependent upon the intention or knowledge of the doer, is one the answer to which must necessarily depend upon the circumstances of each case. But the foregoing considerations are for this purpose material, as they illustrate the guiding principles to which the rule is subject. *Secondly*, if the harm was not initially intended or known to cause grievous hurt, then the fact that the harm actually caused was grievous or more is immaterial. The two points may be illustrated by reference to the harm caused in a duel and a wrestling match. If the former is fought with loaded pistols, parties intend death, and though the injury caused may be slight, the party causing it is liable irrespective of consent. On the other hand, in a wrestling match there is no intention to cause

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(1) *Per* Stephen, J., in *Coney*, 8 Q. B. D. 534 (549), citing *Lambard Eiren*, p. 129; 1 Hale P. C. 472; *Foster*, C. C. 259, 260; 1 East P. C. 270.

(2) *Young*, 8 C. & P. 644; *Murphy*, 6 C. & P. 103.

(3) *Parkins*, 4 C. & P. 537; *Hargave*, 5 C. & P. 170; *Murphy*, 6 C. & P. 103; *Bellingham*, 2 C. & P. 234; explained; *Per* Cave, J. in *Coney*, 8 Q. B. D. 534 (542).

(4) *Perkins*, 4 C. & P. 537.

(5) *Canniff*, (1840) 9 C. & P. 359; *Bradshaw*, (1878) 14 Cox C. C. 83.

(6) *Young*, 10 Cox. C. C. 37.

grievous hurt. It is a fair trial of strength, but if perchance an awkward throw breaks the bone of a wrestler, the other party is not liable, because the injury would be attributed to misadventure.

773. In one case the deceased, a middle-aged Burman, believed himself to have been rendered *dao*-proof by charms and asked the accused to try a *dao* on his right arm. The accused believed in the assurance of the deceased and inflicted a moderate blow with his *dao* as requested, with the result that his arteries were cut and the deceased bled to death. He was convicted under s. 304 but on appeal his conviction was set aside on the strength of this section and section 90, the Court holding that the accused neither intended to cause nor knew that he was likely to cause any hurt, much less the death, of the deceased.[1]

774. Who must Consent?—Lastly, the section enacts that, in order to be operative, consent must be given *by the person suffering the harm*, and he must be then above eighteen years of age. Of course, where harm is caused with the consent of other persons, the party inflicting it may still be protected under the provisions of section 89, if a proper case under that section is made out or, lastly, it may be a case falling under section 92, in which case, there need be no consent at all. Reserving these two latter cases for future consideration, the section requires that acts sought to be justified under it must be shown to have been consented to by the sufferer himself. If, therefore, a person is forced to play a perfectly legitimate game and suffers injury, it is not justifiable. The fact that in such a case the consent of some other person, whether parent or master, had been obtained is immaterial. And as the person consenting must be above eighteen years of age, what becomes of persons below that age of discretion? Their case is apparently not met by the subsequent sections, which refer to other contingencies. Such a person is then incapable of joining a lawful game under the conditions which prevail in the case of male combatants.

Act not intended to cause death done by consent in good faith for person's benefit.

88. Nothing, which is not intended to cause death, is an offence by reason of any harm, which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z's* death, and intending, in good faith, *Z's* benefit, performs that operation on *Z*, with *Z's* consent. *A* has committed no offence.

775. Analogous Law.—Under the last section the intentional causing of death or of grievous hurt cannot be justified by consent. Under this section unintentional causing of grievous hurt is justifiable, though not of death. The reason is that under the last section there was no question of benefit to the complainant, whereas in this the act is done in good faith and for the benefit of the injured. The illustration makes it clear that the section has a direct reference to an operation performed by a surgeon, though the section may have a wider application. This section enacts a rule in harmony with English Law which was proposed to be thus stated in the English Criminal Code Bill of 1879: "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case."

776. The fact that a person performs an act in good faith and for the benefit of another does not entitle him to perform that act forcibly upon him, even though the person upon whom the benefit is sought to be conferred be foolish in

(1) *Nga Shwe Kin*, 8 L. B. R. 166; 30 I. C. 133.

denying to himself the benefit which the other intends to confer on him. Consent is, therefore, necessary, though it need not be express, which may even be implied. The resultant harm may be great, causing even death, but it must not be so intended. It will, thus, be seen that a person working for the benefit of another is given a greater latitude than one who inflicts harm in sport or play.

777. Principle.—A person working for the benefit of another is given a greater latitude than is allowed to one acting merely with consent. The only thing postulated in his case is that he should not intend to cause death, though he may know that death will be caused. Here, since death of a person was probably certain without the benevolent interference of the other party, law permits him to barter one chance for another. The illustration appended furnishes an apt example. *Z* is there suffering from a painful malady. If it were curable without an operation there would be no necessity for *A's* assistance. It may not immediately cause death, but it will probably do so, and in the meantime cause the sufferer pain. The sufferer is then permitted to choose between the chance of a cure and death, and he is so permitted, because, without taking that risk, no surgeon will operate on him, and without operation he cannot hope for a cure. Take another example: A person in the grip of a wild beast orders his companion to fire, and the shot misses its aim and kills him. Here he had bartered one chance for another and the fact that it killed him would not affect the question.

778. Meaning of Words.—"*Which is not intended to cause death*": In the illustrations given under the last paragraph (§ 777), if the surgeon pretending to cure intentionally stab the patient, or the sportsman deliberately aim at the other, in both the cases they will be responsible for their acts. The clause means that the doer must intend not only not to cause death, but his act must be done in good faith and for his benefit, which means that the intention must be to confer benefit and not cause death. "*Or intended by the doer to cause,*" that is, if the doer intends to cause any harm short of death, it is no offence if (*i*) he did not intend to cause his death, (*ii*) if the act done was for his benefit, (*iii*) it was done in good faith, and (*iv*) the sufferer was apprised of the coming harm to which (*v*) he had expressly or impliedly consented. "*For whose benefit it is done*": The explanation added to section 29 says mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

779. Harm Intended to Benefit.—The scope of the rule here enunciated has been already discussed elsewhere (§ 753). The section enacts that consent justifies any harm short of intended death even though the harm may result in death, if only it was caused for his benefit and in good faith. These words then control the whole section, as do the commencing words: "Nothing which is not intended to cause death." These three restrictions form the exceptions to the rule, for they lay down that (*i*) no one shall under any circumstances be excused for causing another's death if he so intended it, or (*ii*) if it was not caused while doing an act for his benefit, and (*iii*) which was not done in good faith. If so far the act of the accused is not blameworthy, then he is not guilty of any harm including death, even though he may have known that death was likely, and even though he may have *intentionally* caused any harm from which he may have *known* that death would be caused. In the choice of evils a person may well be left to be his own judge.

780. The first condition postulated is that the act done must be beneficial, and as has been explained elsewhere,[1] the "benefit" here contemplated is not a "mere pecuniary benefit," which implies that it *may be* a pecuniary benefit if it is also a benefit of some other kind, as, for instance, it may be for the benefit of his life, health or body. He may expect a legacy if he lives up to a certain age. It may then be also for his pecuniary benefit. But if the harm cause only a pecuniary benefit, it is not a benefit within the comprehension of the rule. For instance, a person may desire, as did the beggar mentioned by Lord Coke, to amputate his arm so as to be able to beg successfully. The harm contemplated would have conferred a mere pecuniary benefit on the sufferer,

Act must be Beneficial.

(1) S. 92, Expl.

but that benefit would be the result of imposture. So there is a class of persons in this country who get themselves emasculated with a view to obtaining service in a harem or to follow the occupation of "nautch girls." If, therefore, a person engages another to emasculate him, the question may be whether the performance of such operation would be legal. It was so held in a case[1] in which a man over 18 years of age engaged a party of eunuchs to emasculate him, whereupon they, being persons unskilled and unqualified to perform the operation, simply cut off his private parts without proper ligatures, in consequence of which the man died. It was held that the accused could not claim exemption under this section.[2] The same view was taken in another case in which the prisoner a *kabiraj*, performed an admittedly dangerous operation of cutting out the internal piles by an ordinary knife, in consequence of which the patient died the next day.[3] Mutilation or disfigurement of one's body is then not a "benefit" within the meaning of this section though it may be justifiable on the ground that it was suffered to avert a greater evil. In the case last cited the Court placed some emphasis on the unskilful manner in which the operation was performed. But if the operation was itself illegal, no skill used in performing it would alter its nature or affect the punishment. But where the operation is itself legal, the exercise of care and attention is a necessary prerequisite for they are implied in the doing of an act in good faith[4] which the rule enjoins.

Act must be Done in Good Faith.

781. Now as the exercise of care and attention does not postulate any technical skill but only such skill as a man of ordinary prudence and intelligence may command, it follows that it is by no means a necessary ingredient of the section that the assistance rendered should be one especially qualified to render it. So it has been held in England that a physician or surgeon need not be a regular or licensed one to be entitled to exemption.[5] So Blackstone says that "if a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for negligence or ignorance; but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir Mathew Hale very justly questions the law of this determination; since physic and salves were in use before licensed physicians and surgeons, wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic, though it may be of use to make people cautious and wary, how they meddle too much in so dangerous an employment.[6]

Only Care and Attention Required.

782. It has thus been long since settled that what is required is care and attention, not necessarily special skill and knowledge. This was clearly laid down by Hullock, B., in a case in which the prisoner had been arraigned before him for compassing the death of a person by thrusting a round piece of ivory against his rectum. "It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country, many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons, might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred..... In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner and yet might have failed. ..... But it would be most dangerous for it to get abroad, that if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would

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(1) *Babulan Hijrah*, 5 W. R. 7.
(2) *Ib.*
(3) *Sukaroo Kabiraj*, 14 C. 566.
(4) S. 52, *ante*.
(5) 1 Hale P. C. 429.
(6) 4 Black. 197. It may be added that this view has since been unanimou sly adopted by the Courts; *Crick*, 1 F. & F. 519; *Webb*, 1 M. & Rob. 405; *Crook*, 1 F & F., 521; and cases cited *post*.

be prosecuted for manslaughter."[1] So in another case, the prisoner had been known to act as an accoucheur among the lower classes of people, and as such safely confined the deceased, but two days later the deceased suffered from a *prolapsus uteri* which the prisoner, mistaking to be a part of the placenta, attempted to pull out, and in so doing he lacerated the uterus and severed the mesentric artery causing the death of the patient. The prisoner was thereupon indicted for murder but Lord Ellenborough, C. J., charging the jury said, that, " though the accused was not a qualified accoucheur the fact that he had confined many women at different times showed that he had some degree of skill and the only question that remained was whether there was any want of attention on his part amounting to crimina' negligence.[2]

True Test of Proper Care.

783. But want of care must depend upon the circumstances of each case Where, for instance, a quack induced a person, two of whose relations had died of consumption, to place herself under his treatment stating that she should die unless she became his patient, and thereupon he applied a noxious liniment which produced a wound which the prisoner went on describing as an improvement, and which he did nothing to stop and to which she eventually succumbed in a fortnight, it was held that the prisoner had been guilty of gross imposture and that he could not be acquitted.[3] In this case the prisoner was able to produce 29 witnesses who had been patients of the prisoner, and were satisfied with his skill and diligence ; but nevertheless the jury found him guilty, because he had applied a dangerous ointment in a reckless manner and had moreover, hoaxed the deceased with false assurances of her improvement, in spite of her ulcer which was mortifying and suppurating and growing worse from day to day.

784. Whether the care and attention employed in a case has been adequate and proper may be judged by the effect produced.[4] And so Bolland, B., observed in the same case : " To my mind it matters not whether a man has received a medical education or not ; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter."[5] The two cases instituted against one St. John Long aptly illustrate the operation of this rule. In the one case the prisoner had been visited by his patient, of whose condition he was made aware from day to day, in spite of which he went on asserting that the symptoms seen were just the symptoms to be expected in a case of cure, whereas in the second case the prisoner had applied probably the same liniment, but after the application he did not know the whereabouts of his patient, and when he did, she was already under the treatment of another person. Consequently the jury convicted him in the first case and acquitted him in the other.

What Circumstances are Material.

785. The amount of care and attention required in a given case depends no less upon the nature of the disorder, the character of the medicine used, than upon the education and experience of the prisoner. The same latitude cannot be allowed to a person working from mercenary motives, as to one whose act was inspired by charity and benevolence. A person who handles a dangerous poison, such as morphia, cannot be excused on the ground of mistake if he had administered it without weighing it.[6] So where a person, not a regular practitioner, administered lobelia, a dangerous medicine, it will be for the jury to say whether he had not acted so rashly and carelessly as to cause death.[7] So where the disease from which

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(1) *Van Butchell*, 3 C. & P. 629.
(2) *Williamson*, 3 C. & P. 635.
(3) *St. John Long*. 4 C. & P. 398.
(4) *Per* Bayley, B., in *St. John Long*. (2nd case), 4 C. & P. 423.
(5) *St. John Long*, 4 C. & P. 423.
(6) *McLeod*, 12 Cox C. C. 534.
(7) *Crick*, 1 F. & F. 519.

a person is suffering is such as require skilled medical aid, it would be a sheer recklessness on the part of a quack to perform the operation whatever may have been the wish of the patient ; for the question here is not one of consent, but the exercise of good faith, which demands care and attention independently of consent.[1] An unskilled practitioner should be as cautious in not performing difficult operations as in prescribing dangerous drugs, of the use of which he is ignorant.[2] So Cockburn, C.J., in one case observed : " If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of man-slaughter."[3] St. John Long was convicted because he had applied a dangerous ointment in a reckless manner. (§ 783). So where a blacksmith applied mercury to a tumour due to cancer, in consequence of which the patient died of poisoning and the medical evidence showed that, though the deceased would have died of cancer, still his death was accelerated by the medicine, it was held that having regard to the prisoner's education and employment, it was almost want of skill in the prisoner to use the dangerous substance in the manner it had been, but the question was left to the jury who found the prisoner guilty.[4]

Evidence of Qualified Medical Men.

786. In such cases where want of care and caution in the prisoner is alleged, the evidence of qualified medical men is admissible for the purpose of showing that the disease sought to be cured was serious, or that the medicine employed was unsuitable and dangerous. But the prisoner cannot call evidence to shew that he had successfully treated others for similar complaints, for the question to be inquired into is not the general competency of the prisoner but his competency in the particular case.[5]

787. Lastly, the greater the education of the prisoner, the greater will be the amount of care and attention required. As Tindal, C.J., said : " Every person who enters into a legal profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause ; nor does a surgeon undertake that he will perform a cure nor does he undertake to use the highest possible degree of skill ; there may be persons who have higher education and greater advantages than he has, but he undertakes a fair, reasonable, and competent degree of skill."[6]

788. These principles equally apply to other persons requisitioned for assistance. A fellow-sportsman cannot refrain from firing to rescue his comrade from the grip of certain death, merely because his shot might miscarry and kill every person he intended to save. The test in both cases is the same. Did he act for the benefit of the other, and had he used proper care and attention ?

Act done in good faith for benefit of child or insane person, by or by consent of guardian.

89. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person, having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person :

Provisos.

Provided—

First.—**That this exception shall not extend to the intentional causing of death, or to the attempting to cause death ;**

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(1) *Spiller*, 5 C. & P. 333, *Lamphier* v. *Phipson*, 8 C. & P. 475 ; *Spilling*, 2 M. & Rob. 107 ; *Moakes*, 4 F. & F. 920.

(2) *Markuss*, 4 F. & F. 356 *Chamberlain*, 10 Cox C. C. 486 ; *Bull*, 2 F. & F. 201 ; *Ruddock* v. *Lowe*, (1865) 4 F. & F. 519.

(3) *Bull*, 2 F. & F. 201 ; *Nanny Simpson's Case*, (1829) 1 Lewin 172 ; *Joseph Webb*, (1834) 2 Lewin 191 ; *Jones* v. *Fay*, (1865) 4 F. & F. 525.

(4) *Crook*, 1 F. & F. 521.

(5) *Per* Maule, J., in *Whitehead*, 3 C. & K 202 ; explaining *Williamson*, 3 C. & P. 635 as follows : "In *Williamson* the witnesses were asked generally *causa scientiae*. Neither on the one hand nor on the other can other cases be gone into. The attention of the jury must be confined to the present case."

(6) *Lamphier* v. *Phipos*, 8 C. & P. 475.

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity ;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity ;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death but not intending to cause the child's death. *A* is within the exception inasmuch as his object was the cure of the child.

[*Good faith*—s. 52.]

789. Analogous Law.—This section was clause 71 which the authors justified on the ground that, as the harm here inflicted was on a lunatic or on a child under 12 years of age, something more than mere good faith and benefit was necessary. This is provided in the four provisos. The authors had appended six illustrations to their note of which only illustration (*d*) was enacted while the other five were omitted. These related to the parent chastising his child or confining it for its benefit or to prevent it from falling into the hands of kidnappers ; but if he emasculated his child or abetted a rape upon his daughter, though for pecuniary benefit, his consent would not exempt him. These illustrations are covered by the provisos.[1]

790. Principle.—This section empowers the guardian or other person similarly situated to inflict harm either himself, or consent to its infliction by another, but it requires that the infliction of harm shall, as in other cases, be (*i*) "done in good faith," (*ii*) "for the benefit of the person,"and further that though done in good faith and for the benefit of the person, it is not an act which is immoral or illegal. (§ 789)

791. Meaning of Words.—"*Nothing.....done in good faith for the benefit of a person*" : "Good faith" has been defined in s. 52, and its sense generally set out under s. 87. "Benefit" here does not mean a mere pecuniary benefit ; *see* illustration (*e*) of the original draft Code.[2] "*Of unsound mind*," for the meaning of which *see* under s.84. The term is, however, used here in the wider sense as denoting a person who has lost control of either his cognition, emotion or will. "*Guardian or other person having lawful charge*" : The word "lawful" does not qualify the word "guardian" but "other person" having charge of that person. A guardian *de jure* or *de facto* may validly consent only if the consent required is of "other person," he must be one in lawful charge of the person. The section is really intended to exclude an officious intermeddler in no way interested in his welfare.

792. Consent by Guardian.—This section extends the exception to harm caused either by the guardian himself or by another with his consent. It recognizes the power of parental discipline over children below 12 years of age, for it permits a guardian to chastise his ward for his benefit. The schoolmaster or other persons in *loco parentis* would be excepted for the same reason. The limit within which a person in authority may legitimately chastise another has been already discussed. All such cases are as much excepted under this section, as on the ground of general policy (§ 789). The question if and how far the husband is protected by the rule here enacted is perhaps not difficult to answer, as the section does not save any class of persons below 12 years of age. It may then be predicated as regards the husband's right of correction that he, being the guardian of his minor wife, is not precluded from administering correction.

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(1) Note p, Reprint p. 109.

(2) *See* 1 Penal Law (4th Ed.) § 851.

793. A person of unsound mind is for all purposes in the same predicament as a child under twelve years of age. The section does not speak of his lucid intervals, but it is probable that a person, though of unsound mind, would be allowed to judge for himself in his lucid intervals. But it would be no illegality if the guardian even then exercised the same power as at any other time, for the section confers upon him a power which is in no way limited or qualified by the fits of the maniac.

794. The power conferred by this section must be exercised for the benefit of the person and in good faith. The " benefit " here spoken of is the personal temporal benefit, not being merely a pecuniary benefit. A person may firmly believe that it would be to the benefit of his child, if it were sacrificed to his deity. He is not, therefore, justified in offering him as a sacrifice. Some persons have a belief, that it is an act of piety to offer their virgin daughters to the deity. The section will not justify their action, whatever may have been their motive. Indeed, the section does not except cases on the ground of so-called spiritual benefit. If it were so, it would not be difficult to justify the most atrocious crime on that ground. Moreover, it will place the life and liberty of infants too much in the hands of their guardians.

795. The Age of Consent.—Unlike the last section this section does not prescribe the age of consent, and it may be a question whether the section applies to all persons irrespective of age. But since the next section refers to the consent of the guardian in the case of a person under twelve years of age, and s. 90 enacts that unless the contrary appears from the context, a consent is not such a consent as is intended by this section, if it is given by a person who is under twelve years of age, it follows that this section permits a minor above that age to consent to an act done under this section. But the validity of consent on the ground of non-age or other incompetency is thrown into the back-ground by the provisions of s. 92 which provides for such cases. Of course, one person seeing another in distress will not wait for the pharisaical formality of a formal consent, which will in most cases be presumed from acceptance of service or the exigency of the case.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception ; or

Consent known to be given under fear or misconception.

if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent ; or

Consent of insane person.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent of child.

796. Analogous Law.—This section does not define consent, but mereet provides that wherever the term consent is used in the Code it must be deliberaly and free.[1]

797. In order then that there should be such a consent, the mind must have materials to work upon. In the first place it must have knowledge or consciousness of the act consented to.[2] A person consenting under a " misconception of fact " cannot be said to consent within the meaning of the section. Such misconception may arise from fraud or a misrepresentation of fact.[3] Suppose, for instance, that a person is told by a medical man that a certain drug, if taken internally, would cure him of his ailment. He believes him and consents to take the drug, which was poison, and dies. Here his consent cannot be availed of, because it was given

(1) Consent under Misconception.

(1) Story's Eq. Juris. § 222.
(2) *Lock*, 12 Cox 244 ; *Ngwa* v. *Shwe Kin*, 8 L. B. R. 166, 30 I. C. 133.
(3) *Jatadu*, 38 M. 453 (456, 457) ; *Soma*, (1916) P. R. (Cr.) 17 ; *Mg. Ba Chit*, 7 R. 821 (836, 837).

under a misconception of facts. So where the accused who professed to be snake-charmers, persuaded the deceased to allow them to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm. Here there was consent, but it was given under a misconception of facts, that is, in the belief that the accused had power by charms to cure snake-bites, and the accused knew that the consent was given under such misconception. It was, therefore, not such a consent as is here understood.[1] So there have been several cases in which women consented to acts on the assurance of their medical men that they were a part of the treatment, and, as such, necessary for the cure, in all of which cases consent could not be used to exculpate the criminal.[2] In such a case it may be said in the words of Wilde, C. J., that "she consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will."[3]

798. Where a person consents to a thing on the assumption of facts which in fact did not exist, the result is the same as if on the true facts there never had been any consent. Field, J., in one case said: "The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances, I think, that her consent to the intercourse in fact was given upon the implied condition that, to the knowledge of the prisoner, the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, *i.e.*, a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which, in all probability, would communicate to her a foul disease, to which, the jury have found, that she would not have consented, had she known the state of his health. It seems to me, therefore, to follow that, the mere consent of the prisoner's wife to an act, innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and, moreover, that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease.....The result, therefore, at which I have arrived, is, that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse because although he knew, yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act."[4] "Where consent is obtained by duress, fraud, or misrepresentation, there is not even the freedom of will necessary for consent."[5]

799. Of course, it is not necessary that the misconception of facts should have been brought about by the accused. All that is necessary is that he must know or have reason to believe, that the consent was given under the misconception of facts. If, therefore, there be a misconception of facts unknown to the accused, the result so far as he is concerned is the same, as if there had been no misconception at all. The deceased believed that he had been made invulnerable by charms. He invited the accused to try his *cla* (a stick with a blade about a foot and a half long, on him, and he struck him with it with a moderate force with the result that the arteries were cut and the deceased bled to death. The accused, an ignorant youth of 19, had probably believed in the alleged immunity of the deceased. He was consequently acquitted, the Court holding him protected both by s. 87 and this section.[6]

(2) Consciousness.

800. Secondly, there can be no knowledge unless there is consciousness. Where, therefore, the prisoner made the prosecutrix quite drunk, and ravished her while in the state of insensibility, there could be no question of consent, for consent implies a conscious mind.[7] So

(1) *Poonai Fattemah*, 12 W. R. 7.
(2) *Flattery*, 2 Q. B. D. 410; *Young*, 14 Cox. C. C. 14.
(3) *Case*, I Dent. C. C. 580 (582); cited with approval, *per* Mellor, J., in *Flattery*, 2 Q. B. D. 410 (413).
(4) *Clarance*, 22 Q. B. D. 58.
(5) *Saunders*, 8 C. & P. 265.
(6) *Ngwa Shwe Kin*, 8 L. B. R. 166, 30 I. C. 133.
(7) *Camplin*, 1 Den. C. C. 89.

where the mind is blank owing to idiocy or imbecility, there can be no consent, and any consent given is immaterial.[1]

(3) Mere Submission is Not Consent.

801. Thirdly, there may be both consciousness and knowledge, and yet not that freedom of mind which is the very essence of consent. So in a case where a master had taken indecent liberties with a female scholar to which she did not resist, the Court told the jury that though there was submission, there was no consent, as the act was done against her will.[2] So in a similar case Coleridge, J., distinguished a mere submission from consent : " Every consent involves a submission ; but it by no means follows that mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting ; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law."[3] So the submission by a boy of eight years of age to an indecent assault was held not to amount to consent, as he was ignorant of the moral nature of the act done to him. In the cases above cited there was a fear, though not perhaps the fear of injury. But where that fear is presented the case is, of course, worse.

(4) Merely Taking the Risk.

802. It is sometimes said that persons who " take the risk" must be deemed to consent. Instances have been given before (§ 765) of cases in which the Courts have refused to infer consent from the mere desire to take a risk. A workman may find the machinery he is employed on dangerous. He apprises his employer of that fact and protests against his having to work on it. The employer neglects to repair it. The workman is unwilling to work, but he is afraid to strike, lest he should be dismissed. He takes the risk but does not consent to it. The question, however, becomes more complicated. When the question of taking the risk is presented with reference to that expression as used in Exception 5 to s. 300, which says : " Culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death, or takes the risk of death with his own consent." In this connection it was said in a case : " A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life ; and, as he voluntarily puts himself in that position, he must be taken to incur the risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riots, or assemblies who agree to fight together, and of whom some on each side, are, to the knowledge of all the members, armed with deadly weapons."[4]

803. The question of consent is said to play a part where an armed body of men encounter another body similarly armed, resulting in a free fight between them,[5] in which case it cannot be said that one party had consented to fight the other. The intention, indeed, was not to fight at all, but to overawe the other party to submission by the show of force. In such a case, the question of consent does not arise, though, if death is caused, it may be a question what offence the combatants had committed. The subject will be found discussed under s. 299.[6]

804. Unintelligent Consent.—The second paragraph deals with the semblance of consent which is, however, not the real consent as understood in law. If a person consents to an act, " the nature and consequence " of which he does not understand, his consent is inoperative and ineffectual. The meaning of the phrase

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(1) *Fletcher*, 28 L. J. M. C. 85 ; *Charles Fletcher*, L. R. 1 C. C. R. 39 ; *Barret*, L. R 2 C. C. R. 83.

(2) *Nichols*, Russ. & Ry. 130.

(3) *Day*, 9 C. & P. 722 ; *Lock*, L. R. 2 C. C. R. 10

(4) *Kukier Mather*, (unrep.) cited in *Shamshere Khan*, 6 C. 154.

(5) *Shamshere Khan*, 6 C. 154.

(6) *Rahimuddin*, 5 C. 31 ; *Naamuddiny* 18 C. 484, F. B.

" nature and consequence " of an act has been before explained (s. 83). It is used here in the same sense.

805. Evidence of Consent.—The question whether there was consent in a given transaction is necessarily one of fact depending upon the facts of each case. As consent justifies an act otherwise criminal, it has to be pleaded and proved by the defence. But the evidence required and given will vary in each case. Where the consent pleaded is express, it must be so established. But the accused is not bound by any technical rules of pleading, and if he establishes consent of any kind, it would be sufficient. The quantum of evidence required in a criminal case is not greater than or different to that required in a civil suit.[1] As consent is a mental act it is idle to speak of " physical consent "—a phrase sometimes used to denote physical expression of consent, for " there can be no such thing as material consent and in the case of a rational being, it must be mental consent or nothing."[2] The Code speaks of consent as express or implied, or as consent simply, in which case too the term would appear to have been used to mean consent, whether express or implied. The evidence of implied consent may consist of acts, circumstances and conduct from which the Court may infer at least a state of mind not opposed to the act. In some cases implied consent may be merely a fiction, that is to say, it may be based upon a mere presumption, unconnected with the actual state of one's mind (§ 765).

806. Consent of a child.—This section prescribes an age limit for consent in that it enacts that a child under twelve years of age is incapable of giving consent " unless the contrary appears from the context," *i.e.*, unless any provisions of the Code mentioning consent permit of a different interpretation.[3]

91. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Exclusion of acts which are offences independently of harm caused.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence " by reason of such harm," and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

[***Benefit***—*See* Explanation. ***Good faith***—s. 52. ***Consent***—s. 90. ***Hurt***—s. 319. ***Grievous hurt***—s. 320.]

807. Analogous Law.—This section is intended to explain the exceptions in which the operation of consent in condonation of crime is defined. It lays down that the condonation will not extend beyond the harm caused and the offence that the causing of that harm may constitute. The section is a recognition of the two great sub-divisions of crime, public offences and private offences. (*vide* § 768). Such are the offences against the State or its various departments or its currency or revenue offences, intended to produce public commotion or disturbance, acts intended to interfere with public convenience or to corrupt public morals which are all punishable regardless of the consent of any person who may have been incidentally affected by them. So the consent of an individual to obscene publications, indecent exhibitions and public nuisances has no effect on the criminal responsibility of the persons guilty of them. So again, in cases of affrays and riots consent of the individuals harmed thereby is no answer to the crime which affects the society generally. Duels and prize-fights afford other instances of offences in which the measure of criminality is not the harm consented to or caused to an individual.

808. The case of the offence of miscarriage given in the illustration furnishes another, though not a very apt, example of the operation of the rule. With regard to this offence, there are two theories. It is, on the one hand, contended that the offence partakes of its public character on account of the injury caused to the child,

(1) *Anunto Ruruagat*, 6 W. R. 57 (58).
(2) *Dee*, 15 Cox C. C. 594.
(3) *Khalil-ur-Rahman*, 11 R. 213 (222, 223) F. B.

and as affecting society, by preventing the increase of its population. It is on the other hand, said that the injury both to society and the child is too remote, to be penal, but the unsoundness of this view is apparent, since an operation which is both dangerous to the life of the mother as well as deterrent to the progress of population cannot be regarded but as unlawful, regardless of the consent of the mother.

809. The same policy underlies the classification of offences made in the Code of Criminal Procedure between "non-compoundable" and "compoundable" offences, the former being offences in which the consent of the individual directly affected is insufficient to exculpate the offender, the latter being those in which the party wronged is permitted to exonerate the wrong-doer.

810. The illustration quotes the expression "by reason of such harm," used in sections 87, 88 and 89, in a way which would seem to suggest that the section is naturally implied in those sections, which it is not. If it were, the illustration would have been sufficient without the section.

Act done in good faith for benefit of a person without consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit :

Provisos.

Provided—

First.—**That this exception shall not extend to the intentional causing of death, or the attempting to cause death ;**

Secondly.—**That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death, or grievous hurt or the curing of any grievous disease or infirmity ;**

Thirdly.—**That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt ;**

Fourthly.—**That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.**

Illustrations.

(*a*) *Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death, but in good faith, for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

(*b*) *Z* is carried off by a tiger. *A* fires at the tiger knowing it to be likely that the shot may kill *Z*, but not intending to kill *Z*, and in good faith intending *Z*'s benefit. *A*'s ball gives *Z* a mortal wound. *A* has committed no offence.

(*c*) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

(*d*) *A* is in a house which is on fire, with *Z*, a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, *A* has committed no offence.

Explanation.—**Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.**

811. Analogous Law.—In its natural sequence this section should have found a place next after section 89. It deals with cases of emergency and not covered by that section. It was thus justified by the Draft Committee : "There yet remains a kindred class of cases which are by no means of a rare occurrence. For example a person falls down in an apoplectic fit. Bleeding alone can save him and he is

unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught by a blanket below but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished. In these examples there is what may be called a temporary guardianship, justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by clause 72 (now 92), a protection very similar to that which we have given to the acts of regular guardians."[1]

812. Four illustrations are appended to the section, to which the following may also be added :—

(*a*) *A* is rendered insensible by an accident which makes it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is no an offence.

(*b*) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(*c*) *B* is drowning and insensible. *A*, in order to save his life, pulls him out of the water with a hook which injures him. This is no offence.[2]

813. Principle.—This section enacts a rule which carries its own defence. The four exceptions added were added because it was considered inexpedient to give unlimited power to officious interference with one's self, however benevolent. They demand that the interference shall be to save life, not to imperil it, and no one has a right to interfere with another unless he is reasonably certain of doing more good than harm.

814 Meaning of Words.—"*By reason of any harm*" : This phrase has been used in sections 87, 88 and 89, and in the illustration to section 91. It refers to cases in which the mere causing of harm alone constitutes an offence. "*For whose benefit*" : As the explanation adds, this does not mean a mere pecuniary benefit. It does not also mean a spiritual benefit. "*If the circumstances are such.*" These circumstances may have affected his mind or power of speech or thought. A man gagged and wrongfully confined may be in such a predicament. "*It is possible to obtain consent in time,*" of which the person aiding will be the sole judge.

815. Beneficial Act Without Consent.—This section deals with those cases in which the exigency of the case requires prompt assistance, in which the formality of consent might delay the benefit till it is too late. The acts authorized without consent are therefore only such acts as from their urgency call for immediate relief, in which no one will think of pausing for consent before rendering assistance. Indeed, in such cases the dictates of humanity prescribe a rule far higher than the one recognised by the criminal law. For who will think of asking consent to justify an interference in a quarrel between two persons, and would it be wrongful confinement if the timely interference of a stranger prevents the combatants from coming to blows? These are trivial cases which may be excused under section 95, but nevertheless they illustrate the first principle in the law of consent which underlies civil as well as criminal law. For, civil law as much welcomes the presence of a stranger[3] as the section under discussion. In both the cardinal rule to be observed is that (*i*) his interference was necessary ; (*ii*) that it was beneficial ; and (*iii*) that

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(1) Note B, Reprint, p. 109.
(2) Stephen's Cr. Law, Art. 226.
(3) *Eg.*, s. 69, Indian Contract Act (Act IX of 1872) ; s. 95, Transfer of Property Act (Act IV of 1882).

it was made when consent was unavailable. The four exceptions appended to the section are self-explanatory. The first exception requires that under no circumstance shall a person *intentionally* cause the death of another or attempt to cause it. The exception is self-evident, but by no means supererogatory. A person may find himself surrounded by robbers who make a criminal assault on his daughter, whereupon he decides to kill her to save her from the disgrace. So a person may offer his child in sacrifice, believing that it will be to its spiritual benefit. So, again, while a person may not *intend* another's death, he may risk his life without calculating its cost. This is safeguarded by the second exception. The third exception enunciates the salutary rule that the hurt caused shall in no case exceed the hurt to be averted, which is another way of saying that the interference shall not cause more harm than good. The last exception is directed against assistance rendered for an unlawful purpose. The case of a number of eunuchs having caused the death of a person in trying to emasculate him may be cited by way of an illustration. In that case the deceased desired to emasculate himself and for that purpose employed an old eunuch who, however, performed the operation by cutting off his private parts without ligatures with the result that the patient died from bleeding. It was held that the accused were all guilty.[1] (§ 780)

Communication made in good faith.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

[***Person***—s. 11. ***Good faith***—s. 52. ***Harm***—§ 874.]

816. Analogous Law.—A communication made in good faith may amount to defamation,[2] or it may perhaps amount to hurt,[3] or more. The section sets at rest any doubt that may exist on the subject by protecting all communications made in good faith.

817. Principle.—Two things are essential to protect a person under this section : *First*, the communication must be made in good faith, and *secondly*, it must be made for the benefit of that person. It is not clear how the illustration given answers this second requirement. A doctor may be under the painful necessity of giving his patient a timely warning of his approaching dissolution, to enable him to settle up his worldly affairs, to arrange for his succession, and in such a case speaking broadly it will be " for the benefit of that person," though the resultant shock may kill him. But without any such paramount necessity a communication which merely hastens his patient's death without doing his estate any good could scarcely be regarded as entitled to any exceptional privilege.

818. The word "benefit" has been here used undoubtedly in its large sense as including both personal or pecuniary benefit where death is inevitable ; it will be to the patients pecuniary benefit that he should be warned of it betimes, so that he may have time to settle up disputes which may avert the ruin of his fortune. Such a communication may even be for the personal benefit of the patient if it induces him to submit to a treatment of the last resort.

Act to which a person is compelled by threats.

94. Except murder, and offences against the State punishable, with death, nothing is an offence which is done by a person who is compelled to do it by threats which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence : Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

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(1) *Baboolun Hijrah*, 5 W. R. 7.
(2) S. 499, *post*.
(3) S. 319, *post*.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law, for example a smith compelled to take his tools and to force the door of a house for th dacoits to enter and plunder it, is entitled to the benefit of this exception.

[***Offences against the State***—Ch. VI, ss. 121-130. ***Murder***—s. 300.]

819. Analogous Law.—This section is narrower than the English Law under which, except in cases of treason and homicide, a person who has been forced to commit an offence by fear of death or of grievous bodily harm is exempt. The fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels,[1] though an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains with the rebels.[2] As Blackstone observed : "A sixth species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves ; and which it is to be presumed his will (if left to itself) would reject. As punishments are therefore only inflicted for abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion."[3] Of this nature there is the obligation of civil subjection, whereby the inferior has to obey the behests of his superior as where the State commands us subjects to do an act contrary to religion and sound morality. " The sheriff, who burnt Latimer and Ridley, in bigoted days of Queen Mary, was not liable to punishment from Elizabeth for executing so horrid an offence, being justified by the commands of that magistracy which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution."[4] So in the case of persons in private relations the principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceed upon the matrimonial subjection of the wife to her husband, which the law, indeed, presumes so great that she is exempt from punishment for theft or even a burglary if committed in her husband's company.[5] But this is only a prsesumption, and even as such it only applies to minor offences to *mala qua prohibita* and not *mala in se*, such as treason, murder or robbery, in which, apart from her husband's coercion, she is equally responsible.[6]

820. In this respect this section lays down a rule widely divergent according to which no compulsion justifies murder and offences against the State punishable with death, but compulsion may justify other offences if the compulsion was not self-invited. **(§ 824).**

821. Principle.—" Criminal law," wrote Sir James Stephen, " is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit a crime. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, if you do it, I will hang you. Is the law to withdraw its threat if some one else says, if you do not do it, I will shoot you ?

822. " Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to

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(1) *MacGrowther's case*, 18 St. Tr. 391.
(2) 1 Hale P. C. 44 (516) ; 1 Hawk P. C., c. 1, s. 14.
(3) 3 Black, 27.
(4) 4 Black, p. 28.
(5) *Ib* ; 1 Hale P. C. 45 ; 1 Hawk, P. C., c. 1, s. 9.
(6) *Buncombe*, 1 Cox C. C. 183.

execute their commands. If impunity could be so secured, a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise."[1]

823. Meaning of Words.—"*Threats which at the time of doing it, etc.,*" that is, the apprehension of instant death must be present at *the time of the act.* The person must be under the belief that he is to do or die. "*Provided the person did not of his own accord,*" as in the case contemplated in Explanation 1. Having joined a gang of dacoits, a person could not then plead compulsion, for his initial act was illegal, and one which he was by no means bound to do. "*Seized by a gang of dacoits,*" *i.e.*, unawares; not if the smith was one of the party but unwilling to force the door.

824. Crime under Compulsion.—This section enunciates a simple rule under which law recognizes the presence of compulsion as a defence to criminality. It enacts that no compulsion can justify murder and offences against the State punishable with death. As regards the first, no man has a right to take another's life to save his own[2] (§ 664). As regards the second, the State has the right to insure its own preservation by enacting deterrent pains and penalties. In this respect all States do no take the same view of their rights and responsibilities. Indeed, in England, the law in this respect has long since settled to be different. So MacGrowther who was tried for high treason in 1746, for having joined the Duke of Perth in arms against the King, proved that being a tenant of the Duke he had been compelled by him to join the rebel army, who had threatened to burn his house and to destroy his cattle and corn, and that several of the Duke's men came and threatened him with destruction and bound him with cords till he consented to serve as a lieutenant of the Duke's rebel regiment, whereupon Lee, C.J., told the jury that there is not, nor ever was, any tenure which obliged tenants to follow their Lords into rebellion. And as to the matter of force, he said, that the fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels. "The only force that doth excuse is force upon the person and present fear of death, and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could."[3] Such force will not excuse joining in a rebellion in this country. In other words, English Law permits a man to save his life at the expense of the State, but in India the State demands that it shall be preserved, it may be at the expense of its subjects. But offences against the State to which compulsion is no answer are only those punishable with death. There is only one such offence in the Code, that of waging war against the King,[4] and the only sections to which this section is inapplicable are sections 121 and 302.[5]

(1) When Compulsion is No Defence.

825. With these exceptions the rule here enunciated applies. It lays down that an act committed by a person under the fear of instant death is not a crime. But this fear must be present *at the time* of the act. If it preceded the act, it ceased to exercise the influence which alone entitles a person to exoneration.[6] So where certain persons admitted having perjured themselves to incriminate a person of murder because they had been so tutored by the Police, the defence was rejected, because they were under no compulsion to make the statements which they did, and which would have had the effect of sending an innocent man to the gallows.[7] Indeed, in permitting a man to commit a crime for the sake of his life, law does not by any means set an exalted standard of morality before the people, but law is a corrector of evil and not a moralist and it never places before itself a standard of altruism which people will not generally find it easy to follow. If it did so, law will soon be honoured in its breach than by its observance. It has, therefore, been enacted that self-preservation shall be a defence,

(2) When Compulsion is a Defence.

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(1) 2 His. Cor. L. 107.

(2) *Dudley and Stephens*, 14 Q. B. D. 273; *Umar Din*, 3 L. L. J. 287, 67 I. C. 340.

(3) *MacGrowther*, 18 St. Tr. 301 (393, 394) followed in *Aung Hla*, 9 R. 404.

(4) S. 121, *post*.

(5) *Aung Hla*, 9 R. 404.

(6) *MacGrowther*, 18 St. Tr. 301; *Autar*, (1925) A. 315.

(7) *Sonoo*, 10 W. R. 48.

but a defence only when it was a case of self-preservation. Where, therefore, certain persons offered bribes to classers of the revenue survey, alleging that the bribes were paid under the influence of threats held out by the accused of raising the assessment, cutting down the hedges, and erecting new boundary marks, it was held that the bribe-givers were all accomplices, as nothing but fear of instant death could excuse their crime.[1] But the person may not be threatened with death, and yet the person paying the money need not necessarily be an accomplice. Such a case would arise where the offence discloses facts constituting the offence of extortion.[2] Of course, this section only lays down the general rule, and it is subject to the special provisions of other parts of the Code.

826. In order, however, to entitle a person to avail himself of the general exemption here provided for, he must bring his case strictly within its compass. He must not only show that he was not a voluntary agent, but he must further show that he was given no alternative but to do or die. On this subject people have curiously very vague notions in this country. They seem to think that compulsion, whether physical or moral, of any degree, is sufficient to justify their crime. A policeman is no more justified in torturing a man to death, simply because he had been ordered to do so, by his superior,[3] than a robber can justify his act on the plea that he had to obey his fellow confederates. If this had been a sufficient justification, law would be robbed of its most salutary check, for necessity would be made "the legal cloak for unbridled passion and atrocious crime."[4] Necessity, short of the threat of death, does not, therefore, excuse a crime, though as a matter of judicial propriety it will necessarily mitigate the punishment.[5]

827. Even where a person is shewn to have acted under the fear of instant death, still, it must be shewn that the predicament into which he found himself was not brought about by himself. As the

Exception 4.

authors of the Code wrote: "If a captain of a merchantman were to run his ship on shore in order to cheat the insurers and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy; if a person who had joined himself to a gang of dacoits with no other intention than that of robbing, were, at the command of his leader accompanied with threats of instant death, in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply; for it is evident that punishment, which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear, which a man may entertain of being brought to the gallows at some distant time, as sufficient to overcome the fear of instant death; but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang robbers and rioters to excuse their crimes by declaring that they were in dread of their associates and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which every one among them was unwilling to commit, under the influence of mutual fear, but we think it clear that this circumstance ought not to exempt them from the full severity of the law."[6] No man from a fear of consequences to himself has a right to make himself a party to committing mischief on mankind.[7]

828. The only exception that justifies a person to participate in crime is a *reasonable* fear of *instant* death, not a mere threat which may or may not be carried into

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(1) *Maganlal*, 14 B. 131; Ss. 363 & 384.
(2) Ss. 363, 384.
(3) *Devji Govindji*, 20 B. 215.
(4) *Dudley*, 14 Q. B. D. 273.
(5) 2 Stephen Cr. L. 107.
(6) Note B, Reprint, p. 112.
(7) *Tyler*, 8 C. & P. 616 (620); *Maganlal*, 14 B. 131 (132); *Devji Govindji*, 20 B. 215 (222, 223); *Killikyatara*, 19 I. C. (M) 207

execution but a threat which precedes action, and an action which can only be averted by associating in the crime. The question whether the act of a person was prompted by such a fear is a question of fact depending on the circumstances of each case. But whatever the facts, three essential points must be clearly established to justify an act: (*a*) that the person did not voluntarily expose himself to the constraint; (*b*) that the fear which prompted his action was the fear of instant death; and (*c*) that the act itself was done at a time when he was left no option but to do it or die. The threat couched in a resolution as of an anarchist meeting that a certain member shall murder a certain personage, failing which, his head is prescribed, is, therefore, threat of certain death, but not of an instant death. It is, moreover, not a threat at all but a condition of membership, of which all members had timely notice. No anarchist can therefore complain that he was the victim of coercion. The question whether a person was a *particeps criminis* or merely an involuntary agent will therefore depend upon his previous relations with the other criminals, and upon the circumstances which threw him in their company upon the threats given and resistance made, and the chances that there were of his dying at their hands if he did not submit to their will.

(Explanation 1): Exception 2.

829. The fact that a person was coerced into joining a gang of ruffians may be a sufficient excuse, if he had been presented with the certain alternative of death in case of refusal. The mere fact that a gang of dacoits threatened to beat a recruit is no reason for joining it. But if the gang had personated, say a marriage-procession or officers of Government on duty, the case would be otherwise. For he had then joined a lawful assembly as he then considered it. And if the gang afterwards threw up the mask, and compelled him to commit a crime, he must still resist, but must not be a willing tool in their hands, for his duty is even then to mankind. It is only when his will is dominated by the fear of instant death that he is permitted to plead necessity in justification of his crime. The mere fear of beating or other personal violence is not a reason for swelling the ranks of criminals. If such a reason were sufficient, it existed in MacGrowther's case,[1] but they were considered wholly insufficient. (§ 824).

(Explanation 2): Exception 3.

830. But where a person does not join a gang but is physically overpowered to join it, and is then compelled by a threat of instant death to work for it, he cannot be held responsible, for his will was never given a free play, as he was himself overpowered by physical force. Such is the case of the smith mentioned elsewhere.

831. It will be observed that the section makes no special reference to *femme covert*. Their case will therefore be judged by the general rule.[2]

Act causing slight harm.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

[***Intended to cause***—s. 35. ***Known to be likely to cause harm***—§§ 667-669.]

832. Analogous Law.—This section is the legal recognition of the maxim *De minimus non curat lex*.[3] So the authors observe: "Clause 73[4] is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public and for the most part dealt with by the tribunals as incorrect. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommodate him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn,

(1) 18 St. Tr. 391.

(2) This omission must have been intentional, for it was noticed and animadverted upon by the Law Commissioners (First Report, ss. 153, 154).

(3) "Law does not care about trifles."

(4) Now, s. 95.

and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice ; for if the Code is silent on the subject the Judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the meaning of the law from its plain meaning." [1]

833. The Madras Regulations [2] as to trivial offences remain unaffected by the section, which has no application where the act charged is an offence irrespective of whether the accused intended to cause or knew himself likely to cause harm.[3] It has, consequently, no application to offences under special or local laws,[4] which are dictated by a different policy.

834. Principle.—Law does not busy itself about unconsidered trifles. It should be stultifying itself if it concerned itself with matters too trivial to demand its notice about which men in their ordinary frame of mind do not complain. Indeed, men living in society must suffer some inconveniences and transgressions without which indeed no society is possible. It will be an idle travesty of law to deal with such delinquencies as if they were crimes. The Code has, therefore, rightly exempted them from that category.

835. Meaning of Words.—"*Intended to cause..... any harm*" : Even the *intentional* causing of harm is here excused because of its triviality. The word "harm" here means injury of any kind, including injury to mind, body or property. "*No person of ordinary sense and temper,*" and belonging to the same class as the complainant and under the circumstances, would complain. Two friends may take liberties with each other, which, as strangers, they would have resented. So, while a friend may walk into another's library and carry away a newspaper, a stranger doing the same would be guilty of theft.

836. Negligible Wrongs.—This section is intended to exempt from criminality offences which, from their triviality, do not deserve the name of crimes. In one sense they are crimes because they fall within the general definition of crimes and, as such, but for this section, they would be punishable. Indeed, the section has no application, unless the act in question is otherwise a crime under the Code.[5] If there was no offence under the Code, there is no need to apply the section, where, for instance, the accused, a servant, was ordered by his employers to take certain bags of waste paper and forms belonging to him to his yard in a certain place, and there to burn and destroy them. And the accused carried the bags but to his own house, where he kept them presumably for sale. He was prosecuted for criminal breach of trust, and the question was, whether the act of the accused was justifiable under this section. It was conceded that the paper was worthless to the employer and its destruction was ordered to prevent designing men from misusing it for the purpose of committing forgery, whereupon the Court held that, as the act of the accused did not amount to an offence, there was no need to resort to the provisions of this section.[6] This case undoubtedly proceeded upon the assumption that the relinquishment by the owner of his dominion over the bags had the effect of making the bags no man's property, the appropriation of which could not therefore be a crime. So where the Health Department of Government condemned as rotten a consignment of rice, and ordered its officers to destroy it, whereupon the latter appropriated it without destroying it, it was held that as the rice had ceased to be the property of the Government, the accused could not be convicted of criminal breach of trust, though they may have been guilty of disobedience of departmental rules.[7]

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(1) Note B, Reprint, pp. 109, 110.
(2) Reg. XI of 1816, s. 10; Reg. IV of 1821, s. 6.
(3) *John Scott*, 1 N. L. R. 139.
(4) *See* s. 40, *ante*.
(5) *Preo Nath*, 29 C. 489.
(6) *Ib.*
(7) *Wilkinson*, 2 C. W. N. 216 ; followed in *Preo Nath*, 29 C. 489.

837. Where, however, the facts point to an offence, the section is applicable only if the facts disclosed make it an offence of a trivial character. The triviality of an offence, however, must not be judged solely by the measure of harm, for it depends equally upon other considerations. A soldier striking his officer in anger commits an offence, the heinousness of which cannot be determined by the injury directly caused to the officer. Such assaults, if suffered, will be wholly subversive of military discipline, and they are therefore considered fit for exemplary punishment. This was the *ratio decidendi* of a case in which a dismissed policeman approached his Superintendent in office and asked him what had been done in the matter of his petition for reinstatement. The Superintendent replied that it had been rejected ; thereupon the accused lost control of his temper and struck the Superintendent a blow across his chest with an umbrella which he had in his hand; whereupon he was convicted under section 323 of the Code and sentenced to a year's imprisonment. And conviction and sentence was affirmed on the ground that though the pain caused by the blow might have been trivial, still as it was a blow struck in anger and was accompanied by language of a most violent kind, it could not be treated as a case under this section.[1] A person may pull another by the ear and the case would be one under this section, if the two persons were friends and the pulling was done in sport or by way of gentle admonition. But where an official superior pulls the ear of his subordinate in a quarrel, the case is then one which cannot be so lightly passed over.[2] In this case the complainant having attended the office late, the accused called him into his room and assaulted and insulted him by pulling him by the ear, whereupon the complainant moved for a summons for assault, which the Court held could not be refused. So while it will be an assault of an aggravated kind if a stranger caught hold of the hand of a modest maiden, while passing along a public thoroughfare, the case would be different where the woman was of a questionable character, and the hand was caught in jest, though it had the effect of arresting her movement and causing her annoyance.[3] The object with which an act was done, no less than the relationship in which a party stood to another, will then determine the nature and degree of the crime.

(1) Relative Position.

838. A thing may be valueless to one person, but it may have quite a different value to another. For example, a rough jotting of accounts between two persons in the handwriting of the obligor may have no value to the latter, but it may be a piece of valuable evidence to the obligee. Where therefore it was in the custody of the obligee as a token of the obligor's indebtedness, the latter would be guilty of destroying a valuable security, if he tore it up in the course of an altercation with his creditor.[4] And the fact that the account sheet was unstamped, and therefore inadmissible for the enforcenemt of any legal claim, would be immaterial. For though it was not a valuable security, still, since it purported to be a valuable security, the wanton act of the accused became an offence under section 477 from which this section offered no escape.[5] So a person who made away with cancelled cheques which were to be filed as exhibits in a case, could not plead exemption under this section, on the ground of their intrinsic worthlessness, because, though in themselves valueless, they furnished valuable evidence of payments, which fact could not be ignored in judging of the gravity of the accused's crime.[6]

839. Again law does not regard the same offence in the same light in every case. Reference has been made before to offences relating to property exposed to view or lying in the open, thefts of which are treated with special severity (§§ 391, 392). This must be the underlying reason in the case in which the Court refused to apply this section to the theft of dung cakes worth one pie and mangoes worth three pies from

(2) Where Special Protection Required.

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(1) *Sheo Gholam*, 24 W. R. 67.
(2) *Walmsley*, 1 C. W. N., cxxxiv.
(3) *Bhairon Misar*, (1887) A. W. N. 73.
(4) *Ramasami*, 12 M. 148.
(5) *Ramasami*, 12 M. 148, followed on this last point, *Kashi Nath Naek*, 25 C. 207, to the same effect *Kapalavaya*, 2 M. H. C. R. 247 ; 7 M. H. C. R., App. xxvi; *Maula Baksh*, 27 A. 28.
(6) *Maula Baksh*, 27 A. 28.

the field of the complainant.[1] Such a case is easily distinguishable from one in which the accused was charged with theft of some pods of trees from Government ground, which were of no value to Government.[2] Such also will be the case where persons pluck fruit or leaves from road side trees. So where a person dug some earth from an open piece of private ground, the earth so appropriated having hardly any appreciable value, the Court regarded the case as a fit one to be disposed of under this section ;[3] the same view was taken in another case in which a person had lopped off the branch of a tree overhanging his house, because it inconvenienced him.[4]

840. The ordinary terms of abuse do not constitute an insult and would be covered by this rule, since no one takes them seriously.[5] Moreover, the harm caused by defamatory or insulting words may be so slight as to call in the aid of this section. Where two pleaders in the midst of a case quarrelled over a remark made by one conveying an imputation on the other, whereupon the latter retaliated by calling him a "liar," the Court considered the case sufficiently met by the section.[6] So where the guard of a train asked a passenger for his ticket, stating that he suspected him of travelling without a ticket, the Court threw out the passenger's suit for damages on the ground that the matter was too trivial to call for damages.[7] It was found as a fact in the case that the guard had used the words *bona fide*, and his suspicion was not altogether unfounded, which was really the saving grace in his case; otherwise the verdict would have been probably different. So where a man was falsely charged with the theft of a goat, he was held justified in prosecuting his accuser of defamation, and the fact that he was a man of low caste could not bring his case within this exception. "The false accusation was one against the moral character of the prosecutor, defamatory in its nature, and presumably made with knowledge and intent to harm or injure the prosecutor, and unless shown to have been made in good faith, renders the party making it liable to be charged with the offence of defamation."[8] So to write of a man as a *kulbhrashta*[9] or to impute a Hindu that he is an out-caste[10] in a published work would be clearly defamatory.[11]

841. There are some injuries which are from their very nature trivial, as where a person distorts his mouth and smiles at another[12] or where one indulges in practical jokes, in which case the criminality of the act will be judged by the intention and the harm actually caused. So where two disputants challenged each other to a fight in the open, brandishing their sticks, the Court dismissed the case as one covered by this section taking the demonstration as in the nature of sparring, with no intention to fight.[13] A stranger entered a pleader's room attached to a Court in order to see a pleader. One of the pleaders objected to the entry of a stranger reserved for pleaders only, but as the stranger persisted in refusing to leave it he was ejected. He re-entered the room when the objecting pleader abused him, apologizing very shortly afterwards. The stranger prosecuted him for insult but the Court held that in view of the previous provocation to and the subsequent apology by the pleader the case fell under this section.[14] The accused killed a goat by twisting its

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(1) *Ranchore*, 1888 B. M. J. 400.
(2) *Kasya* 5 B. H. C. R. 35 ; *Mahomed Khan*, 8 C. P. L. R. 15.
(3) *Gulzarilal*, (1882) A. W. N. 229.
(4) *Jiwa Ram*, (1881) A. W. N. 100 ; *Mahomed Khan*, 8 C. P. L. R. 15.
(5) *Sharif Ahmed* v. *Qabul Singh*, 43 A. 497. *Bhagirath* v. *Saiyad Ali* (1931) C. 392. *Jas Raja Jagga*, (1929) L. 234.
(6) *Vansitart*, (1883) A. W. N. 46 ; *Shrif Ahmed* v. *Qabul Singh*, 43 A. 497; *Philip Rangel*, 56 C. 196 ; *Atwa Singh*, (1926) L. 412 ; *Mg. Sein*, (1927) R. 23.
(7) *South Indian Railway Co.* v. *Ramkrishna*, 13 M. 34 ; *Abdul Rashid*, (1929) A. 940.
(8) *Per* Trevor and Loch, JJ., in *Nobin Dome*, 2 W. R. 35 (36).
(9) Lit. *Kul*, family, and *Bhrashta*, defiles—one who defiles the family, one who is a disgrace to the family by doing an act condemned by the tenets of religion or morality.
(10) *Mohan Lal* v. *Ramcharan*, (1928) A. 213.
(11) *Ramanuja* v. *Prathirvatti*, 12 I. C. (M.) 217.
(12) *Brain's case*, 1 Hale, P. C. 455 ; Cro. Eliz, 578, in which, however, the prisoner had killed the man, and it was held to be murder.
(13) *Parma Singh*, 9 I. C. (C.) 586.
(14) *Moro Balwant*, 22 I. C. (B.) 158 ; *Abdul Rahiman*, 36 I. C. (M.) 142.

neck and not by cutting off its throat. He exposed its carcass for sale, which was objected to by Mahomedans but the Court dismissed that complaint holding that though the mode of killing might be obnoxious to their religious feeling the accused was doing it for a living and he could not therefore be convicted under s. 298.[1]

842. While the rule is then applicable to all trifling injuries whether they relate to one's person, reputation, or property, still these are cases in which Law holds the rule inapplicable. Such is the case of intangible immovable property rights in which could not be protected by permitting petty encroachments. Consequently a commoner may maintain an action for an injury to the common against a person who merely walked over it.[2] "That if a commoner could not mantain an action of this sort, a mere wrong-doer might by repeated torts in course of time establish evidence of a right of common."[3] In such cases law allows an action on the ground of the apprehended damage which the denial of the right might entail.[4] These were civil cases, but it is conceivable that the same reasoning may also support a criminal action. They are, however, exceptional cases and fall within the principle that a small mischief is actionable when its prevention would have the effect of preventing a greater mischief.

OF THE RIGHT OF PRIVATE DEFENCE.

Things done in private defence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

843. Analogous Law.—The object of the group of these sections dealing with the right of self-defence agrees with the English general law,[5] though the Commissioners had noted in their report that owing to the lack of spirit displayed by men in this country they had further strengthened this law.[6]

844. Principle.—Self-help was the first rule of Criminal Law.[7] It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity and social order. "The right of defence," wrote Bentham, "is absolutely necessary. The vigilance of magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men."[8] The eleven sections comprised in this sub-head codify the rules and limitations which are found floating in English Law. They are based on the cardinal principle that it is the first duty of man to help himself. It is next based on the principle that the Police of State is not ubiquitous, and a person may then strike out for himself, or for another. But such a rule, if unqualified, might encourage vendetta which would lead to social disorder. It therefore lays down the limits within which the rule applies, and the conditions to which it is subject. These conditions were the subject of extended controversy at the time the draft Bill was under consideration, but the clauses as framed, were found to be in substantial agreement with English Law, and were as such passed.

845. Plea of Private Defence.—This section is merely declaratory of a right in the abstract. It lays down that an act done in the exercise of the right of "private defence" is not an offence. It does not define that right, nor does it describe its extent and limitations. This is left to the subsequent sections. The

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(1) *Kirpa Singh*, (1912) P. W. R. 26, 16 I. C. 169.

(2) *Pindar* v. *Wordsworth*, 2 East. 154.

(3) *Ib.*, 162.

(4) *Genger* v. *Lysaght*, 49 L. T. 51; *Robertson* v. *Hartopp*, 42 Ch. D. 484 (500).

(5) First Report, § 146, Reprint, p. 227.

(6) Note B. Reprint, p. 110. These clauses were subjected to an exhaustive review by the Indian Law Commissioners (First Report, §§ 130, 162). But there is nothing in this discussion to elucidate the text. It is, indeed, wholly confined to answering objections, and justifying the clauses in the words of the authors themselves.

(7) *See* Introduction, to 1 Penal Law (4th Ed.)

(8) Bentham's Principles of Penal Laws.

right of private defence is, however, here declared to be a justification for a crime. But in order to be a justification, the crime must be complete without it. There is no right of private defence under this Code against an act which is not in itself an offence under it.[1] Consequently, there is no right of private defence against an act done in the exercise of that right.[2] But being an exception to general law, it must be pleaded and proved by the defence,[3] though such proof does not imply any evidence tendered by the defence, since it may equally be secured by the evidence of the prosecution or in the course of the cross-examination of their witnesses,[4] or by the statement of the accused.[5] It is competent to the accused to deny the act, and if proved, to justify it,[6] though in some cases the contrary has been maintained. So it is said : " No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases ; it must be by proof of the actual facts.[7] The plea of private defence cannot, it is said, be listened to unless it is pleaded,[8] and the proper time to plead it is the first Court and not in appeal.[9] But even if so there is nothing to prevent its being raised even at a later stage before the close of the trial, unless it has the effect of springing surprise on the prosecution, in which case the Court will have to allow the prosecution a chance of meeting it. Of course, a Court cannot set up a plea of self-defence when the accused himself has not done so,[10] but if the facts are all there the Court is as much bound to apply the law as it is its duty to do so. And while it is true that the plea must be raised by the accused[11] still the Courts are reluctant to sacrifice justice to a mere technicality[12] unless there are other substantial objections to support it.[13]

846. The true rule appears to be that where a certain intention or knowledge is part of the definition of an offence it is on the prosecution to prove it and in proving it facts have to be necessarily ascertained upon which the accused is entitled to rely for disproof or mitigation of his offence no less than for proving his non-liability. In such case the question is not one of the burden of proof at all, but rather a question of what offence the evidence discloses. But where proof of the offence is complete, and independent evidence is required to disprove the offence, then the question of onus becomes material. Even in that case the accused may by cross-examination of the prosecution witnesses or otherwise establish his exceptional immunity from the crime, and if the facts are all there, and there is no question of surprise or unfairness to either side, the Court will permit the accused to establish his non-liability on the facts appearing on the record. But where the evidence is clear and unequivocal he cannot be permitted to take a line inconsistent with his previous defence and argue for his innocence on hypothetical grounds. He cannot persuade the Court to assume facts which he never pleaded, tne pleading of which would necessitate the calling in of new evidence.

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(1) *Ganouri Lal Das*, 16 C. 206 (218). *Sewal Seth*, (1933) Pat. 144.

(2) *Gowri Sanker* v. *Sulban*, 41 I. C. (L. B.) 832.

(3) S. 105, Indian Evidence Act (I of 1872) ; *Farman Khan*, 5 Pat. 520.

(4) *Kali Charn Mookerjee*, 11 C. L. R. 232 ; *Timmal*, 21 A. 122; *Cf. Bhola Nath*, 51 A. 313.

(5) *Bhola Nath*, 51 A. 313 (321, 322).

(6) *Yusuf Hussain*, 40 A. 284 ; *Fandi Khot*, (1921) Pat. 192 ; *Janki Mahto*, (1933) Pat. 568. [The right of private defence may be pleaded alternatively with the plea of alibi.]

(7) *Per* Ainslie, J., in *Jamsheet Sirdar*, 1 C. L. R. 62 ; *Pasupat* v. *Rambhajan*, 1 C. W. N. 545 ; *Veerana*, 15 I. C. (M.) 310 ; *Adam Ali*, (1927) C. 324.

(8) *Jamsheet Sirdar*, 1 C. L. R. 62 ; *Kali Churn Mookerjee*, 11 C. L. R. 232 ; *Timmal*, 21 A. 122 ; but *contra* in *Wajid Hussain* 32 A. 451 ; *Baburam*, 19 I. C. (C.) 951 ; *Ram Khelawan Singh*, 36 C. 827 ; *Veerana*, 15 I. C. (M.) 310 ; and cases cited *post*.

(9) *Timmal*, 21 A. 122 ; but *contra* in *Rahiman Shah*, (1926) N. 202, where the Court admitted the plea in appeal ; *Nurdad*, (1932) L. 606.

(10) *Gullu*, (1904) A. W. N. 113.

(11) *Upendra Nath*, 30 I. C. (C.) 113 F. B.; *Afiruddi*, 52 I. C. (C.) 485 (488) ; *Wajid Hussain*, 32 A. 451 ; *Yusuf Hussain*, 40 A. 284 explaining s. 105, Indian Evidence Act (I of 1872) ; *Prag Dat*, 20 A. 459 ; *Timmal*, 21 A. 122 ; to the same effect *Ghulam Rasul*, 62 I. C. (L.) 331 ; *Kishen Lal*, (1924) A. 645 ; *Jogali*, (1927) M. 97 ; *Adam Ali*, (1927) C. 324; *Hafiza Singh*, (1927) L. 786.

(12) *Bahadurkhan*, 9 O. W. N. 1019.

(13) *Ganowri Lall Dass*, 16 C. 206

847. It is not possible to formulate a general rule which the Courts at times are apt to lay down in cases which, from their very complexity and variety, present no common rule for guidance. While then the plea of private defence should in strictness of law be raised by the accused, the Court out of its solicitude for doing justice allows such a plea to be argued at any stage, not upon any hypothetical grounds, but if the facts necessary to establish it are on record.[1] But this is an indulgence and not a right and it cannot be extended in a case involving consideration or proof of independent facts, as for instance, defamation.[2] Moreover, the Court will not entertain a plea on appeal inconsistent with the defence set up at the trial.[3]

848. It has been said that the plea of self-defence must not be incompatible with the other plea set up by the defence.[4] This is undoubtedly the rule, but it does not mean that the accused is not entitled to set up alternative pleas. His pleas must not be hypothetical, but founded on a statement of facts. But suppose that the prosecution wholly fail to establish a person's presence in a riot, could not the accused say ; " I decline to say if I was there; but I do say that if I was justified." Such a case is widely different from one in which the accused wholly denies his presence at the scene of crime, but finding his presence conclusively established, he attempts to justify it on appeal.[5] So where the accused had an intrigue with *A's* wife, who left her cot to visit him. *A* understood the purpose of her absence and followed her with a hatchet with which he attacked the accused, wounding him, whereupon the accused stabbed *A* with a knife in the heart killing him immediately. He then made away with the body and all traces of his crime. On being prosecuted for murder he denied all knowledge of the transaction and of his intimacy with *A's* wife. He was convicted, and on appeal he contended that even if the facts be as proved, his act was justifiable homicide in the exercise of the right of private defence, but, though the plea was considered, it was rejected.[6]

849. Private Defence v. Private Defence.—There is only a right of private defence against acts which are offences. Where an act is justified as being within the limits of the right of private defence, it could give rise to no right of private defence in return.[7]

Right of private defence of the body and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—**His own body, and the body of any other person, against any offence affecting the human body ;**

Secondly.—**The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.**

[***Person***—s. 11. ***Offences affecting the Human Body***—Ch. XVI, ss. 299-377 *post.* ***Theft***—s. 378. ***Robbery***—s. 390. ***Mischief***—s. 425. ***Criminal trespass***—s. 441. ***Attempt***—s. 511.]

850. Analogous Law.—This section lays down the rule as section 99 lays down the exceptions to which the rule is subject. It defines the *extent* of the right, as section 99 prescribes its limitations. This section lays down what a person *may do* ; section 99 lays down what he is forbidden to do. The two sections are thus complementary to each, and together, complete enunciation of the rule.

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(1) *Wajid Hussain*, 32 A. 451 ; *Yusuf Hussain*, 40 A. 284 ; *Garugu*, 8 I. C. (M.) 1088 ; *Veerana*, 15 I. C. (M.) 310 ; *Baburam*, 19 I. C. (C.) 951 ; *Pachai Gounden*, 26 I. C. (M.) 158 ; *Upendra Nath Das*, 30 I. C. (C.) 113 F. B.; *Afiruddi*, 52 I. C. (C.) 485 (488); *Pasupat* v. *Ram Bhajan*, 1 C. W. N, 545 ; Cf. *Nazimuddi*, 40 C. 163 ; *Ghulam Rasul*, 62 I. C. (L.) 331.

(2) *Abdur Razak* v. *Gansi Nath*, (1910) P. W. R. 4, 5 I. C. 714.

(3) *Philpot*, (1912) 7 Cr. A. R. 140 ; *Fitzgibbons*, (1912) 7 Cr. A. R 264.

(4) *Wajid Hussain*, 32 A. 451 ; *Baburam*, 19 I. C. (C.) 951.

(5) *Hakim*, (1884) P. R. No. 41.

(6) *Ib.*

(7) *Gorie Sankar*, 41 I. C. (L. B.) 832.

851. Principle.—The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said: "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble, injured by the strong. It is a noble movement which makes us forget our danger at the first cry of distress. ... ...It concerns the public safety that every honest man should consider himself as the natural protector of every other."[1] But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit of lawlessness and disorder. The right has therefore been restricted to offences against the human body and those relating to aggressions on property.

852. Meaning of Words.—"*Every person has a right to defend*": The right exists to defend his and other's body and property by use of force. But what force is justifiable? That depends upon the circumstances of each case. The amount of violence necessary to repel the aggression of one person will not be the same as is necessary to repel an armed band of twenty. "*Against an offence*": The word "offence" here means an offence made punishable by the Code—and not merely under any special or local law..[2] "*The body of any other person,*" who may be a perfect stranger.[3] "*Theft, etc,*" for the meaning of which *see* the various sections referred to below the text.

853. Defence of Person.—The right of private defence consists of the right of self-defence and the defence of another person's body and property against the four offences of theft, robbery, mischief or criminal trespass. The right of such defence commences as soon as a reasonable apprehension of danger to person[4] or property[5] arises, and it continues so long as the danger lasts or the property stolen is not recovered. The amount of force, justifiable in the exercise of the right, is such as was strictly necessary for the purpose.[6] The right to defend one's own, or another's person is absolute and unqualified.[7] A person may be on bad terms with another and may be on the prowl to have his revenge. The fact that his act was actuated by malice and a spirit of revenge is nothing if he was well within his right under this section. Such, indeed, was the case of one Dhauman Teli who had been on inimical terms with one Itwari Teli owing to the latter's intrigue with his wife. One night he lay in wait for him with a friend and on Itwari appearing, subjected him to merciless beating. They were prosecuted, but the Court acquitted them observing: "I think Dhauman Teli and Karu Lal are much to be commiserated. The former has defended his house and honour against the trespass of a would-be adulterer; and admitting on the meagre record that there was very violent retaliation, I think that under sections 96 and 104 of the Penal Code, he should be held to have committed no offence, as he was justified in causing any harm short of death to a person committing house-trespass. With respect to Karu Lal, I would give him the benefit of considering him to have aided Dhauman Teli to commit no offence."[8] A person is, of course, entitled to resist by force his seizure for service or employment.[9]

854. It will be observed that the right of private defence postulates the attempt to commit or the commission of an offence specified in the section. There is, therefore, no right unless there was at least an attempt to commit an offence. To suppose in the last case, Itwari had been set upon before he entered Dhauman's house, the two accused could not have justified their beating for the right had not then come into existence. And it would have ceased to exist as soon as Itwari had effected his retreat after the commission of the crime.[10] The right is indeed a right

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(1) Bentham's Principles of Penal Laws; *Dalganjan*, 22 A. L. J. 81.
(2) S. 40, para 1; *Gobardhan Bhuyan*, 4 B. L. R. 100.
(3) *Nga Than*, (1933) R. 273.
(4) S. 102; *Pancham*, 52 I. C. (O.) 887.
(5) S. 105.
(6) S. 99.
(7) *Rose*, (1884) 15 Cox. C. C. 540.
(8) *Dhauman Teli*, 6 W. R. 203.
(9) *Pancham*, 52 I. C. (A.) 887.
(10) *Balakee Jolahed*, 10 W. R. 9; cf. *Banku Behari*, 20 I. C. (Pat.) 602. *Keshar Lal*, (1930) M. W. N. 502.

of *defence*, and not of *punishment* for past and prospective iniquities. And the use of force sanctioned is, therefore, proportioned to that purpose and not to the gravity of the crime.

855. Defence of Property.—So, as regards property, whether his own or another's every person has the right to defend it by peaceful means if he can, by show and use of force if he must. But when it is said that a person has a right of private defence as regards property, all that is implied is, that a person in peaceful possession of property is entitled to maintain that possession even by use of force if necessary.[1] The question whether he had or had not the right to possession is immaterial.[2] Indeed, it is not the business of criminal law to protect titles; it does so when it can. But its chief function in this respect is to maintain peace, and for that purpose it protects peaceful possession irrespective of title. A person in such possession is then entitled to collect men to defend his property, and the concourse of such men does not constitute an unlawful assembly.[3] And as it is sometimes impossible to exercise such right successfully without preparation, a person in possession may prepare himself against an expected aggression.[4] But this view is controverted in Allahabad, where the right of preparation is denied.[5] But it is difficult to concede the right without conferring the power to use it with any degree of success. It may be conceded that in case of disputed possession no person has the right of using force against another, for the right of private defence postulates the existence of at least undisputed prior possession. Where therefore two factions, each of whom had been more or less in possession of a field, turned out with armed forces and had a free fight, the case would be different. But where possession is with one party and title in the other, could the person with title turn out the person in possession by main force, and has not the person in possession any right to repel the aggression? That he has such a right is undisputed and undisputable.[6] And so it has been held that where a person kills a wild animal or a wild bird on the property of another, the latter has property in the game and may enforce his right by the use of force if necessary.[7] But the Allahabad Court denies that he has, under the circumstances, any right to repel force by adequate force. The reason why he should have the one right and not the other has not been stated in any reported case.

856. That he has such right can no longer be denied.[8] Any other view would be subversive of the elementary right of self-defence. That it may, and at times does, cause bloodshed and that it is a right which is apt to be abused is no ground for denying it.

857. It will be observed that so far as regrads the defence of one's right to property the section mentions only four offences against which the right is said to exist. But the enumeration of these offences is apparently inexhaustive. Indeed, it is not intelligible why the section should have mentioned theft and robbery and omitted to mention house-breaking and dacoity. Indeed if the two offences mentioned were intended to be referred to only generically, then the mere mention of "theft" without "robbery" would have been sufficient. As it is, the right being declared to exist against theft must be deemed to exist against all offences *ejusdem generis*. And the same

Section Not Exhaustive.

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(1) Possession may be proved by legal presumption; *Jainath*, (1927) Pat. 181, Party relying upon possession must, of course, prove it; *Sulleman*, (1927) S. 92,

(2) *Sachee*, 7 W. R. 112, followed in *Gooroo Churn*, 14 W. R. 69; *Toolsee Sing*, 10 W. R. 64.

(3) *Brijoo Singh* v. *Khub Lal*, 19 W. R. 66; *Shunker* v. *Burma*, 23 W. R. 25; *Ganourilal Das*, 16 C. 206; *Gulshah*, 6 S. L. R. 121, *Fouzdar Rai*, (1918) Pat. 254.

(4) *Jagarnath*, 24 C. 324; *Pachkari*, 24 C. 686; *Uma Churn Singh*, 29 C. 244 (246); *Poresh Nath Sircar*, 33 C. 295; *Narsan Pathabai*, 14 B. 441; *Baglu Ragula Bheemappa*, 26 M. 249; *Hira*, 45 A. 250.

(5) *Prag Dat*, 20 A. 459; *Kaliji*, 24 A. 143; *Khadu Singh*, 24 A. 298; *Bechor Anop*, 40 B, 105, *Jaipal*, 33 I. C. (O.) 820; contra *Hira*. 45 A. 250.

(6) *Jasuram*, 74 I. C. (Pat.) 73.

(7) *Artur*, 3 Pat. 549.

(8) *Hira*, 45 A. 250; *Fateh Singh*, 41 C. 43.

may be said of mischief and criminal trespass. As against the thief the right of the owner is not only to recover his property but also to secure the thief, and in securing him he is entitled to use such force and violence as may be necessary [1] (§§ 936-937). So where they seized a thief in the act of committing theft in his house, and on the villagers assembling, the thief was found to be dead, and medical evidence showed that death was probably caused by strangulation due to the prisoner holding the deceased with his face downwards as he was getting into the house, it was held that the prisoner had not exceeded the right of private defence, which he had against the thief, and he was consequently acquitted.[2] So in another case the accused had a field of chillies which had frequently been stolen ; one night he found the deceased stealing chillies from his field, whereupon he struck him a heavy blow with a stick from which he died. He was held to have acted within his right. As the Court observed : " No man finding a plunder in his field by night in a place where others may be within call is expected to deal his blows very gently." [3] Besides, it must not be forgotten that when a man is surprised by a thief or finds himself surrounded by robbers, he cannot be expected to be cool and calculating. His first impulse is to strike a decisive blow. It may have been unnecessarily severe, but then the Court has to consult his feeling at the moment.[4]

858. As it was observed in a case, the amount of force justifiable may then depend not only upon the nature of danger actually present, but also upon the nature of the danger apprehended. And in judging of the necessity of the violence used the feelings of the man at the time, his exaggerated sense of danger, the want of self-possession, and the disconcerted state of mind, must all be taken into account.

Theft; Robbery.

859. The right of private defence against theft and robbery or an attempt to commit theft or robbery calls for no comment, since the right exists, is declared by the section and is otherwise supported by sound sense. But a case on the borderline may sometimes create difficulties. Such was the case of one *A*, whose cow had trespassed into the field of *B*, whereupon *B* seized it and proceeded to take it to the cattlepound. He was waylaid by *A* and his two companions and as *B* would not give up the cow, there was a fight, in the course of which, one of *A's* men speared *B* through the heart, and killed him. They were convicted ; but *B's* men who had inflected injuries upon *A* and *A's* men were acquitted on the ground that *B* being in lawful possession of the cow, its attempted rescue by *A* and his men presumably amounted to an attempted theft. This case can be held rightly decided only if *A's* act in rescuing the cow is held to amount to an attempted theft within the meaning of S. 378, which was probably taken for granted.[5]

Mischief.

860. The same principles govern cases relating to mischief. Where for instance, the prisoner found that a number of persons from another village had assembled to cut open a *bund* whereupon he took counsel of the villagers with whom he proceeded to oppose the mischief, he was held to be justified. In such a case the assemblage of men for organizing a defensive campaign cannot be held to be unlawful.[6] So where the villagers of *A* paraded a procession through the village of *B*, carrying with them a pot of consecrated water, to which the villagers from *B* objected, and who consequently obstructed the procession, whereupon the party of *A* retaliated and used some violence causing grievous hurt to one of the obstructors and hurt to several others. It was held that inasmuch as the villagers from *A* had a perfect right to pass through *B*, and as the latter, could not legally object to their carrying the water in their procession their obstruction was unlawful, and amounted to wrongful restraint, or at least to attempted mischief in respect of the pot of water against which the other party had the right of private defence and which justified the force used by them.[7]

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(1) S. 105, Comm.
(2) *Karrim Bux*, 3 W. R. 12.
(3) *Makee*, 12 W. R. 15.
(4) *Bhut Nath*, 3 I. C. (C.) 867 ; *Ahmad Din*, (1927) L. 194.
(5) *Tanoo Shikdar*, 3 W. R. 47 ; *Nyein*, 38 I. C. (Bur.) 316 ; *Devi Das*, 45 I. C. (L.) 683.
(6) *Birjao Singh* v. *Khub Lall*, 19W. R. 96.
(7) *Regula Bheemappa*, 26 M. 249.

Trespass.

861. Similarly the right of private defence against criminal trespass entitles the person in actual physical possession to use such force as is necessary to maintain his own possession and to turn away the intruder.[1] In the first place, however, there must be at least peaceful possession with the party employing force, for where there is no possession, there is no legal protection to the use of violence. But the possession which law protects is not the possession of a thief. If *A* owns a house and leaves it open whilst he goes out for a drive, and *B*, a thief walks into it and takes possession during *A's* absence, *B* has physical possession but not juridical possession so as to entitle him to legal protection. In fact *B* is not in such a case in possession at all; for possession in criminal law means at least prior peaceful possession. If, for instance, on his return, *A* finding *B* in the occupation of his house suffers to let him remain in possession, the possession of *B* would then develop into juridical possession against which *A* will forfeit the right of private defence.

862. A person in possession does not forfeit his right by the mere disturbance of his possession, as distinct from dispossession.[2] The case would be otherwise if such disturbance was occasioned by the lawful owner effecting a re-entry upon his property. Where the owner of the land and the trees standing upon his tenant's land entered upon it and used the force necessary to prevent the tenant from removing a tree which had been blown down and severed from the ground by the action of the wind, his action was held justified.[3] So a lawful entry in an unlawful manner may entitle the party in possession to exercise the right of private defence. Where, therefore, a zemindar was entitled to levy distress after written notice to the tenants, whose servants entered upon the crops without such notice, the tenants were entitled to consider such an entry as trespass, against which they were held to have the right of private defence.[4] In this case there was an unlawful entry. But suppose that there had been no such entry, then the mere fact that there was persistence in demand of rent would not have amounted to trespass justifying the use of force.[5]

863. The rule as regards criminal trespass is that a person in actual peaceable possession of land cannot be dispossessed by mere use of force; and that he has a right to maintain his possession by use of force if any one attempts to assail it.[6] In such a case the party in possession may use such force as is necessary to prevent a forcible entry by another and as is necessary to compel him to desist.[7] But it does not justify more. It will not, for instance, justify the confinement of the would-be trespasser.[8] Nor does the right include the wanton infliction of harm, as where a person went out to shoot and found the deceased committing real or supposed cattle trespass, whereupon there was an altercation in the course of which the deceased struck the accused with a heavy club who thereupon fired without any particular aim, but lowering the muzzle of the gun so as not to hit a vital part but death nevertheless ensued from the wounds thus inflicted, it was held that the accused's act was not a legal exercise of the right of private defence as he had only to stand back and he was safe.[9] So there is no right of private defence, in a case of premeditated riot where the primary object of the opposing factions is to fight, the complaint about trespass being merely a pretence.[10] Indeed, the right of private defence only commences when there is a reasonable apprehension of danger; where, therefore, persons fire guns from five and twenty yards at their expected assailant and injure him, their act is not protected as they had fired and injured a man before they could apprehend any danger from him.[11]

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(1) *Fateh Singh*, 41 C. 43; *Ponthala*, 24 I. C. (M.) 327, F. B.; *Gorie Sankar*, 41 I. C. (L. B.) 832; *Fouzdar*, (1918) Pat. 254.

(2) *Binderswari*, 46 I. C. (Pat) 413; *Chandulla*, 22 I. C. (C.) 993.

(3) *Padu*, 10 N. L. R. 38.

(4) *Kanhai Shahi*, 23 W. R. 40.

(5) *Mahomed Jan* v. *Khadi Sheikh*, 16 W. R. 65.

(6) *Tulsi Singh*, 10 W. R. 64; *Sachee*, 7 W. R. 76.

(7) *Ib.*, p. 77.

(8) *Shurufooedin* v. *Kassinath*, 13 W. R. 64.

(9) *Kureem Buksh*, (1868) P. R. No. 13.

(10) *Jeolall*, 7 W. R. 34; *Sikander*, (1918) P. R. No. 36, 48 I. C. 883.

(11) *Hussainuddy*, 17 W. R. 46.

864. There is, of course, the right of private defence against one forcing another to work or engage into any service against his wish,[1] or against the imprisonment of one's cart or cattle for the service or benefit of a public servant.[2]

Right of private defence against the act of a person of unsound mind, etc.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations.

(*a*) *Z*, under the influence of madness, attempts to kill *A* ; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(*b*) *A* enters by night a house which he is legally entitled to enter. *Z*, in good faith, taking *A* for a house-breaker attacks *A*. Here *Z*, by attacking *A* under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* were not acting under that misconception.

[***Misconception***—ss. 76-79. ***Youth***—ss. 82, 83. ***Immaturity of understanding***—s. 83. ***Unsoundness of mind***—s. 84. ***Intoxication***—s. 85.]

865. Analogous Law.—This section means that the right of private defence exists irrespective of the physical or mental incapacity of the person against whom it is asserted. Illustration (*a*) furnishes an example of the right against a person who is *non compos mentis*. Illustration (*b*) is taken from an English case,[3] discussed elsewhere.[4]

866. Principle.—As the right of private defence is the right of the preservation of one's life and property against all comers, it follows that the defender cannot permit a lunatic, or an inebriate to kill him or rob him of his property without protest. Having the right to preserve his life and possess his property, it is a right which, from its very nature, admits of no exception and may be asserted against any assailant, whether sane or insane, competent or incompetent, against a person mistaken or otherwise. In short the right prevails against overt attacks irrespective of their intention and meaning.

867. Meaning of Words.—"*Or by reason of any misconception*," such as in illustration (*b*). "*Every person has the right*," *i.e.*, in judging of the right of private defence, the exceptions which make offences non-penal should be ignored. Accused was the proprietor of land in the occupation of a tenant, upon which a tree was felled by the wind. Such trees belonged to the accused, but the tenant under a misconception that it belonged to him was cutting and stacking the wood. The accused entered on the land to remove the wood but the tenant resisted whereupon the accused assaulted him. The Court held that as, but for the misconception, the tenant's act would amount to theft, it was an offence against which the accused had the right of private defence, and the force used was therefore justified by this section.[5]

Act against which there is no right of private defence.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good

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(1) *Pancham*, 52 I. C. (O.) 887.
(2) *Ram Harakh*, 24 I. C. (O.) 172 ; *Pershadi* v. *Baljit*, 20 I. C. (O.) 233 ; *Asa*, 20 I. C. (L.) 992.
(3) *Devett's case*, Cro. Car. 538.
(4) S. 79
(5) *Padu*, 10 N. L. R. 38, 23 I. C. 704.

faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—**A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.**

Explanation 2.—**A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.**

[***Public servant***—s. 21. ***Good faith***—s. 52. ***Acting under colour, etc.***—s. 79. ***Grievous hurt***—s. 320.]

868. Analogous Law.—This section has been misplaced. Its appropriate place is after section 100 which defines the extent of the right. This section defines its limitations. Indeed all the following sections might be more logically re-arranged in this order : Sections 102, 100, 101, 106, 105, 103, 104 and 99. The section itself would have been more logical if the third and fourth paragraphs had preceded the first two. The latter refer to a special class and the explanations would then be better placed. As it is, the third clause of this section must be read as subject to section 105.[1] The first clause was enacted to meet cases which would not fall within section 332 by reason of the public servant in section 332 not being at the time when the assault was committed on him in discharge of a duty imposed on him by law.[2]

869. Principle.—This section lays down the limits within which the right of private defence must be exercised. It does not arm the party wronged with fire and sword, but allows him to help himself only when there is a reasonable apprehension of danger.[3] Other sections define the extent to which the right may be pushed. This section limits the general rule there laid down, and its object is to lay down certain restrictions ; the first two of which are specially intended to protect public servants, the remaining two paragraphs being more general.

870. Meaning of Words.—"*Under the colour of his office,*" that is, *bona fide* believing that it was his duty to perform the act, whether he was lawful or unlawful in the discharge of his duty.[4] "*Strictly justified by law*" means that there must be jurisdiction, though the act complained of may not be within that jurisdiction. "*More harm than is necessary for the purpose of defence,*" that is, the harm inflicted must be no more than is necessary to avert the danger. It may even be deterrent, but must not be excessive.

871. Right against Public Servants.—The first two clauses of this section limit the right of private defence, against public servants, due to the reason that law presumes their acts to be legal, and when in fact they are illegal, law undertakes to remedy them. The first clause limits the right of a person of self-defence, when the party against whom that right has to be enforced happens to be a public servant. In other words, this clause confers an exceptional immunity on public servants against the attacks of persons in the exercise of their right of private defence. As regards the latter, the clause evidently confers no right to the defence of one's

Paragraph 1.

(1) *Narsing Pathabhai*, 14 B. 441.
(2) *Dalip*, 18 A. 246.
(3) Ss. 102, 105.
(4) *Dalip*, 18 A. 246 (252).

property against the acts of public servants unless the seizure of property was accompanied by the use of force giving rise to the apprehension of death or of grievous hurt.[1] But this is on the assumption that the public servant was acting within his legitimate powers, which it is for him to show.[2] When this is the case, there will scarcely be any necessity to invoke the aid of the section, for there is no law to justify a public servant in causing death or grievous hurt in the discharge of his duties. Such hurt he is no doubt entitled to cause when illegally resisted, but then there is no right of private defence, when one is legally liable to arrest and is using force to resist it. Nor are the persons who aid and abet such a person exempt from punishment. They cannot plead that they were justified in rescuing a thief by assaulting a policeman charged with the duty of arresting him. The question of private defence has then no application in such a case. The only question that may then arise is that raised in the two explanations, *viz.*, that the person resisting did not know that the person resisted was a public servant, or was acting under the directions of a public servant. But the question attains prominence only when the public servant concerned had acted without jurisdiction, or having jurisdiction he had abused it. In order to earn the protection of this clause two things at least are essential: (*i*) that he should have acted in good faith; and (*ii*) that he should have acted "under the colour of his office."

Good Faith.

872. In the first place there must be good faith, a term negatively explained in s. 52 which lays down what is not good faith. But apart from that section the act of the public servant must be supported by the positive presence of care, caution and circumspection and an honest endeavour to discharge his public duty with strict compliance with the requirements of law. This must depend upon the facts of each case. Cases decided on the point will be found set out under ss. 521 and 183 and other sections relating to public servants.

There must be Jurisdiction.

873. As regards the exercise of good faith, the law requires that the public servant acting in the discharge of his duties must exercise due care and attention. Now, no one can be said to be possessed of good faith when he consciously arrogates to himself a jurisdiction which he does not possess. Where, for instance, a person (*A*), obtained a decree for a portion of land from a Court which had no jurisdiction to effect partition, and the Court therefore asked the Collector for advice as to how to execute the decree, and the Collector thereupon took upon himself to execute the decree by appointing a surveyor to measure off the land and give possession of it to the decree holder. The surveyor went, but was resisted by the accused who questioned his jurisdiction, whereupon he was prosecuted, but the Court acquitted him, observing that the protection given by this section to a public servant, does not extend to an act which is altogether illegal.[3] So where the revenue peons were assaulted while effecting an attachment of property in execution of a warrant after the date of its return when it ceased to be operative, the Court held the resistance justified as the re-issue of the warrant being illegal the resistance offered was not unjustified.[4] So where the partition Amin of one village being empowered to measure land proceeded to measure the land of an adjoining village and was obstructed, the obstruction was held to be justifiable.[5] So while a District Magistrate has jurisdiction to summon a witness to appear before himself, he has no jurisdiction to arrest a witness for the purpose of giving evidence before the police. If, therefore, a person be so arrested, his resistance would be justifiable.[6] So where a person applied for a search warrant under section 100 of the Criminal Procedure Code (which empowers the search for persons wrongfully confined), but the Magistrate issued

(1) *Ponthala*, 24 I. C. (M.) 327; but see *Adhar*, 5 C. W. N. 391.

(2) *Bahal*, 28 A. 481; *Sampat*, 15 A. L. J. 566.

(3) *Tulsiram*, 13 B. 168; *Lilla Singh*, 22 C. 286; *Jogendra Nath Mookerjee*, 24 C. 320, *Sit Nyein*, 8 I. C. (Bur.) 988, followed in *Gopi Mahto*, 10 Pat. 821.

(4) *Adhar Midday*, 5 C. W. N. 391.

(5) *Lilla Singh*, 22 C. 286.

(6) *Jogendra Nath Mookerjee*, 24 C. 320.

a search warrant under section 96, (which empowers the issue of a search warrant for the production of document or thing which the Court thinks will not be produced on summons), the Police empowered to execute it were not protected under this section, as the issue of the warrant was not only "not strictly justifiable by law," but wholly illegal and *ultra vires*.[1] So while a vaccinator is empowered to take lymph from persons who do not object to it, he has no right to take it as of right, and his attempt to take it without consent was illegal, and such as would justify an assault committed to prevent its removal.[2]

Not Strictly Justifiable by Law.

874. This raises the question when is an act merely "not strictly justifiable by law," so as to entitle the public concerned to the protection of the section. The words "not strictly justifiable" refer to irregular as distinguished from illegal acts. They show that the act was within jurisdiction, but that the jurisdiction had been exercised irregularly or on insufficient grounds. In short, the act has been done wrongly, though it might have been done rightly. They do not apply to an act which was done wrongly and could not possibly have been done rightly.[3] In other words, the clause is not intended to cure the want of jurisdiction but only to erroneous exercise of it, and that when the error affects the procedure rather than the principle —such an irregularity, for instance, as initialling a warrant instead of signing it,[4] or issuing it without complying with the preliminary procedure prescribed by the Civil Procedure Code[5] the mode of delivering possession,[6] or the like—it would be covered by the clause. A Police officer executing a bailable warrant is bound to give the person arrested the option of bail, and if he fails to do so, he is not protected by this section against the rescuers who use force to liberate the person so arrested.[7] So where a subordinate Police officer deputed by the officer in charge of the police station to make a search entered a house in search of person as well as property, though the search for the property required a search warrant from the Station House Officer, it was held that though the search of the house for property without a search warrant was illegal, still the inmates could not offer the resistance especially as the policeman had charged those persons with theft, and the resistance offered to the Police was as much to the search as to their own apprehension.[8] So where the accused were arrested by the Police at midnight lurkings armed, in a village inhabited by dacoits, it was held that even if the arrest be not justifiable under section 100 of the Criminal Procedure Code of 1861,[9] still the resistance could not be justified under this section.[10] The sergeant who arrested the accused whom he found armed with guns, and who were reported against as dacoits was fully within his rights under sections 45 (6) and 54 (1) of the Criminal Procedure Code, and the accused who resisted him and fired at men assisting him, wounding and killing several, were clearly guilty of murder under aggravating circumstances.[11]

875. Such was also the case of a policeman whose cart had been stopped by some camel drivers whose camels had been trespassing on the Government canal banks, and through whose action a prisoner in lawful custody effected his escape, and who had further threatened the officer with personal violence, who thereupon fired a shot without taking careful aim wounding one of his assailants.[12] The same view was taken in another case in which a Sub-Inspector of Salt and Abkari had attempted to enter a house in search of property, the illicit possession of which was

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(1) *Bisu Haldar* v. *Probhat Chunder*, 6 C. L. J. 127.
(2) *Mangobind*, 3 C. W. N. 627.
(3) *Ib.*, p. 629; *Attar Singh*, (1918) P. R. 9, 44 I. C. 742; *Gaman*, (1913) P. R. 16, 18 I. C. 894.
(4) *Janki Prasad*, 8 A. 293.
(5) *Sahibulla*, 51 C. 1; *Rajani Kanta*, 58 C. 940; *Puna Mahton*, 11 Pat. 743.
(6) *Preolal Mukerjee*, 18 C. W. N. 548, 24 I. C. 163; followed in *Puna Mahton*, 11 Pat. 743; *Rajani Kanta*, 58 C. 940.
(7) *Shyama Charan*, 15 I. C. (C.) 1006.
(8) *Vyankat Rao*, 7 B. H. C. R. 50; *Gaman*, (1913) P R. No. 16, 18 I. C. 894; *Mirshah Newaz Khan*, 8 S. L. R. 1; *Chunder Kumar*, 3 C. W. N. 344.
(9) Now s. 54, Act V of 1898.
(10) *Gateea Meena*, (1869) P. R. No. 69.
(11) *Bhanga Singh*, (1900) P. R. No. 21.
(12) *Mukerjee*, (1901) P. R. No. 5.

an offence under the Madras Abkari Act,[1] and which he could not legally do without obtaining a warrant from the Abkari officer, who could only issue a warrant after recording "his reasons and the grounds of his belief."[2] This case probably carries the doctrine of immunity too far. In another case an Excise Sub-Inspector was empowered to search only for "excisable article" under the Bengal Excise Act,[3] and he attempted to search a house for "*foreign* excisable article," for which he was not empowered to search, it was held that this entry being unlawful, the accused who assaulted him were justified.[4] The section would, however, clearly protect a person who attaches articles exempt from attachment, as where a bailiff attaches agricultural cattle and grain which are under the Procedure Code exempt from attachment.[5] So where in the case of a defaulter under the Local Board Act, a warrant of distress was issued, and a bucket and spade belonging to him attached. The defaulter was a potter and the articles attached were his tools exempt from attachment.[6] The potter resisted the attachment, and it was held that his resistance was illegal.[7] So where on a Magistrate having been satisfied that certain persons accused in a case were keeping out of the way, and he accordingly issued a proclamation under section 87 of the Code of Criminal Procedure and an order for the attachment of their property under section 88, in execution of which the police-officer was informed that the property he was seizing in attachment did not belong to the absconding accused, but the *patwari* who was present, having stated the contrary, the police-officer proceeded with the attachment, and he was molested. It was held that even assuming that the property attached did not belong to the absconders, the rightful owners had no right to private defence.[8] So where a vakil was appointed to make the attachment, under O. 21, R. 105 of the Civil Procedure Code, but no reasons were given for appointing him instead of the Amin or bailiff, it was held that the provisions in O. 21, R. 105 were not mandatory, consequently the attachment was not illegal or without jurisdiction and, therefore, no right of private defence arose for the accused person.[9]

876. So where the Magistrate ordered the police to take charge of paddy, pending proceedings before it, under section 145 of the Code of Criminal Procedure, which he had no right to do, whereupon the police in pursuance of the order proceeded to guard it, but were resisted by armed violence, it was held that violence was excessive and unjustified, especially as the police had acted in an open and straightforward manner, simply announcing what the orders they had received were.[10] But where the officers of the Salt Department, being empowered to make searches for contraband salt without a warrant only in cases in which the delay in obtaining a magisterial warrant would defeat the object, searched a house without a warrant when there was time to apply for a legal warrant, it was held that their search was illegal and resistance to it was consequently justifiable.[11] There was, of course, no pretension to acting under the colour of their office by the Deputy Commissioner's peons who forcibly seized the bullocks of the accused to pull their own cart out of a rut into which it had fallen, and the conduct of the accused in forcibly retaking his property was of course amply justified.[12] The law imposes no duty on Government officials, nor indeed gives them power to seize animals belonging to private persons for the purposes of camp transport. Consequently, the owner of such property is well justified in resisting its forcible seizure by such officers or their servants, and this section has no application to a case of abuse of power, and a proceeding wholly illegal and without jurisdiction.[13]

877. Explanation 1 goes with this paragraph, and it is intended to protect persons who may have acted in ignorance of the fact that the person they were

(1) Mad. Act I of 1886.
(2) S. 31, Mad. Act I of 1886.
(3) Beng. Act VII of 1858, s. 40.
(4) *Pukot Kotu*, 19 M. 349.
(5) Mad. Act V of 1884.
(6) *Ib.*, s. 94.
(7) *Poomalai*, 21 M. 296.
(8) *Bhai Lal Chowdhury*, 29 C. 417.
(9) *Tej Singh*, (1935) A. 490; following *Sahebulla*, 51 C. 1.
(10) *Bhola Mahto*, 9 C. W. N. 125; *Preolal Mukerjee*, 18 C. W. N. 548, 24 I. C. 163.
(11) *Kalian*, 19 M. 310.
(12) *Ram Harakh*, 24 I. C. 172.
(13) *Asa*, 20 I. C. (L.) 992; *Parshadi* v *Baljit Singh*, 20 I. C. (O.) 233.

dealing with was a public servant. Where a public servant has a distinctive badge or uniform, his position will be manifest to all who have to deal with him. But if a public servant has no distinctive badge or attire, he has to state who he is, before he can claim exceptional treatment. If he was, however, attended by peons whose badges proclaimed his position, or if he was already known in the locality, it would be sufficient.

878. Acting under Orders.—Next to the acts of public servants there are acts done under the direction of public servants which are similarly entitled to privileged treatment. Such acts may not be done by persons who are themselves public servants, but they must be done under their direction, and that direction must be legal, though it may not be strictly justifiable by law (§ 874). This is apparent from the tenor of the first clause, and from the language of which it is evident that an act which would be unjustifiable if done by a public servant, could be no less so if done by another under his authority.

Paragraph 2.

879. So where the warrant issued by the Civil Court was not in the prescribed form, but was generally worded, and it did not authorize the peon charged with its execution to enter into the accused's house or seize his property, resistance to execution was held to be justifiable, though the accused in the case had exceeded his right by inflicting more injury than was necessary under the circumstances of the case.[1] Similarly, the law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized and the law cannot be circumvented by use of such an expression as "stolen property relevant to the case." Consequently, a Police officer searching a house in execution of such a warrant is not making a legal search, and any resistance offered to him is not subject to the limitation enacted in this section.[2]

880. Public servants have no legal right to commandeer private property for their own use.[3] Where, therefore, a Forest Settlement Officer deputed a peon "to impress fifteen carts for his use" to which he was apparently entitled under the executive orders of Government, contained in a Revenue Handbook, it was held that the executive rules of Government not having the force of law, the action of the peon in impressing the carts was illegal being an offence under section 374 of the Code, and the resistance offered was therefore justifiable.[4] But where a warrant was issued for the arrest of one Dalip under section 114 of the Code of Criminal Procedure which was addressed to one thana, the officer in temporary charge of which endorsed it over to one Nazir Hoossain and others who arrested Dalip, when they were not in possession of their warrant, whereupon they were set upon by his friends who caused hurt to the police and rescued him. It was held that though the arrest of Dalip was not strictly justifiable by law, still it was one, the irregularity of which was covered by this section and the accused had, therefore, no justification in offering the resistance.[5] In this respect the English Law takes a stricter view of official duties. For in England a person is held justified in offering resistance to a public servant making an arrest, if the warrant or writ is not with him ready to be shewn to the person to be arrested, or if it is in any way defective, as if the name of the officer or party is entered without due authority.[6] This was conceded by Edge, C.J., in Dalip's case in which, however, he considered the Indian rule to be divergent and wider, inasmuch as while good faith will not atone for the absence of a warrant in England, good faith without a warrant is in this country said to be sufficient, provided, of course, the officer had the necessary authority.

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(1) *Uma Charan Singh*, 6 C. W. N. 164; *Bahal*, 28 A. 481.

(2) *Bajrangi*, 38 C. 304; *Prankhang*, 17 I. C. (C.) 76; *Ishwar Chandra*, 12 C. W. N. 1016.

(3) *Asa*, (1913) P. L. R. 325, 20 I.C. 992; *Parshadi* v. *Baljit*, 20 I. C. (O.) 233; *Ram Harakh*, 24 I. C. (O.) 172.

(4) *Rakhmaji*, 9 B. 558.

(5) *Dalip*, 18 A. 246; *Pershadi* v. *Baljit* 20 I. C. (O.) 233.

(6) *Chapman*, 12 Cox 4.

881. General Warrants.—A general warrant is a warrant either issued in blank or without particulars sufficient to identify the person sought to be apprehended. The illegality of such warrants has long since been settled in England. All the writers upon the Crown law agree " that there must be an accusation, that the person to be apprehended must be named, and that the officer is not to be left to arrest whom he thinks fit."[1] So where the Secretary of State had issued a warrant for the apprehension of the author, printer and publisher of a paper called *North Briton* generally, without naming or describing them, Lord Mansfield declared the arrest of one Leach as its printer illegal. As he remarked : " It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The Magistrate ought to judge ; and should give certain directions to the officer. This is so, upon reason and convenience."[2] Not only the name of the person to be apprehended but the offence for which he is charged should be clearly stated on the warrant. This was settled in the reign of Charles I who claimed it as his prerogative to commit by his own power, which power was said to devolve in point of execution upon the Secretaty of State.[3] The Parliament disputed the King's authority to commit, either by himself or by his Council, without shewing the cause, and it condemned the practice by a resolution of the House passed on the 25th April 1766. This resolution was passed after the practice of general warrants had been condemned and its illegality declared by three Courts in 1763-1765,[4] in the first of which[5] Pratt, L. C. J. (afterwards Lord Camden), considered the practice as " totally subversive of the liberty of the subject." And when it is said that the warrant must contain the name, what is meant is that the name should be so given as to leave no room for ambiguity. The insertion of a surname without the Christian name, the space therefor being left blank, would not be a sufficient description, though the name of the father be inserted, if it appears that more than one person answered the surname.[6] If the Christian name of the person cannot be ascertained some other description sufficient for identification should be inserted.

882. Where a constable went to execute a warrant directing the arrest of one John H., instead of Richard H., the person really intended and who was supposed to be called John H., which was, however, the name of his father, it was held that the arrest of Richard under the colour of the warrant was unjustifiable,[7] though the complainant had pointed him out as the man who had stolen his mare and against whom he had laid the information; but in such a case it would have been perfectly open to the constable to justify the arrest independently of the warrant. The case would have been again different if the warrant had been a writ of execution, in which case the Sheriff was bound to execute it notwithstanding that the defendant was therein wrongly described.[8]

883. It is thus settled that a warrant which does not contain the name or a sufficiently clear description of the person, who is to be arrested or whose house is to be searched, is wholly illegal.[9] But the question whether such a warrant should also state the cause remains. In the three cases last cited the warrant under the signature of the Secretary of State for the search of papers in the office of the paper *North Briton* had stated no cause, and this fact was animadverted upon by the Judges, who, however, disposed of the cases on the ground that the Secretary of State had no power to issue a general warrant. The question, however, came up for decision in another case in which the plaintiff had been arrested by the Sergeant-at-Arms of the

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(1) 1 Hale P. C., pp. 580, 586 ; 2 Hawk. P. C. 81, 82.

(2) *Leach* v. *Money*, 19 St. Tr. 1000 (1027); *Entick* v. *Carrington*, 19 St. Tr. 1029 (1069) ; *Wilkes* v. *Wood*, 19 St. Tr. (1154).

(3) This authority was said to be based upon the Statute of Westminster, the first of which recites an arrest by the command of the King to be one of those cases that were irreprievable by the common law.—Staundford Pl., fo. 72 G.

(4) *Wilkes* v. *Wood*, (1763) 19 St. Tr. 1154 ; *Leach* v. *Money*, (1765) 19 St. Tr. 1001 ; *Entick* v. *Carrington*, (1765) 19 St. Tr. 1029.

(5) *Wilkes* v. *Wood*, 19 St. Tr. 1154 (1167).

(6) *Hood*, R. & N., C. C. R. 281.

(7) *Hoye* v. *Bush*, 1 M. & G. 775 (780).

(8) *Reeves* v. *Slater*, 7 B. & C. 486 ; *Fisher* v. *Magnay*, 6 Sc. N. R. 588.

(9) *Prankhag*, 17 I. C. (C.) 76 ; but see *Gaman*, (1913) P. R. No. 16, 18 I. C. 894 ; *Mirza Shah Nawaz Khan*, 8 S. L. R. 1.

House of Commons on a warrant which set out no reason for the arrest. It was held by Coleridge, J., that it gave no protection to the officer executing it, but it was held, on appeal[1] that a distinction must be drawn between the warrants issued by the Superior Courts and those issued by the inferior Magistracy, in the former case jurisdiction to issue such warrants would be presumed, in the latter case it must be proved.[2] The Superior Courts, observed Parke, B., wield their jurisdiction by the authority of common law, the Magistrates derive their power by statute by which their authority must appear on the face of the warrants. The rule of jurisdiction consequently, is that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged. If the analogy of these cases be applied to India the High Courts would be considered the Superior Courts within the meaning of the rule, all other Courts being Courts of limited jurisdiction and bound by the terms of their creation, whose warrants must comply with the strict requirements of the law which authorizes their issue.

884. It is equally illegal to issue a general search warrant. In this connection reference may, however, be made to explanation 2, according to which a person is not deprived of his right of private defence against an act done, or attempted to be done by the direction of a public servant, (*a*) unless he knows or has reason to believe that the person doing the act is acting by such direction; or (*b*) unless such person states the authority under which he acts; or (*c*) if he has authority in writing, unless he produces such authority, if demanded. In the case of a person excecuting a warrant, the written authority, if demaded, must be produced. If he is unable to produce the authority, he is disqualified from enforcing it. Supposing, however, that the public servant is able to satisfy this requirement of law, is he then entitled to execute the process, though it may be otherwise illegal? In one case Prinsep and Stephen, JJ., have, indeed, permitted themselves to use language which would seem to countenance this conclusion: "They say, that even supposing that the property attached was not the property of the absconders,[3] the rightful owner had no right of private defence of his property, inasmuch as the evidence shows that the police officer was acting in good faith under colour of his office; and even supposing that the order of attachment might not have been properly made, that would in itself be no sufficient ground. The law, as expressed in s. 99, explanation 2, is clear on this point."[4] If this is intended to suggest that as soon as a person produces his authority, he becomes entitled to the protection of clause 2, whatever may have been the defects in the authority, then the proposition cannot be correct. For as has been before observed, the delegate cannot acquire greater immunity by virtue of his delegation than the delegator. And all that Explanation 2 is intended to lay down is, that a person may have been deputed to execute the orders of a public servant, but no one is bound to take notice of him as such, unless the fact is known or brought to one's notice in the manner stated in the explanation. The combined effect of the second paragraph, and the second explanation is to cast on the person claimimg special protection the burden of proving that the other knew about his status. This is clear from the use of the words "knows or has reason to believe," words which mean that the information must be conveyed to him directly or indirectly unless the fact was already known to him.

Explanation 2.

885. Recourse to Authorities.—The third clause of this section places a noticeable restriction upon a person's right to private defence. It lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. A large number of cases have clustered round the words "in which there is time," words which are perhaps ambiguous and misleading. In one sense

Paragraph 3.

(1) *Howard* v. *Gossett*, 10 Q. B. 377; 14 L. J. (Q. B.) 375.

(2) *Howard* v. *Gossett*, 10 Q. B. 452.

(3) Whose property alone the officers wer entitled to attach. *See* case *supra*.

(4) *Bhai Lal Chowdhury*, 29 C. 417.

there is always time to have recourse to the protection of the public authorities, the only danger is that the offender may in the meantime escape, or the property lost may never be found. But as the object of private defence is both to protect person and recover property, it follows that any abstinence which defeats that object could not have been sanctioned by law. It may then be safely asserted that the clause has no application to a case in which the authorities are available, but not availed of, because of the delay and the consequent risk of further harm thereby apprehended. At the same time cases are conceivable in which there was manifestly time to have recourse to the authorities. Such would be the case where the opposite party was preparing to fight, or where forebodings of a coming struggle were otherwise received. In such case the proper procedure would be not to oppose force by force, but to report the matter to the guardians of peace, whose duty it is then to prevent a disturbance. This may appear to be a curtailment of the right of private defence, but it is well justified. As Holloway, J., observed quoting the observations of Pollock, C. B.[1]: "The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country abounding insects inflamed with the bitterness engendered by small theological or ceremonial differences." Quoting these observations Rampini, J., in another case remarked: "The right of self-help when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise, would be to encourage and put a premium on offences of rioting."[2]

886. It comes to simply this, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner. This is possible where the combatants are aware of the preparation made by each other. But a preparation to defend one's possession is not necessarily a preparation to attack another. And the right of a person to collect an armed force would then seem to depend (*i*) upon his prior peaceful possession, (*ii*) upon the necessity of defending it by force, and (*iii*) upon the reasonable expectation of an aggression. There is nothing in section 141 of the Code to render such an assembly unlawful. On the other hand, the assembly of five or more persons, the common object of which is by means of criminal force *to take or obtain* possession of any property is by that section declared to be unlawful,[3] from which it may be inferred that while the employment of force *to take* possession is undoubtedly unlawful, *the maintenance* of one's possession by use of force is not necessarily unlawful. But this is not the view on which the Courts here are agreed, though probably some of the cases may be distinguished on this ground. There are some cases in which the Courts have clearly laid down that a person in possession has undeniably the right of self-defence against another attempting to oust him,[4] but a different note has been sounded in other cases,[5] in which the view taken is that while one has cer-

(1) *Hyde* v. *Graham*, 1 H. & C.

(2) *Kabirruddin*, 35 C. 368, following *per* Holloway, J., in 7 M. H. C. R. (App.) 35; *Jairam Mahton*, 35 C. 103.

(3) S. 141, "*fourth*"

(4) *Sohun*, 2 W. R. 59; *Mitto Singh*, 3 W. R. 41; *Sachee*, 7 W. R. 112; *Tulsee Singh*, 10 W. R. 64; *Birjoo Singh* v. *Khub Lall*, 10 W. R. 66; *Shunkur Singh* v. *Burmah Mahto*, 23 W. R. 25; *Ganauri Lall*, 16 C. 206; *Mahesh Sheikh*, 21 C. 392; *Pachkauri*, 24 C. 686; *Anant Pandit* v. *Madhusudan*, 26 C. 574; *Poresh Nath*, 33 C. 295; *Bepin Behari* v. *Pranakul*, 11 C. W. N. 176: *Ambika Lal* 35 C. 443; *Baij Kualee*, 36 C. 297; *Silajit*, 36 C. 365; *Faleh Singh*, 41 C. 43; *Narsing*, 14 B. 441; *Pulimuthu*, 24 M. 124; *Gouri Shankar*, 41 I. C. (L. B.) 830; *Panthala*, 24 I. C. (M.) 327, F. B.; *Penumetza*, 44 I. C. (M.) 40; *Fouzdar*, (1918) Pat. 254; *Sundar Baksh Singh*, (1918) Pat. 359, *Lashkari Khan*, 8 S. L. R. 343, 29 I. C. 664.

(5) *Nawabdee*, (1864) W. R. 11; *Jeolalli*, 7 W. R. 34; *Manu Singh*, 7 W. R. 103; *Kalee Beparee*, 1 C. L. R. 521; *Kabiruddin*, 7 C. L. J. 359; *Prag Dat*, 20 A. 459; *Kaliji*, 24 A. 143; *Kadhu*, 24 A. 298.

tainly the right of repelling an unpremeditated attack, one has no right to prepare for a fight, whether it be in a righteous cause or otherwise. This view is justified on the ground that the country would be "deluged with blood" [1] if an offender, who could get relief by recourse to law, were allowed to take the law into his own hands.[2] The other view is that a person in possession is entitled to defend his possession against all comers, and he is not bound to take the risk of referring his case to the police.

887. So far as this clause is concerned, the question really turns upon the meaning to be assigned to the words when "*there is time*" to have recourse to the authorities. Now it has been held that this clause must be read with the first paragraph of section 105;[3] consequently the right of private defence of proprety commences when a reasonable apprehension of danger of the property commences. "Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought generally to be based on some information of a definite kind, as to the time and place of the danger actually threatened."[4] Where therefore the owner received information that the accused's party were coming next day to plough up the land, he was not thereupon bound to go and lay information to the police. And when in the morning the raid was made, his first duty was to go to his field and not run for the police, unless he passed them on his way. For if he were to go to the police, it may be that the mischief threatened to his property may, in the meantime, be completed.[5] This view, the soundness of which has never been questioned, shows when a person is said to have time to have recourse to the authorities, he is not to carry idle gossip to them; if he does so he runs the risk of being himself prosecuted for making an accusation, the truth of which he may be unable to establish. His information must be definite and precise, and it is then his duty to lay his case before the authorities, before entrusting his defence to his strong right arm. For when it is said that a person having time to have recourse to the authorities has no right of private defence, what is meant is that having the two alternatives equally good, the owner must choose the submission of his case to the authorities rather than enter the lists with his adversary. He is not bound to have recourse to the authorities at the sacrifice of his interest. He is not bound to abandon his property to the mercy of marauders, with a view to making application to the police for assistance.[6]

888. So where the owner found some hostile claimants taking away his saltpetre, he was held justified in reclaiming the property by force, if the circumstances were such that the wrong-doers would have successfully made off with the property if the owner had, in the meantime, gone to report to the police.[7] So where a person is assaulted, he is not bound to escape further injury by resorting to less violence or run away to have recourse to the protection of the public authorities.[8] Indeed, the right of private defence would have been a mockery if the law were otherwise, for the right of private defence is founded on the doctrine of self-help, and its underlying principle is to allow people to help themselves. Moreover, the law could not be invoked to oppress persons, who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exert the privilege of private defence as provided and restricted by the law, or submit to a forcible invasion of a right of person or property in case in which, under section 97, the law does not require any such submission.[9]

889. The question whether a person had, in a given case, time to have recourse to the public authorities, is naturally a question of fact dependent upon

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(1) *Per* Holloway, J., in 7 M. H. C. R. (App.) 35 (36).

(2) *Per* Holloway, J., cited *per* Rampini, J., in *Kabiruddin*, 7 C. L. J. 359 (366).

(3) *Narsingh Fathubai*, 14 B. 441.

(4) *Narsing Fathubai*, 14 B. 441.

(5) *Narsing Fathubai*, 14 B. 441; *Chandulla Sheikh*, 22 I. C. (C.) 993; *Penumetsa*, 44 I. C. (M.) 40.

(6) *Anumantan*, (1881) Weir, 144; *Shamsher Khan*, (1896) A. W. N. 170.

(7) *Shamsher Khan*, (1896) A. W. N. 170; *Chandulla Sheikh*, 22 I. C. (C.) 993.

(8) *Hafiz Ali*, (1907) O. C. 196, 6 Cr. L. J. 271; *Alingal Kunhinayan*, 28 M. 454; *Nga Hla Tun U*, (1896) P. L. J. B. 219.

(9) *Nga Hla Tun U*, (1896) P. L. J.B. 219.

(*i*) the antecedent knowledge of the attack; (*ii*) its precision and reliability; (*iii*) the opportunity it gave to report to the authorities; which again depends upon (*iv*) the proximity of the police station or other place to which a report might be sent. These questions, of course, do not arise where the attack is sudden and unpremeditated; or where there are no facilities for having recourse to the authorities; or the recourse being had, there is no succour, or it is delayed.

890. Commencement of the Right.—The next clause deals with the *quantum* of harm that may be caused in self-defence. It will be seen that the right of private defence of person[1] and property[2] commences as soon as a reasonable apprehension of danger to person or property arises. A person is not therefore bound to wait for the first blow before he strikes his adversary, but that does not justify him in attacking him in anticipation. "If *A* fears upon just grounds that *B* intends to kill him, and is assured that he is provided with weapons and lies in wait so to do, yet without an actual assault by *B* upon *A* or upon his house to commit that act, *A* may not kill *B* by way of prevention. For the law hath provided a security for them by flight, and recourse to the civil magistrate for protection."[3] But if in such a case *B* trespass into *A's* house to kill him, or raise a blow to smite him, *A's* right of private defence commences, and he is then under no restraint other than here prescribed. But in considering what was a harm necessary to inflict for the purpose of defence, regard must be had to the position and circumstance of the parties, their comparative strength and the force and violence of the attack, and the consequent angry feelings aroused, the danger apprehended, and the difficulty of adjusting the harm caused to the danger threatened.[4] A man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little farther than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.[5]

Paragraph 4.

891. That the person attacked should naturally exaggerate the danger is natural, that he should deal with him on that assumption is, therefore, not unreasonble. Law presumes every man to know law, but it does not presume every man to be perfect. In judging of the necessity of harm it makes just allowance for the sentiments of a person placed in a situation of peril and has then no time to think, whose blood is hot, and whose sole object then is to strike one decisive blow so as to ward off the threatened mischief. But the right is, nevertheless, a right of defence, and it must not be converted into one of reprisal. Nor is it a primitive right. For the hurt caused in defence does not exonerate the offender from the sentence of law, nor does the fact that he has already suffered harm entitle him even to a consideration. On the other hand, if the person entitled to inflict harm in private defence, inflicts more harm than was necessary, the Court may make an allowance for the fact and punish him only for the excessive harm.[6] Such harm, though not justifiable, would probably be punishable as a harm caused on provocation.[7] So where two owners of land found some trespassers threatening their possession, whereupon they ran home and brought swords with which they slightly wounded two of the trespassers

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(1) S. 102.
(2) S. 105.
(3) 1 Hale P. C. 52.
(4) *Marudochela Gounden*, 1931 M. W. N. 646.
(5) *Alingal Kunhinayan*, 28 M. 454; *Bhut Nath Dome*, 13 C. W. N. 1180; 3 I. C. (C.) 867; *Pachai Gownden*, 26 I. C. (M.) 158; *Radhey*, (1923) A. 357.
(6) Cf. *per* Jackson, J., in *Sohun*, 2 W. R., 59; *Banku Behari*, 20 I. C. (C.) 602.
(7) Cf. *per* Jackson, J., in *Sohun*, 2 W. R., p. 60.

in the land, it was held that the use of swords was in the circumstances unjustifiable, though having regard to the provocation received, and the right of private defence in the prisoners, they were entitled to a lenient sentence.

892. But a person has no right to kill persons found upon one's land. They may be trespassers, or thieves, or even robbers,[1] but criminal trespass and theft do not justify homicide unless there was resistance and use of violence. As Alderson, B., said: "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited and gives another a kick, it is an unjustifiable act."[2] So Holroyd, J., said in another case: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's clothes, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorized to fire a pistol on every intrusion or invasion of his house, he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity; but the making of an attack upon a dwelling and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle; and, therefore, in the eye of law, it is equivalent to an assault; but no words or signs are equivalent to an assault, nor will they authorize an assault in return."[3] So where two persons learnt that their land was being ploughed up by eight or ten men and thereupon they rushed out with spears, and who, after a few words of remonstrance, killed two of the trespassers, wounding a third, it appeared that the latter were unarmed and had offered no resistance, the Court held that the use of unprovoked violence resulting in death was wholly out of all proportion to the injury done or threatened, and that the act of the accused was therefore murder.[4] The decision in this case turned upon the fact that the trespassers were unarmed and offered no resistance.

893. The case would, however, be different, where the trespasser attacked the owner with a spear, whereupon the owner struck him a blow with a *lathi* which killed him. As Markby, J., remarked: "If the prisoner was justified in using it at all, surely he is not to be expected on such an occasion to measure out with any very great nicety the force of his blow."[5] In another case the zemindar and his ryots were on bad terms. The former had employed a number of up-country men to defend his cutcherry threatened by the ryots. One day a pony of Hira Singh, one of such men of the zemindar's having strayed into the ryots' crops, the latter making this a pretext, assembled in large numbers and pursued him, so that he had to beat a retreat towards the cutcherry, where he was surrounded by the ryots whereupon he shouted for help, which brought to his assistance eight men who were, however, beaten and driven back. The ryots had actually entered the cutcherry when the prisoner rushed into an inner apartment, brought out a loaded gun and fired off both barrels, killing one man, and wounding others. It was held that the prisoner's act was justifiable, as having regard to the attitude of the ryots he was justified in believing that they might cause death or grievous hurt to him or his companions.[6] But in this case there was a reasonable apprehension of danger, and on that apprehension arising, the firing of a gun was held to be justifiable. But if in such a case the gun had been fired at, say, from the distance of five and twenty yards before the ryots had entered the cutcherry or menaced its peace, the conduct of the prisoner could not have been justified.[7]

894. Where the deceased, a sturdy dissolute young man, quarrelled with the accused, his uncle and the latter's son, and after an exchange of abuse snatched up a heavy *jatu* (side post of a cart), three feet long, and aimed a blow with it at his uncle and possibly another at his uncle's son, whereupon the latter seized a second *jatu*, two feet long, and struck his assailant two blows on the head in consequence

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(1) *Ram Prosad*, (1919) Pat. 262.
(2) *Wild's case*, 2 Lew, 214; *Jhalku Tewari*, 21 I. C. (C.) 382.
(3) *Meade's case*, 1 Lew, 184.
(4) *Gourchand Chong*, 18 W. R. 19.
(5) *Moizudin*, 11 W. R. 41 (42).
(6) *Ram Lall Singh*, 22 W. R. 51.
(7) *Hussainuddy*, 17 W. R. 46.

of which he died, it was held that there was an excuse for the right of private defence, and that the accused was entitled to be acquitted.[1] So was the accused, a policeman, who was conveying a prisoner, was mobbed by a number of camel-drivers whose camels were trespassing on the canal banks belonging to Government, discharged his gun either accidentally, or without taking careful aim, wounding one of his assailants, it was held that the accused was protected by this section.[2] So while it is a legitimate exercise of the right of private defence to seize a thief, it is not a necessary consequence of that right that he should be beaten to death, unless the thief offers resistance or uses force, in which case even the causing of death is justifiable. But where death was involuntarily caused, as in holding down the thief by the throat in consequence of which he died of suffocation, the Court regarded the death as caused in the legitimate exercise of the right, for which the person causing it could not be held liable.[3] But the case would have been naturally different, if in such a case the prisoner had strangled the thief after he had been secured and was helpless.[4] So where a person found a starved old woman cutting his rice, and thereupon he brutally assaulted her, fracturing her shoulder-blade and wrists and causing two contused wounds on the skull, from the effects of which she immediately died, it was held that the injuries inflicted were far beyond what was justifiable under the circumstances, and that the act of the prisoner was nothing short of murder.[5]

895. Excessive Force.—The case is, however, different where a person, whose property had been frequently stolen, resolves to lie in wait with a companion for the thief. At midnight a thief appeared in the field and thereupon the prisoner struck him a heavy blow with his *lathi* of which he died, the question was whether the right of private defence had been exceeded. Norman, J., held that it had not been. "No man," he observed, finding a plunderer in his field by night in a place, where others may be within call, is to be expected to deal his blows very gently." The prisoner was acquitted.[6] What difference is there between this case and the last, it may be asked. But the difference is considerable. In the latter case the thief hit was a man and the blow struck was single, whereas in the last case the starved woman could not possibly have offered any resistance, and there was no reason to suppose that she had other companions. This distinction accounts for the different view taken in a similar case. The prisoner had his grain stolen on previous occasions. He was therefore watching his field on a dark night. He saw the deceased cutting his corn, and so chased him. The deceased ran his head against a tree and fell. The prisoner thereupon commenced to hit him recklessly with a fair-sized stick and fractured his skull in two places causing death. It was held that the injury caused was quite unnecessary after the deceased was helpless, but that, inasmuch as it was provoked by the previous thefts from which the prisoner had suffered, he was entitled to some leniency. The accused who was trying to smuggle opium was entrapped by the Excise Inspector assisted by his peon. The Inspector ordered the accused to stop and fired two shots to frighten him. The accused thereupon turned round and stabbed the Inspector with his sword. He was then arrested and while the peon was disarming him the accused wounded him also with the sword. He was arraigned for wounding the two but the Court acquitted him of causing wound to the Inspector on the ground that the shots fired at him might reasonably have caused the apprehension of death or of grievous hurt in the accused who was, however, guilty of wounding the peon who was justified in arresting him.[7] The accused had been to demand his share of the crops from the deceased who aimed a violent blow with his *dang* at his head but it fell on his shoulder, whereupon the accused struck back with his *wahola* which he happened to carry with him. It killed the assailant. He was held protected by this exception.[8]

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(1) *Puran*, (1904) P. L. R. 49.
(2) *Mukerji*, (1901), P. R. No. 5.
(3) *Kurim Bux*, 2 W. R. 12.
(4) *Dhununjai*, 14 W. R. 68.
(5) *Gohool Bowree*, 5 W. R. 33.
(6) *Mokee*, 12 W. R. 15.
(7) *Nga Nan Da*, 54 I. C. (U. B.) 577.
(8) *Mhd. Akbar*, 72 I. C. (L.) 520; cf *Pachai Gounden*, 26 I. C. (M.) 158.

896. Unjustifiable Force.—No man has a right to kill a thief any more than a trespasser (§ 892). His right extends to protection of his person and the recovery of his property and no force not necessary for that purpose is justifiable. So where the owner found a thief committing house-breaking by night in his house, who upon being detected was endeavouring to escape, (but which was not likely), upon which the accused sent for a *kodalee* with the express object of killing him and on the *kodalee* being brought killed him on the spot, he was convicted but his sentence was mitigated by the Local Government.[1] It will be observed that in this case the killing was on purpose, and done with a weapon not ready to hand or seized by the prisoner, and used in the heat of sudden passion. The thief was killed while lying prostrate on the ground held by the accused who had other assistance available to prevent his escape. All these facts clearly showed that the killing was wholly unnecessary to prevent his escape. The accused was therefore technically guilty of murder in cold blood, but inasmuch as his object in killing him was probably to prevent his escape and inasmuch as his act was done in the undoubted belief that the accused had that right, the Court, while convicting the accused, commended these considerations to the mercy of Government who gave effect to them by commuting the sentence passed to one year's rigorous imprisonment.[2] Another case illustrates the wording of the opposite rule. There a thief was caught house-breaking by night with half his body and his head through the wall of a house occupied by none but women, except the prisoner and his young son who was an idiot. The prisoner awoke and seizing a pole-axe which was handy, seized the deceased by the hair, struck him five times on the neck, and in fact, nearly beheaded him. It was held that the accused had exceeded the right of private defence, and that he was therefore guilty of culpable homicide, as his case fell within Exception 2, section 300 of the Code ; but having regard to the fact that the accused had not deliberately chosen the dangerous weapon, that he was unassisted, and that the alarm and excitement produced by his determination to defend his house and his family to the very death, might have, under all the circumstances, led any one to use greater violence than was absolutely necessary for defence, the Court felt justified in passing the light sentence of four months's imprisonment.[3]

897. But where the correction was not only excessive but cruel, mitigation was considered as out of question. Where, for instance, a parker finding a boy stealing wood in his master's ground, beat and tied him to a horse's tail, and the horse having taken fright ran away dragging the boy till his shoulder was broken, of which he died, it was held that the offence was murder, for it was not only an illegal, but a deliberate and dangerous act, and the correction was both excessive and savoured of cruelty.[4] The plea of provocation will not avail where express malice be proved, as where a person declares that he will take his life, in which case death will be attributed to his previous intention and not to the passion that the provocation may have suddenly aroused.[5] In the result he was convicted of culpable homicide and sentenced to one year's rigorous imprisonment.[6] It would seem that the mere fact that a thief is armed is not sufficient to cause a reasonable apprehension of danger, so as to let in the right of private defence. The accused at night found a man in his field stealing melons. He challenged him, but the man made no answer but ran away, whereupon the accused pursued him into a deserted village, and coming up with him, first struck him a blow on the cheek with his sword, and when the man suddenly turned round, he struck him another blow, which proved fatal. The accused believed that the deceased was armed with a knife and had turned round to stab him, but it was held that the supposition of the accused that the deceased was armed with a knife was insufficient to give rise to any right of private defence in the

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(1) *Durwan Geer*, 5 W. R. 73.
(2) *Durwan Geer*, 5 W. R. 73 (75) *note*.
(3) *Fukeera*, 6 W. R. 50 ; *Kunja Bhunia*, 39 C. 896 ; *Nga Tun Nyein*, 38 I. C. (L. B.) 316.
(4) *Holloway*, Cro. Car. 131 ; 1 Hawk P. C. c. 39, s. 42 ; 1 Hale, P. C. 453 ; 1 East P. C., p. 237 ; Fost. 292.
(5) 1 East. P. C., p. 224 ; *see* s. 302, Comm.
(6) *Bag*, (1902) P. R. No. 29 ; distinguishing *Mokee*, 12 W. R. 15.

absence of any threat or attempt to draw the knife for the purpose of attacking the accused with it. That as the accused had no stolen property in his possession, the right of private defence for recovery of property did not continue until the wounds were inflicted. The accused's act therefore amounted to murder.[1]

898. So where a Magistrate erroneously ordered the attachment of paddy purporting to act under section 145 of the Criminal Procedure Code, and the Police Officer intimated to the accused that, in taking charge of the crops, they were only carrying out the order of the Magistrate, whereupon the accused pushed and jostled the constables brandishing their sticks, and then confined them for 19 hours in a room without food and drink, it was held that the action of the petitioners was violently aggressive, and not merely self-defensive, and that they were not therefore protected.[2]

899. Limits of the Rule.—There can be no right of private defence where there is no violation of a legal right. Where a girl who had been previously betrothed to one *A* was afterwards betrothed to another *B*, whereupon *A* eloped with the girl accompanied by two servants. The party were, however, intercepted by *C*, a party of the girl's father, who seized *A's* horse to prevent his riding away with the girl, whereupon *A* and his servants attacked and struck *C*. It was held that *A* had no right to attack *C*, and that the mere fact that he apprehended a general attack upon his party by *C* did not let in that right.[3] In another case the proved facts of the case disclosed that the accused was in intrigue with one A's wife, who one night left her husband to visit the accused, who was then sleeping 80 paces distant from *A's* lodging whereupon *A* understood the purpose of her visit and followed her with a hatchet with which he attacked and wounded the accused, who thereupon stabbed *A* with a knife in the heart, instantly killing him, for which he was prosecuted for murder. In the original Court he denied his intimacy with *A's* wife, and all knowledge of the transaction, but on the facts being found against him, he contended on appeal, that even if the facts be found to have been as alleged, his act was justifiable homicide in the exercise of the right of private defence, but it was held that the accused had failed to establish any circumstance establishing the necessity of killing *A* which it was upon him to do, and that the plea could not be availed of.[4] So where the complainant's party had seized the accused's cattle after they had left their field which they had no right to do, whereupon the accused resisted, killing one of them, it was held that the accused party did not constitute an unlawful assembly, and only the person who had inflicted the mortal wound was liable for it.[5]

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated :—

When the right of private defence of the body extends to causing death.

First.—**Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault ;**

Secondly.—**Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault ;**

Thirdly.—**An assault with the intention of committing rape ;**

Fourthly.—**An assault with the intention of gratifying unnatural lust ;**

Fifthly.—**An assault with the intention of kidnapping or abducting ;**

Sixthly.—**An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.**

[***Voluntary***—s. 39. ***Grievous hurt***—s. 320. ***Wrongfully confining***—s. 340.
Kidnapping—s. 359. ***Rape***—s. 375. ***Unnatural lust***—s. 377.]

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(1) *Gulbadan*, (1885) P. R. No. 25,
(2) *Bhola Mahto*, 9 C. W. N. 125 (127) ; *Shurfooddin*, 13 W. R. 64.
(3) *Gurdeit Singh*, (1872) P. R. No. 12.
(4) *Hakim* (1884) P. R. No. 41.
(5) *Ahmad*, L. L. J. 245.

900. Analogous Law.—This section is generally in accordance with English Law under which the offences named in the section have been held to offer sufficiently grave provocation so as to justify homicide.

901. Principle.—Homicide is justifiable only upon the plea of necessity, and such necessity only arises in the prevention of forcible and atrocious crimes. This section lays down what is the law in England that a person upon whom a felonious attack is first made is not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured and when the apprehension of danger has ceased, such killing will be murder: though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter on account of the high provocation.[1] This is the rule here enacted. Under the last section two things curtail the defender's right, (*i*) facility of recourse to the public authorities, and (*ii*) the rule that the harm caused should be preventive and not punitive. These two rules still apply to this section, as do also the other two restrictions specially made in favour of public servants or others acting under their direction (§ 878). Subject, then, to these four restrictions, a person may even take human life to save human life or liberty or dishonour of the kind which is deemed even as a greater calamity than death.

902. Meaning of Words.—"*Voluntary causing of death,*" which may moreover be intentional. "*Or of any other harm to the assailant*": The word "assailant" would here include also his confederates. If a man is surrounded by two brigands, one of whom deals him a deadly blow and then runs away, leaving the other to finish him, could it be said that his right was only against him who had hit him and run away? "*If the offence.....such an assault*": There must be *at least* an assault before the commencement of the right under this section. "*Under circumstances which may cause him to apprehend,*" which will depend upon the means of his knowledge, and the manner and nature of his captivity.

903. Justifiable Homicides.—Homicide in self-defence is justifiable under this section subject only to the restrictions contained in the last section. Consequently it may be justifiable irrespective of the fact that the party killing was guilty of an assault, or was engaged in an unlawful contest, provided (*i*) that the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm; (*ii*) that he declined further conflict, and quitted and retreated from it, so far as was practicable with safety; (*iii*) that he killed the assailant because he had reasonable cause for believing it to be necessary to do so, in order to avoid immediate death,[2] or the other offences here enumerated. A person who apprehends that his life is in danger or his body in risk of grievous hurt, is entitled to defend it by killing his assailant, but in order to justify his act the apprehension must have been reasonable, and the violence used not more than what was necessary for self-defence.[3] Nor should it be used towards persons unconnected with the assault, actual or threatened.[4]

904. So where the deceased *C*, who was going on a cart, met one *A*, whom he asked, "Is that you," and on his replying in the affirmative he commenced to abuse him and kicked him. The latter (*A*) then called out to one *B*, who ran up with a bottle in hand with which he struck *C*. The latter (*C*) then slashed *A* with his *dah* after which he turned on *B* and slashed at him with it. The injury caused to *A* was slight, but the blow given to *B* cut off three of his fingers. *A* thereupon took out a knife which he carried and stabbed *C* in a vital part causing his death, the question was how far his act was justifiable. It was held that although *C* had turned upon *B*, *A* had the right to cause his death if he reasonably apprehended at that time that *B's* life was in peril owing to the assault by *C*; that in the circumstances, *A* might reasonably apprehend that *C's* conduct indicated an intention on his part to continue using the *dah* at either of them regardless of the consequences. Indeed,

(1) Dig. Ch. XV, s. 2, Art. 21; First Report, s. 157.
(2) Tenth Part, Rep., p. 35.
(3) *Kuppa Somier*, 28 M. 454.
(4) *Narain Das*, 3 L. 144.

if *C* had used his *dah* on *B* once more, there was the probability of his losing his life, and that under the circumstances *A's* act in stabbing *C* was protected by this section.[1]

905. So where a person armed with a heavy weapon rushed at the accused showing every indication of assaulting him, whereupon the latter used his spear as the deceased was in the very act of delivering a blow to him, and which killed him, it was held that, though the accused could have run away, still he was not bound to do so, and that as he reasonably apprehended grievous hurt, he was entitled to use his spear even to the extent of killing his assailant.[2] The same view was taken in another case in which the deceased, a sturdy and dissolute young man, upon a quarrel with the accused who was his uncle and his son, seized the side-post of a cart and raised it to strike the former, whereupon his son seized another side-post two feet long and struck the deceased two blows on the head which killed him; it was held that, as the blow aimed at him by the deceased would certainly have caused grievous hurt and probably death, the accused was within his right in hitting the deceased in the manner he did.[3]

906. In these cases, it will be observed, that the weapons used were such as would have certainly caused grievous hurt, if not death, and where it is so, the question is comparatively a simple one, for all that the accused has then to show is that he had no time to have recourse to the authorities and that the harm caused was under the circumstances not excessive. There may, however, be cases in which it may not be easy to establish that the accused had reasonable apprehension of suffering grievous hurt, as that term is used to denote hurt " which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits."[4] Now, how is it always possible for a person to say whether the force of a blow will be such as will disable him for twenty days? Indeed, as Mr. Pyne, a Judge of the Sudder Court, commenting upon this clause remarked that " scarcely any assault could be committed wherein the assailed may not justify an act of homicide under the eighth definiton of the offence."[5] It may, however, be added that though the accused may justify his act, it will be for the Court to see if the violence threatened was under the circumstances sufficient to have caused in the mind of the accused a reasonable apprehension of greivous injury. As Straight, J., told the jury in the case of a sergeant who had shot a native, and then pleaded self-defence "that they had to consider two questions, firstly, whether he had a reasonable apprehension that his life or limb was in danger, and secondly, whether the force used was reasonable and such as he believed to be necessary for the purpose of self-defence."[6]

907. The reports furnish several instances of justifiable homicides. In one case, an armed gang set upon the two accused announcing their intention to kill them and shouted: " Din, Din." The accused bolted, but were pursued into the dark kitchen of their friend where they had hidden themselves. The mob broke into the house and two of them made their way with torches to the kitchen where they attacked the accused. The latter delivered a counter-attack, whereuopn one of their assailants fled but the other was hacked to death. Their act was held well justified.[7] A person is not bound to abstain from performing a lawful act merely because he is aware that his action would result in a riot. If he is right, woe betide the rioters. The accused were digging a trench. They knew it would provoke a quarrel, which it did. A party attacked the diggers who, being reinforced by their partizans, a free fight ensued in which one of their assailants was killed. One of the accused was himself grievously hurt. They were acquitted.[8]

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(1) *Nga Kyaw Dun*, (1903) 10 Bur. L. R. 99; *Bermu Shetty*, 94 I. C. (M.) 361.
(2) *Nga Kyaw Zan*, (1903) 10 Bur. L. R. 191; *Chheda*, (1933) O. 380.
(3) *Puran*, (1904) 6 P. L. R. No. 49.
(4) S. 320, " *Eighthly*."
(5) First Report, s. 151.
(6) *Whittaker*, (1882) A. W. N. 172 (173); s. 300, excep. 2.
(7) *Gurlingappa* (1921) B. 335; *Mohandi*, (1930) L. 93.
(8) *Bega*, (1926) P. L. R. 105, 37 I. C. 491. (The main facts are stated to be given in another connected case which is not reported.)

908. What is a Reasonable Danger.—The question whether in the circumstances of a given case the accused could have had *reasonable* grounds for apprehending grievous bodily injury is then a question of fact to be decided upon the facts of each case. As the illustration appended to section 300, exception 2, shows, the source of apprehension is not only the kind of weapon used, but the manner of using it. An ordinary piece of rope may be used to cause death, but it depends upon the manner in which it is used. So in a case where the prisoner who had strangled the deceased with a rope said: "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down, and kicked him, and then I put a rope round his neck and dragged him into the ditch." Patterson, J., told the jury, "if you believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to man-slaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is murder, the act is so wilful and deliberate that nothing can justify it."[1] So again, the relative strength of the combatants is not immaterial. For instance, where a strong man is opposing a weak man, the former may have only a small stick, but the injury it is capable of causing may be very great. Such was the case of a father whose son had been beaten by another boy, and who, thereupon, ran three-quarters of a mile with a small rod,[2] with which he dealt the boy a blow on the head of which he died. It was held to be manslaughter and but for the provocation, it would have been murder.[3]

909. Again the section deals with an exception to the ordinary liability for crime. It must, therefore, be clearly established that the assault sought to be justified was really justifiable under the section; so that it is not enough that an attack had been made upon the accused; he must shew by the nature of the attack, the weapon used, the manner in which it was used, and other circumstances that his case was such that he had reason to apprehend the harm contempleted by the section. The fact that there *was* in reality such a harm would, of course, strengthen his case, but it is not necessary. For all that accused is called upon to show is, that he *believed* in its existence, and if the Court is satisfied that he had a reasonable cause for it, he will be held to have established his justification whatever may have been the real facts. Such was the case of one Levet who had killed *F F* under the following circumstances. *F F* was a female help engaged by Levet's servant, who opened the door of the house at midnight to let her out. Levet heard the noise and suspecting that thieves had got in, took up a drawn sword and went down in search of them. Hearing Levet's steps, the servant hid *F F* in the buttery, where Levet's wife espied her and, mistaking her to be a thief, cried out to her husband; whereupon Levet rushed in that dierction, thrusting before him with his sword, and so doing mortally wounded *F F*. It was held to be a misadventure.[4] This finding was justified by Lord Hale on the ground that the ignorance of facts excuses the party from all sorts of blame,[5] and this is also the rule elesewhere enacted in the Code.[6] Where a person pleads the right of self-defence, it is not then necessary to establish the fact conclusively; all that need to be proved is, that he had grounds for believing that violence was attempted and that belief was under the circumstances such as any rational man may have entertained.[7] If he proves this, he is entitled to an acquittal, though it may be shown that he was wholly mistaken in his belief. In short, his belief must be *bona fide* though it may have been wholly mistaken.

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(1) *Shaw*, 6 C. & P. 372.

(2) Godbolt's Rep. 182; other reporters call it a cudgel.

(3) *Rowley's case*, 12 Rep., 87. This case has been much animadverted on. *See* Fost. Cr. L. 294, Cro. *Jac.* 296; *Walsh*, 11 Cox C. C. 336.

(4) *Levet's case*, Cro. Car., 538; 1 Hale. P. C. 42, 454.

(5) 1 Hale, P. C. 42; 1 East P. C. pp. 274; 275; 1 Hawk P. C., c. 28, s. 27.

(6) Ss. 76, 79.

(7) *Casorati*, (1879) P. R. No. 36.

101. If the offence be not of any of the descriptions enumerated in the last preceding section the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

When such right extends to causing any harm other than death.

910. Principle.—The result stated in this section naturally follows from the provisions of the last section. If the harm be of the serious description described in the last section, the right extends to the causing of death, otherwise the harm caused may be any harm short of death. But in causing such harm the restrictions laid down in section 99 still apply. Indeed, they are the restrictions which underlie the whole law of self-defence.

911. The offences which justify the causing of harm short of death are only the offences mentioned in section 97. There is no right of private defence against any offence under the Code[1] much less against an act which is an offence only under any special or local law. But this section was held to justify the intentional firing of a gun by a public servant who had been assaulted while making a lawful arrest, which wounded one of the rescuers.[2] Indeed, any hurt short of death caused in self-defence would be justifiable under this section.

912. Excessive Harm.—Law views with commiseration the plight ot a person who has exceeded his right of private defence. If it has resulted in death his offence is reduced to one of culpable homicide.[3] Where he is one of five or more, the fact that he has exceeded his right does not convert him into a member of an unlawful assembly, though he would be individually liable for his excess.[4] The case would, however, be different, if the party had initially exceeded that right, or in a case where the exercise of that right was mere pretence.[5] In another case, the accused, a person of education and wealth, living in a town where medical attendance could easily be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in an unnecessarily cruel way, and apparently would have continued to confine him indefinitely if the District Judge had not interfered. He was held justly convicted under s. 344 and he could not be exculpated under this section or section 92 because he had not acted with due care and attention. In other words, his act lacked good faith.[6] In one case the deceased descended upon the accused, with a pitch fork in his hand, and commenced to abuse his sister whose son attacked him, whereupon the accused struck the deceased on the head, of which he died. The blow was unpremeditated and held to be the result of sudden provocation. He was held to have chastised the deceased with undue severity and was, therefore, convicted of grievous hurt.[7]

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

Commencement and continuance of the right of private defence of the body.

913. Analogous Law.—This section defines the commencement and continuance of the right of private defence against personal injuries, as section 105 describes the right in protection of property. The two sections are complementary to one another, and have been unnecessarily placed apart. They are both in harmony with the English Law, under which a man may repel force by force in defence of his person, habitation or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a known felony upon either. In these cases,

(1) S. 40, cl. 1.
(2) *Mukerji* (1901) P. R. No. 5.
(3) S. 300, excep. 2; *Jaipal Kunbi*, (1922) N. 121; *Nga Tun Nyein*, 38 I. C. (Bur.) 316.
(4) *Penumetsa*, 44, I. C. (M.) 40.
(5) *Nareshi Singh*, 2 Pat. 595.
(6) *Shimbha* 21 A. L. J. 391; (1923) A. 546.
(7) *Siryan* (*Mt.*) 34 I. C. (L.) 990.

he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger ; and if, in a conflict between them, he happens to kill, such killing is justifiable.[1] But it has been held that this rule does not apply to any crime unaccompanied with force, as picking of pockets.[2] It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt ; so that if *A* make an attack upon *B*, it must plainly appear by the circumstances of the case that the life of *B* is in imminent danger ; otherwise, his killing the assailant will not be a justifiable self-defence.[3]

914. The word "offence" has been used here as meaning an act punishable under the Code.[4]

915. Principle.—On the principle that prevention is better than cure, this section confers upon a person the right of defending himself against both actual as well as threatened dangers. It only postulates that there shall be a reasonable apprehension of danger to the body arising from an attempt or threat to commit the offence : the right then comes into existence and continues so long as the danger lasts. It will be noticed that the wording of this section is different from that of section 97. It will be presently considered how far this change of language is material **(§ 917).**

916. Meaning of Words.—"*Private defence of the body*," that is, of the body of either the defender or any one else. "*Reasonable apprehension of danger*," which must be founded on facts. "*Attempt or threat to commit the offence*," *i.e.*, any offence punishable under the Code.[5] "*Though the offence may not have been committed*" : If committed, the right still exists "if there is a reasonable apprehension of further danger, but not otherwise, for the object of the right is protective and not punitive.

917. Commencement of the Right of Private Defence.—This section, along with section 105, lays down a very important rule, the existence of which had to be assumed in the previous discussion. The right of defence whether of person or of property depends upon the arising of a reasonable apprehension of danger to person and property.[6] The apprehension must be a reasonable one, for the right does not exist against any belief which a reasonable man would not entertain. It would not, for instance, extend to superstitious fears which a person may entertain of another. So where the accused met the deceased and a third person at a liquor shop, where they all drank together, and then walked in company through a forest when the accused charged the deceased with having caused the death of four of his children by his incantations, which the deceased admitted, and who threatened to have the accused devoured by a tiger before they were out of the forest. Thereupon the accused got frightened and killed the deceased with several blows of a heavy stick. The accused was an ignorant savage and probably did believe in the efficacy of incantations and in the threat to cause his death by their influence. But the fact that the accused believed in them does not make the apprehension a reasonable one, and the accused could not, therefore, justify his act on that ground.[7] Moreover, the section requires that the danger must arise from an attempt or threat to commit the offence which means an act punishable under the Code. Consequently, such a threat could not be avenged, as it would not be an offence under the Code.[8] It is not every idle threat that entitles a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution, and whether the person uttering it had the power to do so.

918. There are many threats which are only used as a form of abuse, but which are never intended to be taken seriously. There are threats which the person uttering

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(1) Fost, 273 ; Kel., 126, 129 ; 1 Hale, P. C., 445, 481, 484 ; 1 Hawk, P. C., c. 28, §§ 21, 24 ; *Reg.* v. *Bull*, 9 C. & P. 22; cited in 1 Russ,, Bk. 3, s. 3, p. 849.

(2) 1 Hale, P. C. 488 ; 4 Black, 180 ; 1 East. P. C., c 5, s. 45, p. 273.

(3) 1 Hale, P. C., 464 ; 1 Russ 850.

(4) S 40, para, 1.

(5) *Ib.*

(6) *Hafiz Ali*, (1907) 10 O. C. 196 ; *Hussainuddy*, 17 W. R. 46 ; *Pokhar*, (1907) P. W. R. No. 10 ; *Kunja Bhunia*, 39 C. 896.

(7) *Gobardhun Bhuyan*, 4 B. L. R. 110.

(8) S. 40, para. 1.

them has not the capacity to put into immediate execution. For it is only against a danger, present and imminent, that the right avails. A threat that *A* shall murder *B* whenever he gets a chance, does not entitle *B* to kill *A* on the spot, for the right of private defence is essentially a protective and not a preventive right. "A bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other by way of precaution, there being no actual danger at the time."[1] The threat of an offence here spoken of must then be understood to mean a threat of present and not prospective danger. It may be that the threat uttered is in itself an offence.[2] Where it is so, the question still remains whether it is a threat of a danger to the body, and causes reasonable apprehension of it. Such apprehension could scarcely arise from the mere threat unaccompanied by any act of preparation. And where the preparation permits a person to have recourse to the authorities, he must apply to them for protection. If, however, he obtains no protection, he is entitled to face the danger, and he has then his right, which he may exercise subject to the restrictions here laid down. It cannot then be said that he could have avoided the danger by running away. Indeed, if a person knows that another is on a road lying in wait for him, he is not bound to avoid it, but may proceed on his way having made preparation to resist the attack with all necessary force which he may resist until he has secured himself from all danger, and in doing so he may pursue his adversary, and even kill him if necessary.[3] So in a case Ford and his party were in possession of a room at a tavern. Several persons persisted in having it, and turning Ford out, but he refused to leave, whereupon they drew their swords upon Ford and his company, and Ford drew his sword and killed one of them. It was held to be justifiable homicide.[4]

919. So in another case, Mawbridge and Cope had some words, whereupon Mawbridge threw a bottle at the head of Cope, and immediately drew his sword. Cope returned a bottle at the head of Mawbridge, whereupon the latter stabbed Cope, and the question was whether Mawbridge was justified, but it was held that he was not, and that his act amounted to murder, because Cope's act in hurling a bottle at Mawbridge was fully justified, as Mawbridge first threw the bottle at Cope and drew his sword, the latter had reason to believe that Mawbridge meant great mischief. Cope's act was, therefore, done in self-defence. And Mawbridge was consequently, guilty of murder, for he had then no justification for stabbing him.[5]

920. It is not always easy to see the dividing line between criminality and non-criminality in such cases. A person may truly believe that his life is in danger; he may consider his belief amply justified, but, in fact, it may not be so. Indeed, when once blood is hot, persons begin to take an exaggerated view of the injury threatened and received, and Law has, consequently, made some allowance for an injury caused in the exercise of the right of self-defence without sufficient grounds. Such cases would be dealt with as arising on a grave and sudden provocation.[6] So if an offender, against whom the right avails, is killed after he has been properly secured or after the apprehension of danger is over, such killing would be murder, though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only man-slaughter, on account of the high provocation.[7]

Continuance of the Right.

921. This raises the question as to how far the right of private defence continues. According to the section the right continues "so long as such apprehension of danger to the body continues." The "such" apprehension means, of course, the reasonable apprehension arising from an attempt or threat to commit the offence. Its continuance must then depend upon the existence of facts which had given rise to the

(1) 1 East P. C. 271 (272).
(2) S. 503: *Gunga Chunder* v. *Gour Chunder*, 15 C. 671 (673).
(3) 1 East P. C. 271.
(4) *Ford*, Kel. 82; 1 East, P. C. 243.
(5) *Mawbridge*, Kel. 121; Fost. 296. *see* 1 East P. C. 276, quoted in 1 Penal Law (4th Ed.) S. 970, p. 646.
(6) Ss. 300, (excep. 2), 334, 335.
(7) 1 East P.C. 293; 4 Black, 185; 1 Hale P. C. 485.

apprehension. If, for instance, the defender fears a renewed attack, his right continues. So where two house-breakers had made an aperture in the accused's *tatti* wall, and on seeing him come out with a stick one of the men escaped, but the other advanced to attack him, whereupon the latter struck at him in the dark killing him, it was held that the accused had acted within his right.[1] So where a person was mobbed, and the mob entered the *cutcherry* in which the accused had taken shelter, a person who rushed in and brought out a gun which he fired was held to be justified.[2] But the right does not inure after the affray is over, and after the assailants are running away. If they are pursued, it is revenge and not defence.[3]

Right to Protect the Innocent.

922. Again, the right of private defence cannot be availed of by a person to justify his crime. He cannot use force in prosecution of an illegal act. Where, therefore, a man had wrongfully confined some men in a house and killed one of those who attacked it and endeavoured to set it on fire, he was held to be guilty of manslaughter at least.[4]

When the right of private defence of property extends to causing death.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely—

First.—**Robbery ;**

Secondly.—**House-breaking by night ;**

Thirdly.—**Mischief by fire committed on any building, tent or vessel which building, tent or vessel is used as a human dwelling, or as a place for the custody of property ;**

Fourthly.—**Theft, mischief or house trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.**

[***Theft***—s. 378. ***Robbery***—s. 390. ***Mischief***—s. 425.
House-trespass—s. 442. ***House-breaking***—s. 445.]

923. Analogous Law.—This section is closely analogous to section 100. Indeed, the two sections lay down the same rule, namely, the circumstances in which even the killing of a person is justifiable. Section 100 deals with justifiable homicide in defence of body, while this section deals with justifiable homicide in defence of property. The commentary under this section must, therefore, be read as supplementary to that given under section 100.

924 The rule here laid down is in accordance with the English Law, in which a distinction is observed between such offences as are attended with force, or any extraordinary degree of atrocity which in their nature must be taken of such urgent necessity as will not allow of any delay, and others of a different sort if no resistance be made by the offender.[5] Accordingly it has been held that no one has a right to kill a person found picking his pocket.[6] "But if one pick my pocket and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons."[7]

925 Principle.—This section recognizes the right of a person to kill a person committing offences attended with force or surprise. The offences specified are of this character.

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(1) *Pelkoo Nushyo*, 2 W. R. 48.
(2) *Ram Lall Singh*, 22 W. R. 51.
(3) 4 Black 293.
(4) 1 Hawk P. C. C. 28, s. 22 ; 1 Hale P. C. 405, 440, 441.
(5) 1 East P. C. 273 ; Fost. 273 ; 1 Hale P. C. 445, 481-484 ; 1 Hawk P. C. 22 ss. 21. 24 *Bull*, 9 C. & P. 22.
(6) 1 Hale P. C., 4 Black 180.
(7) 1 East P. C. 5, s. 45, p. 273.

926. Meaning of Words.—"*Under the restrictions mentioned in section* **99**": Obviously the only restrictions ordinarily applicable are those laid down in paragraphs 3 and 4 of this section. "*If the offence which occasions the exercise of the right*": These words are inapt. They only mean if the offences committed and attempted are those described below, and if the circumstances which give rise to the right exist. Such circumstances are described in section 105.

927. Death in Protection of Property.—The circumstances in which a person may lawfully kill another are described in section 100 and this section. The combined effect of the two sections is to authorize the killing of a person in the following cases ;—

If the offender threatens—

(*a*) The causing of death or grievous hurt,
(*b*) Rape and unnatural offence,
(*c*) Kidnapping, abduction and wrongful confinement,
(*d*) House-breaking by night or robbery, and
(*e*) Arson.

928. The right commences with the reasonable apprehension of danger to person[1] or property.[2] In either case it extends to the causing of death in the five foregoing cases.[3] It ends with the cessation of apprehension of danger,[4] or the recovery of the property, or the obtaining of assistance of the public authorities or the escape of the offender. Now, as regards the right here conferred, two points are essential : (*i*) The right does not commence till there is a reasonable apprehension,[5] and (*ii*) that reasonable apprehension must be of the commission of the crimes described in the four clauses. In order then to justify homicide under this section, it is not enough to show that the person slain was a trespasser, or that he had even gone into one's hen roost and some dead fowls and a crow found were near him, for that will not amount to house-breaking or robbery, or an attempt to commit the same.[6] But it will be, of course, different if he had already made an aperture in the wall, and was about to get in through, when he was assaulted.[7] But a mere house-breaking by daytime would not justify the killing of the house-breaker and such is also the law of England,[8] but if the house-breaking is such as imports an apparent robbery, or an intention or attempt of robbery, then the case would be different, and in this respect also the section closely follows the English rule.[9] So where a person was in actual peaceable possession of land upon which he had sown a crop, the act of the accused who came in force to cut the crop was robbery, and the party in possession were entitled to resist it even to the extent of killing the aggressors.[10] And as dacoity is only an aggravated form of robbery,[11] it follows that the same right exists against dacoits as is here declared against robbers. A pick-pocket, as such, is not a robber, and therefore there is no right to kill him. Incendiaries are similarly exposed to the same risk, if they commit mischief which is intended to destroy any building tent or vessel used for residence or custody of property. The last clause deals with the milder forms of the three offences dealt with in the three preceding clauses, but these assume the same aggravated form by the presence of apprehension of death or grievous hurt. This clause would be utilized if there be any technical objection to a case falling into any of the three earlier clauses.

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(1) S. 102.
(2) S. 105.
(3) Ss. 100, 103.
(4) S. 102.
(5) S. 105.
(6) *Scully*, 1 C. & P. 319.
(7) *Poloke Nushyo*, 2 W. R. 43 ; *Ali Mea*, (1926) C. 1012.
(8) 1 East P. C. 5, s. 44, p. 273 ; 4 Black. 180.
(9) 1 Hale P. C. 488.
(10) *Gooroo Churn Chung*, 14 W. R. 69 ; following *Sachee*, 7 W. R. 114.
(11) S. 391.

When such right extends to causing any harm other than death.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

929. Analogous Law.—This section is as related to the last, as section 101 is to section 100. It is enacted to legalize the infliction of any harm short of death in all cases in which the offences of theft, mischief or criminal trespass are not aggravated in the manner described in the clause "*fourthly*" of the last section, *viz.*, by being attended with an attempt to cause death or grievous hurt.

930. The commentary under section 101 may be read, *mutatis mutandis*, as a commentary on this section.

931. Meaning of Words.—"*Harm other than death*": Harm implies use of force, not mere abuse punishable under section 504, which cannot be justified under this section.[1]

932. When Homicide is Unjustifiable.—The last section lays down the cases in which even homicide is justifiable. This section lays down that in other cases it is not. So where the accused were on their master's land, when the deceased came up with a number of men to fish in a disputed tank by force of arms. The accused were prepared for the fight, and the two parties fought in which one of the aggressors was killed. It was held that, as the act of the accused was not protected by the last section, it fell within the scope of this section, which did not justify the killing of a trespasser. But at the same time, though the accused had exceeded their right of private defence, still some consideration must be shown to them in the sentence, and their sentences were accordingly reduced to rigorous imprisonment from 7 to 3 years.[2] This was the case of death. But short of death the section justifies the causing of any harm, subject however to the restriction laid down in section 99 that the harm should not be more than is necessary for the purpose of defence.[3] And neither section takes note of the motive which prompted the harm, unless the harm caused was in itself so excessive as to be indicative of revenge. And in judging of the reasonableness of harm caused, it must be noted that though the harm caused by each individual may not be excessive or sufficient in itself to cause death, still if the cumulative effect of the injuries caused by several resulted in death, they will all be accountable for it. As Campbell, J., observed in a case: "If several parties band together, and so act in defence of property that the lawful causing of death is a natural and probable result, and death, is in fact, so caused, it would be very dangerous to hold otherwise than that they are all responsible and guilty of culpable homicide of a low degree though it be."[4] But where a number of persons acting in concert are shown to have defended their property by use of force and they are acquitted of homicide, they could not be found guilty of rioting.[5] It is not the lawful exercise of the right of private defence to confine trespassers for the night till the arrival of the police on the following day,[6] unless the trespassers were guilty of non-bailable and cognizable offence.[7] But a person in possession of his property is entitled to use force to eject a trespasser, and the trespasser cannot complain that he was acting under orders, if his act was in fact a trespass. So where a police constable authorized to watch the movements of suspected characters entered into the house of a person at midnight and knocked at his door to see if he was there he was held to be guilty of trespass, as he had no authority to enter into the houses,

(1) *Rakhal Das* v. *Kailash Babu*, 5 I. C. (C.) 721.
(2) *Goburdhun*, 14. W. R 74.
(3) S. 99, para. 4.
(4) *Mitto Singh*, 3 W. R. 41 (42).
(5) *Mitto Singh*, 3 W. R. 41 (43).
(6) *Shurufoodin*, 13 W. R. 64.
(7) S. 59, Cr. P. C.

of even suspected characters, and the accused who resented the constable's act by abusing and pushing him and lifting his stick to strike him was held to be protected under this section.[1]

933. The section says that harm may be caused to the wrong-doer, but this term would include his confederates, aiders and abettors who were present at the time of the commission of the offence, though it would not include an accomplice who was not present. If, for example, a zemindar sends out his servants to take forcible possession of property belonging to or in the possession of another, the latter would not be justified in assaulting the zemindar who did not accompany his men, though he was the principal wrong-doer.

Commencement and continuance of the right of private defence of property.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

934. Analogous Law.—This section was clause 81 of the draft in which the Law Commissioners objected to the phrase "till the offender has effected his retreat with the property." In a later opinion on this clause it was pointed out that if the clause remained, the right of private defence against robbery would cease after the robber had left the house, which could not be the intention of the framers of the Bill. But notwithstanding this criticism, this section was enacted as originally drafted.[2]

935. Principle.—This section lays down as to when the right of private defence of property commences. As such, the section is analogous to, and closely follows the wording of section 102 in which a similar rule for the commencement of the right for the defence of a person is enacted. The commencing periods for the two rights naturally differ with the object they are intended to serve. But in one respect they both agree, for the right to personal protection as well as the protection of property commences with the reasonable apprehension of danger to person or property. But as against theft the section declares the right to continue (*a*) till the offender has effected his retreat with the property; or (*b*) the assistance of the public authorities is obtained; or (*c*) the property has been recovered. The section does not say what becomes of the right if any one of the contingencies is satisfied, but the property remains unrecovered. But regard being had to the fact that the primary object of the right is to enable the owner to recover back his property, the right would appear to exist till the purpose for which the right exists has been attained. In other words, the three clauses determine the owner's right of recapture which it is for the owner to resort to at his discretion.

936. Right of Defence of Property.—The right of private defence of property commences with the reasonable apprehension of danger to such property (§§ 888-917). The meaning of this phrase has been set out elsewhere, and its meaning must be understood in the same sense here. So far the section is perfectly

(1) *Dorasamy*, 27 M. 52.

(2) First Report Ss. 155, 158, Reprint p. 230.

intelligible. But then it goes on to limit that right by fixing a period for its determination. As against theft it enacts that the right continues (*a*) till the offender has effected his retreat with the property, or (*b*) the assistance of the public authorities is obtained, or (*c*) the property has been recovered.

937. This clause had been animadverted upon by the Law Commissioners (§ 934), but nevertheless, it remains unaltered. Now in order to understand the clause it must be remembered that the right of private defence of property here contemplated is the *defence* of property[1] by use of force.[2] This section then lays down up to what time it is lawful for a person to use force in defence of his property, that is, to prevent its seizure and removal. The recovery of his property is the sole object of this right, and therefore, the clause lays down that the use of force should cease as soon as that object has been attained, namely, the property stolen has been recovered. If, however, the property cannot be recovered, then the clause allows the owner to follow the thief till "he has effected his retreat with the property" which could only mean till the pursuit is given up. But the pursuit need not be hot on his heels, for the owner may fall behind and yet intend to continue the chase. And suppose *A* runs away with *B's* watch, and *B* pursues him, but *A* getting the better of *B* cannot be caught and *B* gives up the pursuit. He sees *A* the next day wearing his watch; is his right of private defence gone? In one sense *A* had effected his retreat with the watch. But *B* has not recovered the property, and so long as *B's* property has not been recovered, his right of private defence is assured to him by another clause. If, therefore, the two clauses are in conflict, is the felon to have the benefit of it? Such a view would be opposed to all reasonable interpretation of criminal law, and it would lead to awkward consequences. In such a case, the correct view would then seem to be that if *B* sees *A* with his stolen watch the next day, *B* has his right of private defence subject, of course, to the restrictions mentioned in section 99; that is to say, if *B* sees a policeman in sight, he must seek his protection; if he does not, he may use force on *A* and recover his watch.[3] It is said that in such a case *B's* right revives,[4] but there is no question of revival, for theft is a continuing wrong and a thief is a thief whenever he may have committed the theft. And if, therefore *B* sees *A* six months after the theft in possession of his watch, *B* has the same right against him as if *A* had only a moment before stolen it.[5] But this dictum must be qualified. The owner has no right to invade the privacy of another man's house in order to recover his property, that a thief may have concealed therein. Such an entry, as of right, would be trespass. But if the house belong to the thief, then the owner may lawfully enter it in pursuit of the thief, for a thief's house is not his castle.

938. When the Right Ends.—The clause makes the right subject to the limitation, that if the assistance of the public authorities has been obtained, the right of self-help ceases. In this connection the wording of this clause is materially different to the corresponding clause of section 99. According to that clause, there is no right if there is time to have *recourse* to the protection of the public authorities. But under this clause, the right exists and may be asserted till the *assistance* of the public authorities is *obtained*. As this section is a special section dealing with a right directed against a special class of malefactors, it may even be contended that the owner is not bound to have recourse to the protection of the public authorities, and that he has the larger right against the thief till the public authorities choose to assist him. But this construction, though plausible is not a preferable one. For the right of private defence is a right of necessity, and it cannot therefore be asserted whenever it is possible to have recourse to the public authorities whose duty it is to suppress and apprehend crime. Moreover, though this section is not subject to section 99, still it is necessarily subject to section 104, which in its turn is subject to section 99. Conse-

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(1) S. 97.
(2) S. 104.
(3) *Jarha* v. *Surit Ram*, 3 N. L. R. 177 (180, 181).
(4) *Ib.*, p. 180, citing Mayne's Cr. L. 237.,
(5) *Jarha* v. *Surit Ram*, 3 N. L. R. 177 (181); contra *Mirdad*, 7 L. 21; *Karam Ali*, (1927) L. 355.

quently, it is a matter of legal obligation to have recourse to the public authorities for the protection as there required.

Robbery.

939. Robbery is theft accompanied by violence.[1] The right against robbery is, therefore, essentially a right against the use of violence. The right against theft is then a right to prevent the removal of property. If violence ceases, so does also the right against its use unless its fear continues in which case the right remains so long as the fear lasts. But the fear must be of *instant* hurt or restraint. The fact that the person apprehends a renewed attack is insufficient to let in the right. It nust be the fear of present and imminent violence.

Criminal Trespass and Mischief.

940. So in the case of criminal trespass and mischief the right remains only so long as the offence is being committed. If a trespasser has left the land, the owner cannot pursue him for the purpose of chastisement. If he does so, he cannot plead the protection of this exception. This rule only applies to criminal trespass and mischief as such, and unattended by violence. When they are so attended, the right would be enlarged as it may then be a night robbery, or it may fall under the fourth head of section 103. But where it is not so, an assembly lawful in its inception may become unlawful as soon as the trespass or mischief it was intended to remove is over. So where one Goluk Chunder in excavating a *khal* encroached on one Issur Chunder's land, and committed mischief by cutting the land and throwing earth on it, which was resisted by Issur's men, whereupon the mischief ceased, but the men continued to remain assembled probably to prevent even the cutting of the *khal*, it was held that the assembly had no right of private defence after the mischief had ceased and when there was no likelihood of its removal.[2] It need scarcely be added that the right is not only limited as regards duration but also as regards the property in respect of which the right exists. For instance, if the owner detects two of his stolen cattle in a herd, he has no right to seize the herd.[3]

House-breaking.

941. House-breaking is house-trespass attended with force or surprise.[4] House-breaking, however, precedes house-trespass, and as house-trespass is the aim and object of house-breaking the right of private defence is enacted to last so long as such house-trespass continues. As the right of the owner against a house-breaker extends to the extent of even causing his death,[5] it follows that the owner, subject to other reservations, has that right only so long as the house-breaker is on the premises.[6] The moment he quits the premises the right too ceases. The owner has no right to run after him in the open, long after the house-trespass had ceased.[7]

Misappropriation and Receiving Stolen Property.

942. The offences punishable under sections 403 and 411 are no exception to the offences against which the right of private defence exists,[8] but in such cases, of course, the accused would have to show why he had no time to have recourse to the authorities.

Right of private defence against deadly assault when there is risk or harm to innocent person.

106. If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk or harm to an innocent person, his right of private defence extends to the running of that risk.

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(1) S. 300.
(2) *Rajkisto Doss*, 12 W. R. 43.
(3) *Karam Ali*, (1927) L. 355.
(4) S. 445.
(5) S. 103, "*Secondly*"
(6) *Balakee Jolahed*, 10 W. R. 9 (10).
(7) *Balaku Jolahed*, 10 W. R. p. 10; *Guladan*, (1885) P. R. No. 25; *Imamuddin*, (1876) P. R. No. 17; *Jaffer*, (1882) P. R. No. 2.
(8) *Jarha* v. *Surit Ram*, 3 N. L. R. 177; contra *Agra*: (1914) P. R. No. 37: 27 I C. 833.

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob and he cannot fire without risk of harming young children who are mingled with the mob. *A* commits no offence if by so firing he harms any of the children.

943. Analogous Law.—This section should be read with section 100 to which it relates. It is in accordance with English Law. It is a case of extreme necessity, in which a person is entitled to run the risk of harming innocent persons in order to save himself from mortal injury. Here, again the harm caused to innocent persons must have been necessary and it should not have been excessive.

CHAPTER V.[1]

OF ABETMENT.

Abetment of a thing.

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing ; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. —A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that thing.

Illustration.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend *Z*. *B* knowing that fact and also that *C* is not *Z* wilfully represents to *A* that *C* is *Z*, and thereby intentionally causes *A* to apprehend *C*. Here *B* abets by instigation the apprehension of *C*.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

944. Analogous Law.—The chapter opening with this section deals with the law of what is known as accessories in English Law, under which they are of three kinds : (*i*) accessory *before* the fact, (*ii*) accessory *at* the fact, and (*iii*) accessory *after* the fact. Now, where two or more persons are prosecuted for the same offence, they are classified as (*i*) principals in the first degree, (*ii*) principals in the second degree, (*iii*) accessories before the fact, or (*iv*) accessories after the fact. Accessories *at* the fact are usually classified as principals of the second degree, that is to say, aiders and abettors who are actually or constructively present at the scene of offence. In fact, the early writers did not know of the distinction between principals of the first and principals of the second degree.[2] They called the latter accessories at the fact, but then there grew up a rule, out of the well-known maxim of Civil law,[3] that as accessories they could not be brought up for trial till the principal offender had been convicted or outlawed, a procedure which was naturally productive of failure of justice as the accessory could never be brought to trial, if the principal offender died or escaped justice, or was unknown. In order to obviate this mischief, the Judges gradually adopted a rule by which such accessories became classed and were proceeded against as principals in the second degree.[4] Accessories at the fact and principals in the second degree are thus two designations denoting offenders of the same kind, and they have been classed as abettors under this chapter, though a distinction is made as regards the punishment appropriate to their case.[5]

English Law.

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(1) There was at one time some doubt as to the applicability of this chapter to offences subsequently added to the Code, *e.g.*, by sections 121A, 124A, 225A, 225 B, 294A and 304A. This doubt has now been removed by the Legislature which has formally extended the chapter to those offences, *see* Indian Penal Code Amendment Act, s. 13 (Act XXVII of 1870) as amended by the Repealing and Amending Act (XII of 1891).

(2) Fost., 347.

(3) *Accessorius sequitur naturam sui principalis* ("An accessory follows the nature of his or its principal") ; 3 Just. 139 ; 4 Black Comm. 36.

(4) *Coal-heaver's case*, 1 Leach 66.

(5) S. 114.

945. As regards accessories before or after the fact, English Law differs from the rules here codified. Under English Law an accessory before the fact is one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime,[1] while an accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts or assists the felon. Any assistance whatever given to a felon made the assister an accessory.[2] Such persons have been rightly excluded from this chapter, though they have been dealt with elsewhere.[3] This chapter then deals only with offenders who would be classed as accessories *before* or *at* the fact, and so far only do these sections obtain their ground-work from the English cases.

946. So far as this section is concerned it follows closely the English rule applicable to such accessories, and the English cases decided thereon should be instructive authorities on the subject. But the difference between the two systems must be kept in view. Under English Law the distinction between principals in the first degree and in the second degree is limited only to felonies, and does not apply to high treason, forgery or misdemeanours in which both are treated as principals. This distinction does not find place in the Code,[4] which, indeed, recognizes no distinction between what are classed as felonies and what are merely misdemeanours (§ 46). Again, the Code deals with accession after the fact as an independent offence and not as a branch of the law of abetment. The chapter as such has therefore no application to them.

947. The definition of " abet " here given applies to all Acts of the Governor-General in Council, and Regulations under the Government of India Act, 1870[5] made after the 14th January, 1887.[6] Sections 109, 110, 112, and 114-117, moreover, apply to all offences under any special or local law.[7] So where a pleader sent a circular round to other pleaders inviting them to send him their cases, offering to share with them his fees, he was held to be guilty of abetment of an offence under s. 36 of the Legal Practitioners' Act.[8]

948. Principle.—This chapter penalizes abetment as abetment leads to crime and many crimes would be impossible but for the support and encouragement received from others who, though not actively co-operating with the criminal still prepare his ground and facilitate his work. Indeed it is seldom that a criminal acts without accomplices. He does not feel the same confidence as when he has friends to consult, advise and assist him in his nefarious plan. As the rich man requires a sentinel to guard his riches, so does a thief in his plans to rob them. It is the object of this chapter to punish all such as may have lent their assistance to the commission of a crime. As Bentham remarked: " The more these preparatory acts are distinguished for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy with the intention of stopping his enterprise. He places in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles.[9]

949. The definition of " abetment " here given is general. It is not even the definition of the abetment of an offence but of a thing which may or may not be an offence. This was necessary to embrace cases presented in the Chapter in which the Code regards the abettor as solely liable, though the person abetted may be wholly

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(1) 1 Hale P. C. 615, 616.
(2) 1 Hale P. C. 618; 4 Black 37.
(3) *E. g.*, ss. 130, 136, 204, 212.
(4) S. 34.
(5) 33 & 34 Vict., c. 3, s. 1.
(6) General Clusess Act (X of 1896) ss. 3 (1). 4 (2).
(7) S, 40. The contrary held in *Kulli Mooddeen*, 7 W. R, 53, *Ramlugun*, W. R. 54; *Elmstone*, 7 B. H. C. R. 89, must now be considered as overruled by the Legislature.
(8) *Parbati Charan Chatterjee*, 17 A. 498 (504), P. C,
(9) Principles of Penal Laws, Pt. 3, Ch. 15, p. 560.

innocent. In such a case, the act of the latter would not be an offence, as that term is defined in the Code : it is merely a " thing " the abetment of which may be nevertheless punishable. The abetment of an offence is defined in the next section. Here the term is defined in the abstract. In the next section it is defined in its relation to a person as affecting his criminal responsibility. But though the term " abet " has been generally defined here, it is to be understood only as a prelimianry description of the word as used in the Code. The encouragement of a virtuous act is not the " abetment of a thing " as here defined. The section describes the three shades of meaning which the term bears on the Code, which rests the degree of criminality upon the degree of abetment. The lowest form of abetment is when a person.[1] instigates another to do a thing. Such instigation (*i*) may consist of a mere solicitation without more, or (*ii*) may be actively engaging with another in a conspiracy to do an act, or (*iii*) may consist of active participation in the doing of an act, in which case the abettor is, what would be called in English Law, an accessory at the fact, or a principal in the second degree.

950. Meaning of Words.—" *Instigates any person to do that thing* " : The word " instigate " has been used here not as a term of art, but in its general sense as denoting illegal solicitation. A mere request to do a thing may amount to an abetment, *e.g.*, the offer of a bribe which is refused. It is not necessary that a person instigated should be known to the instigator as for instance, a person may intend to instigate a general rebellion by his inflammatory writing.[2] " *Engages in any conspiracy..... for the doing of that thing* " : A conspiracy is an agreement by two or more persons to do an illegal act or a *legal* act in an illegal manner. Merely taking part in the deliberations of a conspiracy is not an abetment unless one " engages " in it, which means that unless one approves and furthers its object. Moreover, there must take place " an act or omission in pursuance of that conspiracy." " *If an act or illegal omission takes place* " : This means that there must be something more than a mere plotting to amount to an abetment under this clause (§ 964). There must be some act or illegal omission in pursuance of that conspiracy. The words " or illegal omission " in the clause are added *ex majori cautela*. In view of the provisions of section 32 they were unnecessary. " *Intentionally aids by any act or illegal omission* " : This clause must be read with explanation 2, which defines when a person is said to *aid* the doing of an act. In order to amount to abetment the aiding must have been intentional.

951. Essentials of Abetment.—Three things are essential to complete abetment as a crime : There must be an abettor ; he must abet ; and the abetment must be of an offence. This section analyses the meaning of the word " abet " as used in this connection. It lays down that a person who *instigates* another to do a thing abets him to do that thing. In this sense, it makes instigation tantamount to abetment. But a person may not only *instigate* another, he may co-operate with him, and his co-operation may consist of counsel or conjoint action. In either case there is an abetment. It is not difficult to see why a person who aids another in the commission of a crime is regarded as an abettor. Nor is it difficult to imagine why one who plots a crime and thereby facilitates its commission should be placed in the same category. But a person who merely " instigates " another may have no idea of the crime that may be committed in consequence. And, moreover, is an " instigator " worse than a co-conspirator, whose abetment is not complete unless " an act or omission takes place in pursuance of that conspiracy ?" The question then depends upon the precise meanings attaching to the expression " instigates " (§§ 952-963), " engages " (§§ 964-973) and " intentionally aids " (§§ 973-979) which have therefore to be examined.

952. Instigation.—In the first place, then, when is a person said to instigate another? The word " instigate " literally means to goad,[3] or urge forward or to provoke, incite, urge or encourage to do an act, by usage now an evil act. So

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(1) S. 108.
(2) *Savarkar*, 5 I. C. (B.) 854.
(3) Gk. *stechen*, a stick ; in *stechen*, to prick with a stick.

the words abetment, procurement, helping, maintaining and counselling have been used in the English Statutes[1] as if they were synonymous and conveyed the same meaning. So abetment is there described by the words " command, counsel or hire "[2] or more loosely by use of the words " comfort, aid, abet, assist, counsel, hire or command."[3] But in all these varied expressions, there is, however, one important element present, namely, that the abettor aids the offender in the commission of the crime. And when he aids him he is said to instigate him in popular parlance, and to abet him in the language of law. Such aid must be something more substantial than a mere advice. It must indicate some active suggestion, or support or stimulation to the commission of the act.[4] Two persons at least are, therefore, required to complete an offence by instigation. A person cannot instigate himself. He can only instigate another though that another may not be known to him. Now a person may aid another without knowing that he was aiding him to commit a crime, and his aid may be so remote as not to amount to abetment which is the policy of law to check and punish. A hotel-keeper or a person charitably disposed may, for instance, give lodging and food to a robber on his way to the crime.[5] A smith may provide him with tools. They both assist him in a way, but are they abettors of his crime? All assistance is not abetment. As the Court remarked : " The supplying of necessary food to a person known to be engaged in crime is not *per se* criminal, but, if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself, while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime, and might facilitate it."[6]

953. In order to amount to abetment there must then be *mens rea* or community of intention. Without knowledge or intention, there can be no abetment,[7] and the knowledge and intention must relate to the crime.[8] And the assistance must be something proximate[9] and something more than a mere passive acquiescence. So where two men having quarrelled agreed to fight with their fists each one having deposited £ 1 with the prisoner who held the amount as a stake-holder to be paid to the winner. He had otherwise nothing to do with the fight nor was he present at it. He had no reason to suppose that the life of either man would be endangered. The men fought and one of them received injuries, of which he afterwards died. The prisoner having been informed who was the winner but not knowing of the other man's danger paid over the £ 2 to the winner. He was indicted as an accessory, but was acquitted, Cockburn, C.J., delivering the judgment of the Court, having remarked : " To support an indictment for being accessory before the fact to manslaughter, there must be an active proceeding on the part of the prisoner. He is perfectly passive here, all he does is to accept the stakes."[10] So too it has been held that persons who are merely present at an unlawful fight, *e.g.*, a prize fight or a duel, are not necessarily to be treated as its abettors[11] though the contrary has also been laid down in other cases[12] which have already been referred to elsewhere (§ 770). The case of persons who do more than merely witness the fight, *e.g.*, who keep the ring, or realize the gate money, or act as seconds, is, of course, different, for they are not merely *spectator haud particeps* but *particeps criminis*.

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(1) 23 Hen VIII, c. 1, s. 3; 1 Ed. VI, c. 12, s. 13.

(2) 4 & 5 Ph. & M., c. 4.

(3) 3 & 4 Will. & M., c. 9; 24 & 25 Vict., c. 94, s. 2, *supra*.

(4) *Raghunath*, (1920) Pat. 76; *Mihan Singh*, 5 L. 1; *Basanta*, 99 I. C. (C.) 236.

(5) *Lingam Ramanna*, 2 M. 137.

(6) *Ib.*

(7) *Tha La Aung*, (1906) 12 Bur. L. R. 70; *Nemur*, 33 I. C. (M.) 655. In *Lakshmi Narayan*, 42 I. C. (M.) 989, the accused was found to have laid a trap to catch a Sub-Magistrate whilst receiving a bribe. He was convicted of abetment (submitted, wrongly), the Court holding the pretence of *mens rea* not a prerequisite of abetment.

(8) *Mahomed Jamal*, (1930) S. 64.

(9) *Ram Nath*, 47 A. 268; *Radha Kishun*, (1929) Pat. 157.

(10) *Taylor*, L. R. 2 C. C. R. 148; 44 L. J. M. C. 67; *Sarju Prasad*, 25 I. C. (O.) 625.

(11) *Young*, 8 C. & P. 644; *Cuddy*, 1 C. & K. 210; *Coney*, 9 Q. B. D. 534; *Chatru*, 43 I. C. (Pat.) 95.

(12) *Per* Littledale, J., in *Murphy*, 6 C. & P. 103.

That a person who is merely present at[1] or cognizant of a crime[2] or only conceals it[3] cannot be treated as an accomplice has been conceded. So words that amount to bare permission do not amount to instigation, as if *A* say to *B* "I will kill *C*" and *B* says "you may do your pleasure for me" which will not make *B* an abettor of *A* in his murder of *C*.[4] Not only acquiescence, but some degree of active support is essential to constitute instigation. Where, for example, the prisoner procured a dose of corrosive sublimate to a pregnant woman with a view to causing abortion of which she died, and it appeared that though the prisoner knew the purpose for which it had been obtained, still he had previously dissuaded her from taking it, and in fact, he had only procured it under a threat by her of suicide and in the belief that she may change her mind. It was held that he was not an abettor of murder.[5] It is by no means necessary that the person instigated should be known to the instigator, as where the accused desired to instigate a rebellion by rousing the masses by his inflammatory writings[6] nor is it necessary that the instigation should be adequate to influence them.

954. What Instigation is Abetment.—There must be then a direct incitement to crime. If it is so intended the instigation is complete, though it may have produced no effect upon the person abetted.[7] Nor is it necessary that the latter should have concurred in the proposal. To take an example given by the draftsmen elsewhere: "The person who without any demand, express or implied, on the part of a public servant, volunteers an offer of a bribe and induces that public servant to accept it, will be punishable under the law of abetment as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe."[8] In its lowest form then instigation may amount to a mere encouragement given in words or by conduct.[9] When in words it may be either in direct language or by suggestive innuendos, as where *A* says to *B*: "*C* had a case in my Court. He made a present to my wife. He won his case."[10] Persons who contribute to the payment of bribe, as by paying a subscription known to have been raised for the purpose, are, strictly speaking, instigators.[11] A person may inflame another to commit a crime not by saying so, but by harping on the injuries, real or supposed, which he has suffered, but in such a case the question would be not only what was said, but what was the speaker's intention at the time, sympathy or instigation to crime. Indeed, words of mocksympathy are often more insidious and effective than a direct incitement to violence, but at the same time it is not alway. easy to lay bare their true character, and it is but in very rare cases that suhs words would be taken to amount to an abetment of the offence they may lead up tco So the publication of obscene literature is a crime and a newspaper publishing an advertisement for the sale of obscene books is guilty of abetment as it knows that the advertisement would encourage their sale.[12] So again, where the prisoner had connived at the deceased's becoming a *suttee*, and had told her to repeat "Ram, Ram" to become a *suttee*, he was held guilty of abetment.[13]

955. Withdrawal after Instigation.—A person may instigate another and then recant before the offence is committed, but it does not seem that he is any the less responsible for his act. In England, the rule is in this respect different. So Lord Hale says: "*A* commands *B* to kill *C*, but before the execution thereof, *A* repents and countermands *B*, and yet *B* proceeds in the execution thereof; *A* is not accessory, for his consent continues not, and he gave timely countermand to *B*,

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(1) *Deodhar Singh*, 27 C. 144; *Sarju Prasad*, 25 I. C. (O.) 625; *Nennur Rami*, 33 I. C. (M.) 655; *Ammaniammal*, 7 Cr. L. R. (M.) 200; *Mataro*, 23 S. L. R. 5.

(2) *Ishan Chandra*, 21 C. 328.

(3) 1 Hale P. C. 616; 2 Hawk P. C. C. 29, s. 23; *Goman Saya*, 21 I. C. (Bur.) 658.

(4) 1 Hale P. C. 616; *Etim Ali Muzumdar*, 4 C. W. N. 500.

(5) *Fretwell*, L. & C. 161.

(6) *Savarkar*, 5 I. C. (B.) 854.

(7) S. 108, Expl. 2.

(8) Note E., Reprint; *Maganlal*, 14 B. 115.

(9) *Baldeo Sahai*, 2 A. 253.

(10) *Cf.* s.164, ill.; *Deodhar Singh*, 27 C. 144.

(11) *Maganlal*, 14 B. 115; *Ameeruddin Salebhoy*, 24 B. 345.

(12) *De Marny*, (1907) 1 K. B., 388.

(13) *Mohit Pandey*, 3 N. W. P. H. C. R. 316; *Gopal Singh*, 1 Agra 21; *Ram Dial*, 36 A. 26.

but if *A* had repented yet if *B* had not been actually countermanded before the fact committed, *A* had been accessory."[1] It may be doubted if this is even a good law now in England. For the mere inciting of another to commit a crime is itself a misdemeanour in English Law though no offence was committed in pursuance of the incitement.[2] A misdemeanant is, of course, not an accessory under English Law (§ 945), still the result is the same. So far as this country is concerned, the retraction of an instigation does not purge the instigator of his crime, though the fact is material as evidencing intention, or as explanatory of the meaning of the instigation, or as shewing that the offence was not committed in consequence thereof[3] and it may in any case be proved in mitigation of sentence. Even in England, it has been held in the case of conspiracy that the entering into conspiracy completes the crime though a conspirator may withdraw from it on the spot altogether and no one be harmed.[4] The accused has a *locus pœnitentiæ* before his offence is complete but not afterwards, for then though he may have done all in his power to undo the mischief, it may still remain.

Instigation must be conveyed.

956. There is, of course, no instigation where the incitement to commit a crime is written and posted, but the letter never reached the addressee, or if it is handed by him to some one else before reading it.[5] In such a case though there is no abetment, the attempt to abet would be complete.[6]

956A. An instigation may be conveyed through the medium of a third party in which case there may be no direct communication between the abettor and the actor. So if *A* order his servant to hire another to murder *B* and the servant hires *C* with the money of *A*, *A* is an abettor in the same way and to the same extent as if he had himself hired *C* to commit the deed.[7] And so Lord Coke, commenting on the Statute of Westminster relating to abetment, said: "Under the word 'aid' are comprehended all persons, counselling, abetting, plotting, assenting, consenting and encouraging to do the act and not present when it is committed."[8]

Limits of Liability.

957. But a person instigating one offence cannot be held responsible for the commission of an offence wholly different from that which he had instigated.[9] Thus, if *A*, command *B* to burn *C's* house, and he in so doing commits a robbery, in which case *A* though an abettor of the burning is not an abettor of the robbery.[10] So again, if *A* incite *B* to steal *C's* goods on the road and *B* breaks into *C's* house for the purpose, *A* is an abettor of theft, but not of house-breaking.[11] So where several soldiers empowered to arrest a person unlawfully broke into his house and some of the soldiers began to plunder and steal his goods, the question arising whether all were equally liable, Holt, C. J., said: "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first, yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door, for this reason because they knew not of such intent but it was a chance opportunity of stealing whereupon some of them did lay hands."[12]

958. In order then to make a man liable for instigation there must be something to show that it had influenced the actor, which may be presumed if he had substantially carried out the instigation. On the other hand, if his act was substantially different, it could not be presumed to be due to the

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(1) 1 Hale P. C. 618

(2) *Higgins*, 2 East 5; *Gregory*, L. R. 1. C. C. R. 77.

(3) S. 116

(4) *Per* Bayley, J., in *DeBerenger*, 3 M. & S. 67 (76); *Bridgewater case* (unrep.), cited *per* Lord Coleridge, L. C. C. J., in *Mogul Steamship Co.* v. *McGregor Gow & Co.*, 21 Q. B. D. 544 (549); *Sushil Chandra*, 6 O. L. J. 210, 51 I. C. 449.

(5) *Ransford*, 13 Cox C. C. 9; followed in *Sheo Dial Mal*, 16 A. 389.

(6) *Ransford*, 13 Cox C. C. 9.

(7) *Per* Foster, J., in *McDaniel*, 19 St. Tr. 746 (804); *Earl of Somerset*, 2 St. Tr. 966.

(8) *Per* Foster, J., *McDaniel*, 19 St. Tr. 746 (805).

(9) Fost. 369.

(10) 1 Hale 617; 4 Black 37.

(11) Plowd. 475.

(12) *Anon*, 1 Leach 7, Ncte (*a*).

instigation. If, for instance, *A* orders *B* to murder *C* by poison and *B*, instead of poisoning him murders him by a sword or other weapon or by any other means, *A* is an abettor of the murder, for the principal object is attained though not in the manner suggested.[1] So if *A* instigates *B* to steal *C's* goods on the road and *B* breaks into his house as stated before, *A* is not an abettor of house-breaking, though he has abetted theft. But if in such a case *A* had incited *B* to steal goods in *C's* house, but not to break into it, and *B* nevertheless broke in to effect the theft, *A* would be accessory to the breaking, because *A*, having commanded house-trespass, *B* had committed house-breaking which is not a very different offence.[2] In fact an abettor is liable for the probable consequences of his abetment, though not for the consequences not so connected with it.[3] So that if *A* advise *B* to rob *C*, and in robbing him he kills him, *A* is liable as an accessory to the killing whether the killing was on resistance made, or to conceal the act, or upon any other motive operating at the time of the robbery. So again, if *A* orders *B* to burn the house of *C*, which *B* does, but the flames extend and destroy *D's* house, *A* is liable as an abettor of the burning of the houses of both *C* and *D*.[4]

959. But does the same principle extend to a case in which *A* orders *B* to murder *C* and *B* by mistake murders *D*? It is said that, in such a case, *A* is not liable.[5] But the soundness of this view may be gravely doubted. Suppose *A* had described *C* to *B* by his stature, appearance and the like, and *B* mistook, from the description *A* gave, *D* for *C* and killed him, could it be said that *A* was not liable, though he had compassed *D*'s death? In such a case *A* would be certainly liable. But suppose that in such a case *B* knew *C* and *D*, and *B* having a grudge of his own with *D* found it convenient to despatch him, could it be said that *A* had abetted *D*'s death? The true solution of the question is thus proposed by Foster: "Did the principal commit the felony he stands charged with under the influence of the flagitious advice; and was the event in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject?"[6]

960. But where the offence is committed in prosecution of some unlawful purpose, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be equally liable for any offence which may be committed in prosecution of the common design. But in such case, it must appear that (*i*) there was a common design and that (*ii*) the offence was committed in prosecution of that design. So where a number of men, some of whom were armed with sticks met to commit rioting, and *A* ordered one of them, his servant *B*, to strike, whereupon, *B* who was unarmed picked up a stick lying by chance on the ground with which he committed grievous hurt it was held that *A* was liable, though *B* had not the stick when he was ordered to beat.[7] The case would have been, however, different if the assembly had previously resolved not to use sticks, and *B* had then picked it up to use it.[8] So the creditor, who ordered his servant to carry off his debtor's cattle in satisfaction of his debt, which he did, keeping the cattle in his own custody, was convicted of abetment of theft.[9] Instigation to do a certain act implies its negative. So where a person asked another to suppress certain facts in giving his evidence, it was held to amount to the abetment of giving false evidence.[10]

961. Misrepresentation or Concealment as Abetment.—Instigation may consist not only in the direct incitement to crime, but it may be wilful misrepresentation or concealment of a fact which a person is bound to disclose. In other words, a person may instigate directly or indirectly. The illustration presents a case in point. *A* knows that *B*

Explanation 1.

(1) Fost. 369, 370; 2 Hawk. P. C. C. 29, s. 20.
(2) Bac. Max. Reg. 16.
(3) S. 111, *post* (q. v.).
(4) Fost. 370.
(5) *Saunders*, Plowd. 475; 1 Hale 431.
(6) Fost. 372.
(7) *Rassokoollah*, 12 W. R. 51.
(8) *Rassokoollah*, 12 W. R. 51.
(9) *Madaree*, 3 W. R. 2; *Tarinee Prasad*, 18 W. R. 8.
(10) *Andy Chetty*, 2 M. H. C. R. 438.

is not *C*. There is a warrant for the arrest of *C*. He represents to the officer executing the warrant that *B* is *C*, and thereby causes the officer to arrest *B*. The officer is guilty of wrongful restraint, but *A* is guilty of abetment. Here *A* was not under any legal obligation to assist the officer, but having preferred his assistance he could not deceive him. But, if in such a case, suppose that the officer had arrested *B*, mistaking him for *C*, and *A* had not disabused him of his mistake, would *A* have been liable as an abettor? Certainly not. Because he was not bound to correct the officer and his omission to correct him could not visit him the consequence of instigation. But if he had been under some legal obligation to make the disclosure, his omission would then have been "a wilful concealment of a material fact which he was bound to disclose" within the meaning of this explanation.[1] So an omission to give information about the commission of a crime does not amount to abetment, unless such obligation involves a breach of a legal obligation.[2] So a policeman or a chowkidar, failing to give information about the commission of a cognizable crime, would be guilty of wilful concealment within the meaning of this explanation, and so would also be a zemindar in certain particular cases. But a private individual is only morally, not legally, bound and if he omits to do what he ought to do, he may suffer in conscience or character, but the law will not touch him.[3] So under the Police Act a police-officer is always on duty in his district, and bound to shelter every person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury. If, therefore, he purposely keeps out of the way, knowing that some prisoners are likely to be tortured to make confessions, he is guilty of abetment.[4]

962. As all acts amounting to abetment must have been done prior to the act which constitues the crime, any subsequent knowledge of the crime is wholly insufficient to constitute abetment.[5] And even when a person is shown to have possessed previously knowledge of a design on the part of another to commit a crime, and that he had spoken to him about it would be insufficient to constitute abetment, unless it is at the same time shown that the person aware of the design had instigated the other by word or deed to commit the offence.[6] Here, again, the case of a police-officer would be different, for it is shown that he was aware of such a design, he becomes liable as an abettor[7] for he has then a higher duty to discharge, the omission of which exposes him to the same penalty as if he were an abettor.

Intention or Preparation.

963. A mere intention or preparation to instigate is neither instigation nor abetment. A person who asks a doctor to supply her with poison to enable her to poison her son-in-law, does not attempt murder of her son-in-law. She may, however, be charged for abetting the doctor to abet her to commit murder, and in so far as she abets him, she is guilty of abetment.[8] Here there was instigation, because the object was disclosed. But suppose that in such a case the accused had asked for the poison without disclosing her object, then there would have been no abetment at all. So where one Baku took her grand-daughter from Sholapur to Tuljapur, a place in the Nizam's dominions, her object being to dedicate her to a temple as a *Murli*, a class of persons who generally lead a life of prostitution, it was held with reference to the applicability of section 108-A that the conduct of the accused in the British territory did not amount to anything more than mere preparation, and that her intentions to dispose of her daughter for prostitution did not amount to an abetment within the meaning of this section.[9] But where a number of persons, being aware of the objects of the members of an unlawful assembly, departed from the locality where such assembly was formed, it could not be said that their failure

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(1) *Cooverji*, 9 Bom. L. R. 159 (161).
(2) *Khadim Shaikh*, 4 B. L. R. (A. C.) 7.
(3) *Per* Glover, J., in *Khadim Sheikh*, 4 B. L. R. (A. C.) 7; *Latif Khan*, 20 B. 394.
(4) *Latif Khan*, 20 B. 394; *Kali Churn Gangooly*, 21 W. R. 11. *See* expl. 2, relied on in the last case.
(5) *Shumeeruddeen*, 2 W. R. 40.
(6) *Venkatasami*, (1866) Weir (3rd Ed.) 187.
(7) S. 119.
(8) S. 108, Expl. 4; *Bakhtawar*, (Rep. 1882) P. R. No. 24.
(9) *Baku*, 24 B. 287. *See* s. 108-A, Comm.

to remain and oppose the assembly amounted to instigation and in direct support of the assembly.[1] So where a person receives without objection an unstamped document, he cannot be held to have abetted its execution as such.[2]

964. Abetment by Conspiracy.—An abettor by instigation may not only be content with his instigation. He may "engage with one or more person or persons in any conspiracy for the doing of that thing," in which case he not only instigates but conspires to commit a crime an act punishable under s. 120-B. The fact that he conspires in addition to instigating does not, however, aggravate his offence except in the four cases mentioned in s. 121-A (conspiracy to wage war), s. 311 (Thug), s. 401 (belonging to a gang of thieves), s. 402 (being a member of an assembly of dacoits). An agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means in itself amounts to a criminal offence.[3] Before the enactment of Chapter V-A in 1913, conspiracy as such was treated as only a species of abetment and was held to be punishable as such[4] (s. 120). But conspiracy relates to the stage of preparation rather than abetment and though when it develops beyond the preparatory stage it amounts to and is punishable as an abetment. A mere conspiracy does not amount to abetment,[5] and is not punishable as such. In order to constitute conspiracy four things are essential :—(*i*) there must be at least two persons ; (*ii*) they must "engage" in the commission of an act ; (*iii*) "an act or omission" must take place in pursuance of that conspiracy ; and (*iv*) that act or omission must have taken place "in order to the doing of that thing."[6] A person *A* may propose to *B* : "Let us murder *C*." *B* may dissent or say nothing, or he may agree. *A*'s proposal is met by the first clause. But it is clear that if *B* agrees, he is equally guilty. His case is met by this clause. As soon as *A* and *B* agree both become liable ; *B* under this clause, and *A* both under this and the last clauses. If *B* dissents, *A* is nevertheless liable as an instigator under the last clause, though neither *A* nor *B* is liable under this. The two clauses thus then overlap, but this clause is intended to cover cases which, but for it, would not fall under the first or next clause.

"Secondly."

965. Now as regards the first requisite it goes without saying that a man cannot conspire with himself. He must have at least one another to conspire with. That other may or may not be an adult. In England the two must not, however, be related to each other as husband and wife, for they are regarded as one in the eye of the law,[7] though the law of this country is in this respect different.[8] As two persons are required to constitute a conspiracy, both will be acquitted of that offence if conspiracy cannot be established against any one of them.[9] (§ 126).

(i) Two or More must Join.

966. Not only must there be two persons, but the two must be "engaged" in the conspiracy. If one engages an innocent person as his agent for the commission of a crime, there is no conspiracy, for the two had not the common intention. Conspiracy is a secret combination of men to commit a crime in concert. Such combination may be formed by an agreement, or it may be the result of an understanding. Two persons, Kelly and MacCarthy, had been engaged by the prosecutor for unloading oats from a vessel, and carrying them to his warehouse, Kelly being employed to draw them from the vessel and MacCarthy to carry them to Kelly's trams on which they were carried. Whilst one bag was being thus conveyed, Kelly said to McCarthy : "It is all right" and shortly afterwards McCarthy stole some oats out of two sacks

(ii) They must "Engage."

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(1) *Atim Ali*, 4 C. W. N. 500. A private citizen is under no obligation to take upon himself the dispersal of unlawful assemblies, ss. 127—132, Cr. P. C.

(2) *Janki*, 7 B. 82; *Mithulal*, 8 A. 18 ; *Sambhu Singh*, 1 Oudh 33; *Madan Singh*, 7 C. P. L. R. 21; *Hira*, (1895) P. R. No. 18; *Nga Shawe Bwin*, 11 Bur. L. R. 34.

(3) S. 120-A.

(4) *Tirumal Reddi*, 24 M. 523; *Sushil Chandra*, 6 O. L. J. 210, 51 I. C. 449.

(5) *Sher Ali*, (1879) P. R. No. 18.

(6) *Kalit Munda*, 28 C. 797.

(7) 1 Hawk., c. 572, s. 8.

(8) *See* S. 120-A, Comm. *post*.

(9) *Manning*, 12 Q. B. D. 241; *Plummer*, (1902) 2 K. B. 339; *Jogjiban Ghose*, 9 C. L. J. 663; *Abdool Kureem*, 4 C. 10.

and put them under the tram. Kelly was absent when this was done, but he returned and took away the stolen oats with the rest. It was contended for Kelly that he could not be convicted of theft , but Maule, J., said that it was all one transaction in which both concurred, and that both having concurred, and both being present at some parts of the transaction, both might be convicted.[1] They would be convicted here of conspiracy under s. 120-A, which is much wider than the abetment punishable under this section or the rule enacted in s. 34. Indeed, almost all cases of abetment, resulting in crime thereupon, would fall under the head of conspiracy, the only difference being that the abettor, as such, may be less guilty than the conspirator, as, where he merely instigates another to do a thing which the other may not agree to do, in which case, the offence abetted is not actually committed in consequence of the abetment. An example would suffice to illustrate the difference. *A* instigates *B* to murder *C*, *B* refuses. Here *A* has abetted *B* but there is no conspiracy. Even in such a case, *B* agrees to commit murder, but does no other overt act in pursuance of the agreement, neither *A* nor *B* can be charged of conspiracy. But, if *B* does an overt act, both *A* and *B* would be *equally* guilty, though in a case of abetment *A* would be less guilty than *B*. The distinction between the two cases is at times fine and in many cases, it is without a difference ; but the distinction exists and has been made in the law, which must be recognised.

967. So far abetment is concerned, one thing is, however, clear, namely, that in order to charge a person with abetment under this clause, it must be shown that he had "engaged" in the conspiracy. That engagement of necessity postulates knowledge of the common design. It is not necessary that all co-conspirators should be equally informed as to the details, for there is always such a thing as an inner circle in conspiracy but they must at least be aware of the general purpose of the plot, and that purpose must, of course, be unlawful. The engagement here spoken of may consist of nothing beyond a mere connivance and countenance on their part, as where a woman prepared herself for *suttee* in the presence of the prisoners who followed her to the pyre, and stood by her, one of them, her step-son, crying "Ram, Ram," and another asking the deceased to repeat "Ram, Ram" in order to become *suttee*, on which the Court found that the prisoners had all engaged with her in a conspiracy for the commission of the *suttee*.[2] The test of guilt in such cases is not what was the object of the accused, but whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable.[3]

968. The third essential element of this clause is that in order to constitute and complete a conspiracy there must take place "an act or omission in pursuance of that conspiracy." All that this phrase means is that there is no conspiracy so long as it rests in intention merely. Two or more persons may be animated by the same intention. But the mere community of intention is not conspiracy. The law distinguishes between acts intended and acts done. If, however, they agree to carry out their intention into effect, their agreement is *an act* in advancement of the *intention* which each of them has conceived in his mind. So Willes, J., said:

(iii) There must be Consequent Act.

"A conspiracy consist not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means."[4]

969. Such an agreement may be proved by words spoken or acts and circumstances evidencing confederacy and common purpose. That purpose must be a defined act and not some vague suspicion resting upon no solid foundation.

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(1) *Kelly*, 2 C. & K. 379. *See* S. 120-A, *post*.
(2) *Mohit Pandey*, 3 N. W. P. H. C. R. 316 *Ram Dial*, 36 A. 26.
(3) *Mathura Das*, 6 A. 491.
(4) *Mulcahy*, L. R. 3 H. L. 306 (317); *Quinn* v. *Leatham*, (1901) A. C. 495.

Where, for instance, one Sher Ali, a transfrontier resident, was found concealed in a deserted house in a village in the Kohat district with three companions, all armed to the teeth, the Commissioner convicted them under section 393, but the Chief Court of the Punjab reversed it on appeal, holding that the mere assembling of a number of persons together with general intention of committing theft, and not for the purpose of committing a specific theft or theft of specific property, cannot be considered to amount to the abetment of an offence : " There must be a design to commit a specific offence before a person can be held guilty of abetment of such offence by having conspired with others to commit it."[1] In this case the men were evidently lying in wait in pursuance of a conspiracy, the nature and object of that conspiracy was not ascertainable, but it could have been presumed that the facts warranted an inference that the men contemplated some heinous crime—it may have been theft, it may have been murder. If so, the case would appear to have satisfied the test laid down by Willes, J., of a completed conspiracy. But as a mere conspiracy is not an offence unless it is a conspiracy to commit a crime, the men could not be convicted of abetment in the absence of any evidence as to the crime that had in view. Where a person intended to forge a document and for that purpose he conspired with others, and to that end he prepared a draft and purchased a stamp-paper upon which he was about to copy it ; the stamp-paper purchased was of a sufficiently early date and in order to complete the instrument, he applied to a witness to furnish him with a Telugu date corresponding with the English date, which it was intended the forgery should bear ; it was held that the facts were sufficient to warrant a conviction of the accused for abetment of forgery.[2] In this case the accused had already performed some acts in pursuance of the conspiracy. These acts were held to have constituted forgery, but the High Court rightly remarked that the draft could not pass for the original and was, therefore, not a forgery, nor was it an attempt at one, since there was no beginning of the commission of the act. It was a preparation for an attempt, but no one can be convicted for a mere preparation, as the law allows a *locus pœnitentiæ*, and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation.

970. The distinction between preparation for an attempt, an attempt, and an abetment must, therefore, be clearly borne in mind. Against a preparation merely, there is a *locus pœnitentiæ* against an attempt there is none. Some attempts are complete offences in themselves and they are punishable as such,[3] others are punishable under the general provisions of section 511. An act may amount to a preparation, but not to an attempt, whilst another may amount only to an abetment. The former consists in planning, designing and arranging means and measures necessary for the commission of an offence ; the latter is the direct movement towards the commission after the preparation is made. It is not of the essence of an attempt any more than of abetment that there should be a power in the offender to complete the offence. For a person may be convicted of attempting to shoot with a gun which could not be discharged.[4] So a person may be convicted of picking a pocket, which, in fact, was empty.[5] So where a woman erroneously believing herself to be with child, conspired with other persons to administer drugs to herself or to use instruments on herself with intent to procure abortion, she was held to be guilty of conspiracy to procure abortion, though abortion was impossible.[6] In one case, the prisoner having had a quarrel with the prosecutor threatened "to burn him up." He went to a neighbouring stack, and kneeling down close to it, struck a lucifer match but discovering that he was watched, blew out the match and went away, Pollock, C. B., told the jury that the prisoner might be convicted of an attempt if they thought that he had intended to set fire to the stack and would have done so, if he had not been interrupted. " It is clear that every act committed by a person with the view

Attempt and Preparation Distinguished.

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(1) *Sher Ali*, (1870) P. R. 18.
(2) *Padala Venkatasami*, 3 M. 4.
(3) *E. g.*, ss. 121, 124, 125, 130, 307, 308, 309.
(4) *Duckworth*, (1892) 2 Q. B. 3 ; *Jackson*, 17 Cox 104.
(5) *Ring*, 7 Cox 491.
(6) *Whitchurch*, 24 Q. B. D. 420.

of committing the felonies therein mentioned is not within the Statute; as for instance, buying a box of lucifer matches to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy but not in an indictment of this nature."[1]

971. The acts of one co-conspirator are thus the acts of all, for which they are conjointly responsible. As Couch, C. J., said: "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object is in the contemplation of the law the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy and doing anything in furtherance of the common design."[2] So if *A* live in Calcutta he may be tried at Patna for the acts of his agent there.[3]

(iv) "In order to the doing of that thing."

972. Lastly, the act or illegal omission must have been done not only in pursuance of the conspiracy, but also in pursuance of the object of the conspiracy. Where an act is not performed in pursuance of the common design there can be no joint responsibility. If suppose *A* and *B* conspire to murder *C*, and for that purpose *A* sends *B* to the chemist's to obtain poison. *B* starts for the chemist's but robs *D* on the way. *A* could not be held liable as an abettor of the robbery. The subject will have to be more fully discussed under section 111.

"Thirdly."

973. Intentional Aid.—The third mode of abetment described in the section is by intentionally aiding any act or illegal omission in the doing of a thing. Any facility afforded to the doing of an act is, as the explanation has it, equivalent to aiding in the doing of the thing. Intentional aid may then consist of (*i*) either the doing of an act, directly assisting the commission of the crime; or (*ii*) it may consist of an act which, though not directly assisting in its commission, affords facilities for its commission; or again (*iii*) it may not be an act at all, but an illegal omission resulting in the same consequence.

974. Direct Acts.—Acts directly contributing to the commission of a crime do not present any difficulty. If the act was done intentionally to assist and it had that effect, the actor is unmistakably an abettor. As Bramwell, B., in a case told the jury: "Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder."[4] So where several persons act in concert to perpetrate a fraud, the act of each person is an intentional aid in prosecution of the common object. So if several make distinct parts of a forged instrument, each is liable, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.[5]

975. So in theft, the servant opening the door to let in thieves intentionally aids them so as to be an abettor.[6] So accomplices standing at a distance to help thieves in conveying the property stolen are abettors even if they took no part in theft and were at such distance from the scene of offence as not to be able to assist in it.[7] So where one stole a horse and another assisted him in colouring and disguising it, he was held to be an accessory.[8] So persons who assist in the rescue of a prisoner are liable under this clause. In fact the assistance given may consist of any aid,

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(1) *Taylor*, 1 F. & F. 535.
(2) *Ameer Khan*, 17 W. R. 15 (18).
(3) S. 180, illus. (*a*); *Ameer Khan*, 17 W. R. 15 (16).
(4) *Jackson*, 7 Cox 357.
(5) *Kirkwood*, R. & M. 304; *Bingley*, R. & R. 446.
(6) *Per* Coleridge, J., in *Tuckwell*, C. & M. 215. The servant had, however, left at the time of the robbery.
(7) *Kelly*, R. & R. 421.
(8) *Per* William, J., in *Lee*, 6 C. & P. 536.

however small and distantly connected with the crime, but if it is given with the intention of assisting the malefactor in his crime, it amounts to abetment within the meaning of this clause.

976. Abetment by Giving Facility.—This leads to the question of acts affording facility for the commission of a crime. If *A* wants to strike *B* and his companion *C* lends him his stick with which he assaults *B*, *C* is guilty of abetment as by lending his stick to *A* he has facilitated the causing of hurt to *B*.[1] Such was the case of Eshan Meah who happened to be present with one Bedoo, who, having had a difference, with his coolies, asked Eshan to bring him a *dao* which he did, with which Bedoo severely hurt a coolie: "It is quite clear, that a person who, under the circumstances detailed by the evidence, gives a *dao* into the hands of another person, who has already given out his intention of coercing the party against whom he is acting by using the words 'I will see to this man' must be presumed to be intentionally doing something in order to facilitate the commission of the subsequent act, and therefore, in the words of the law, abets the commission of that act."[2] So where a certain *Namghur* (a village authority) suspecting a woman to be big with child ordered two of the accused to seize her and take her to the house of the zemindar to account for it and the accused said that they would have to beat her to make her confess, and they thereupon seized and tortured her till she died, it was held that the appellant's act in ordering her seizure had facilitated the crime and that he was, therefore, liable as an abettor within the meaning of Explanation 2 of this section.[3] Here it will be seen the accused was told of the beating beforehand, and he did nothing to prevent it. If he had not been made aware of it, his fate would have been probably different as in the case of the Head Constable who had deputed two Chowkidars to take a person, charged with being in possession of illicit liquor, home to fetch a bribe whom the Chowkidars confined and tortured on the way, in which case, the Chowkidars alone were held responsible for their acts.[4]

Explanation 2.

977. A priest who officiates to solemnize a bigamous marriage stands in the same predicament,[5] for, by his act he facilitates the commission of the offence of bigamy. But persons who are present at such marriage could not be charged with abetment nor those who granted accommodation in their house for the marriage, for it could have been equally celebrated eleswhere.[6] So where a theft had been committed in the house of the zemindar of a village and a report made to the Police, brought the accused, a Sub-Inspector of Police, upon the scene, who commenced his investigation by collecting some *Khangars* in the zemindar's house where he proceeded to torture them with a view to forcing them to give information, and it appeared that the accused who had given the house was at times present when the torturing was going on, it was held that the giving of the house and its use by the Sub-Inspector was the allowing of such facility for the commission of the act as to amount to abetment within the meaning of this explanation.[7] "We also find," said Edge, C.J., and Blennerhassett, J., "that he (the accused) must have known that if he did not allow the Thanadar to use and occupy his house for the purpose of torturing these men, the torturing would have to be stopped, and could not be proceeded with."[8] So the fact that the accused wrote and attested a sale-deed of a child purchased by a prostitute for purposes of prostitution would not expose them to the liability of abettors under section 372,[9] for their assistance was not essential to the commission of the crime, which might have been completed by procuring other writers, or even without any writing. The facility afforded must then be such as was essential for the commission of the crime. In the complex organization of human society life is dependent upon constant human assistance.

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(1) *Eshan Meah*, 12 W. R. 52.
(2) *Eshan Meah*, 12 W. R. 52 (53).
(3) *Doorgessur*, 7 W. R. 97.
(4) *Luchman Singh*, 31 C. 710.
(5) *Umi*, 6 B 126.
(6) *Ib.*
(7) *Faiyaz Husain*, (1896) A. W. N. 194.
(8) *Ib.*, p. 195.
(9) *Bondili Sankara Singh*, (1884) 1 Weir 47.

Such assistance is given alike to the innocent as to the wicked. It is not, however, that assistance which law condemns.

978. As the Madras High Court in a case remarked: "The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime.....The supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; but, if food were supplied in order that the criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it."[1]

979. Criminality therefore rests not so much on the facility given, as on its nature and effect and the intention with which it was given. For example, it is settled that mere presence at the commission of a crime is not an abetment of it, if the person present has no authority to interfere.[2] But if the person present holds some position of rank and influence, so that his countenancing what takes place may, under the circumstances, be held a direct encouragement, it may amount to an abetment.[3] Suppose, for instance, that a faction fight between the servants of the two zemindars is going on, and one of them appears and watches it; would not his dependants take courage and attempt deeds which they would not have otherwise done? Or suppose that a responsible officer of police withdraws on seeing that his subordinates were torturing a prisoner, or that he does nothing to prevent them from torturing him. In the first case he facilitates the commission of his crime by his withdrawal, in the other he is guilty of an illegal omission.[4]

980. When, however, there is no obligation, an act not so intended, but offering facility for the commission of the crime, cannot be condemned as criminal. Where, for instance, one *A* knew that *B's* wife was carrying on a criminal intrigue with *C*, which *B* himself suspected. *A* informed him of an assignation which *B's* wife had with her paramour, and *A* and *B* went thither, the latter armed with a stick, and B finding his wife in the act of committing adultery, pursued her paramour for fifty paces and then struck and killed him. *B's* wife wanted to run away, but *A* detained her till *B* returned and turned upon her, striking her severely and leaving her for dead. *A* was convicted of abetting the murder of *C*, but the Chief Court held that *A* had abetted no offence.[5] Here it will be observed that *A* had distinctly afforded facility to *B* to meet *C* under circumstances which could not but have made *A* believe that *B* would commit an offence, if he saw *C* with his wife. But that was not his proximate intention, and in informing *B* of the criminal conduct of his wife with *C* he had done nothing wrong. Again, *A's* detention of *B's* wife was not shown to have been with the object of enabling *B* to commit a murderous assault upon her. His acts, therefore, were innocent though they gave *B* the facility of killing *C* and grievously injuring his own wife.

Illegal Omission.

981. In the case of illegal omission criminal liability for abetment depends no less upon the provisions of this Code than upon the obligation created or duty imposed by other laws. In the case of a person under such obligation, in order to constitute abetment, it must be shown that the accused intentionally aided the offence by his non-interference.[6] But encouragement would be presumed in the case of a police-officer whose duty as a conservator and warden of peace is to prevent the commission of crime. If, therefore, he knows that a crime is being committed and does nothing to prevent it, he is guilty of an abetment on account of his illegal omission. So where a Head Constable of Police perceiving that his subordinates were about to torture a prisoner left the place so as not to be a witness of what occurred, it was held that he was guilty of abetment of the offence that was committed in his absence. He certainly omitted to do that which he was bound to do. It was illegal in him, knowing that an offence of this kind was to be committed, to go away in order that

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(1) *Lingam Ramanna*, 2 M. 137.
(2) *Shidilingappa*, (1896) B. U. C. 844,
(3) *Lakshmi*, (1886) B. U. C. 303.
(4) *Kali Churn Gangooly*, 21 W. R. 11 (12). *Mahomed Hossein*, 5 W. R. 49.
(5) *Hussein*, (1872) P. R. No. 30.
(6) *Khaja Noorul Hossein* alias *Khaja Waheed Jan*, 24 W. R. 26 (27, 28).

that crime should be committed.[1] In such a case it is immaterial that the torture was being applied by or under the orders of a superior officer. It is the duty of the police to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury. When the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment. Consequently, a policeman who stands by and does nothing to prevent a person being tortured by another, is guilty of abetment in the same manner as if he had actually encouraged it.[2] The same responsibility rests on Magistrates and other guardians of peace.[3] In such cases the measure of responsibility is the duty imposed by law. A village Chowkidar in Bengal is not, for example, bound to prevent the commission of a non-cognizable case, *e.g.*, extortion.[4]

982. There is a difference between an illegal omission to *prevent* an offence, and the illegal concealment of an offence about to be committed. The latter is, of course, punishable,[5] but as the Law Commissioners remarked: "This is a remote and precarious aid, which, though deserving of punishment is surely very different from that which is supposed to be rendered in the former case, conducing by an immediate influence and a positive efficacy to the commission of the offence."[6]

Abettor.

108. A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—**The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.**

Explanation 2.—**To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.**

Illustrations.

(*a*) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.

(*b*) *A* instigates *B* to murder *D*. *B* in pursuance of the instigation stabs *D*. *D* recovers from the wound. *A* is guilty of instigating *B* to commit murder.

Explanation 3.—**It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.**

Illustrations.

(*a*) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as *A*. Here *A*, whether the act be committed or not, is guilty of abetting an offence.

(*b*) *A*, with the intention of murdering *Z*, instigates *B*, a child under seven years of age, to do an act which causes *Z*'s death. *B*, in consequence of the abetment, does the act in the absence of *A* and thereby causes *Z*'s death. Here, though *B* was not capable by law of committing an offence, *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(*c*) *A* instigates *B* to set fire to a dwelling-house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of *A*'s instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

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(1) *Kali Churn Gangooly*, 21 W. R. 11 (12).
(2) *Latif Khan*, 20 B. 394.
(3) *Appanna Hegade*, (1899) 1 Weir 52; *Krishna Shetti*, (1891) 1 Weir 50.
(4) *Gopal Chunder*, 8 C. 728,
(5) S. 119.
(6) First Report, s. 210.

(*d*) *A*, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z*'s possession. *A* induces *B* to believe that the property belongs to *A*. *B* takes the property out of *Z*'s possession, in good faith, believing it to be *A*'s property. *B*, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But *A* is guilty of abetting theft and is liable to the same punishment as if *B* had committed theft.

Explanation 4.—**The abetment of an offence being an offence, the abetment of such an abetment is also an offence.**

Illustration.

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence, in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

Explanation 5.—**It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.**

Illustration.

A concerts with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. *B* then explains the plan to *C*, mentioning that a third person is to administer the poison, but without mentioning *A*'s name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purpose of its being used in the manner explained. *A* administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet C has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has therefore committed the offence defined in this section, and is liable to the punishment for murder.

[***Person***—s. 11. ***Act***—s. 33. ***Intention***—ss. 34, etc. ***Knowledge***—s. 35. ***Offence***—s. 40. ***Abets***—s. 107.]

983. Analogous Law.—This section was re-drafted after it left the hands of the original committee, in whose draft it stood as clause 87. It is now far more comprehensive and complete, and in substance it is based on the English Law, with this difference that while in England a person employing an innocent agent to commit a crime will be dealt with as a principal here he still remains an abettor, though the principal was only a tool in his hands. Thus in England the abettor of a child under 7 or a mad man, or any person of defective mind would be the principal *ex necessitate*, though he were absent when the thing was done;[1] he would be under the Code liable only as an abettor. But, as the Law Commissioners remark the effect in each case is the same.[2] In other respects the section is in entire harmony with the English Law and the explanations are taken from its decided cases.

984. Principle.—This section defines an abettor to mean (*i*) the abettor of an offence, and (*ii*) the abettor of an act which would have been normally an offenec were it not for the incapacity of the actor. The reason for holding the abettor liable in the second case is self-evident. He is in fact the sole auth or of the crime, but as the punishment is in each case the same,[3] it is a distinction iwithout a difference for whether he is called an abettor or the principal he can in either case be equally punished.

985. Meaning of Words.—"*The commission of an act,*" which is criminal though the actor is exempt from punishment. "*The abetment of an illegal omission,*" as where a private person advises a police officer to withdraw from a scene of torture. Here he would not have been guilty if he had himself withdrawn, but his abetment of the police officer who was in duty bound to stay and stop the torture is criminal. "*Or that the effect requisite should be caused*": Suppose, for instance, that a person advises another to kill by means of charms would it be an abetment? Under the clause it will be, but this seems doubtful (§ 991). "*Should be capable by law,*" *e.g.*, a child, a person *non compos mentis*; *vide* illustrations. "*Abetment of an abetment,*" as where *A* requests *B* to induce *C* to murder *D*, and *B* does so.

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(1) Fost. 349.
(2) First Report, 182.
(3) S. 109.

Here *B* abets murder and *A* abets *B's* abetment.[1] "*Abetment by conspiracy*": Members of secret societies seldom know the actual perpetrators of the crime. So where persons are balloted for to commit crimes only the person reading the ballots knows the name of the person deputed to do the deed.

986. Who is an Abettor.—The last section defines only the abetment of *a thing*. Now a thing may or may not be an offence. If it is an offence, the person who abets is here defined to be the abettor. If it is not an offence because of the incapacity of the actor, the person abetting its commission is also an abettor. But if it is not an offence at all, then the person abetting its commission is not an abettor, and that act ceases to have any meaning in the Code.[2] In order then that there should be an abettor liable to punishment, there must be at least an act which must possess the ingredients of an offence. But every act implies the author of that act. That person may not himself be liable to punishment, but he must have committed the act either by himself or in participation with some one else. In the former case he is the principal and in the latter case a conspirator. And abetment is possible only in these two cases. If, therefore, there is neither, no person can be proceeded against as an abettor though his act may have been illegal.

987. Such was the case where a Mahomedan infant girl aged six, possessed of considerable properties, had been thrice married to three different persons by persons who professed to be her guardians. She was first given away in marriage to *A* by her mother, which marriage was, however, invalid, as the proper persons to give her away in marriage were her paternal uncles and not her mother. Consequently, another marriage was solemnized between the same parties at which one paternal uncle, Abdul Subhan, was alleged to be present and to have given away the bride. A few weeks later her third marriage was solemnized at which both her guardian uncles Abdul Karim and Abdul Subhan were alleged to be present, who gave her away in marriage to another man. Thus her two uncles were charged for abetting a bigamous marriage under sections 109 and 494 of the Code. The Sessions Judge found that Abdul Subhan who had taken part in the second marriage was not present at the third marriage. He was accordingly acquitted, Abdul Karim alone being convicted of abetment. But the High Court, on appeal set aside his conviction, holding that as the infant was a mere cypher in the transaction, the acquittal of Abdul Subhan removed the only other ground upon which the accused could have been convicted: "To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence, or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdul Subhan, who was jointly charged with the prisoner, puts an end to the case of the conspiracy, for except with Abdul Subhan, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Harunissa to contract a second marriage. The evidence shows that Harunissa took no part in nor was present at the ceremony which the prisoner caused to be performed in her name. .....Although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by law, to bind the infant by the marriage so contracted yet she was not less personally a stranger to both the ceremony and the contract. Assuming the facts and law to be as found and laid down by the Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by the younger paternal uncle; but, in doing this act, he was, according to the evidence, the sole actor; and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code."[3] This case then

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(1) *Srilal*, 46 C. 607.
(2) *Purna Chandra*, 41 C. 17; *Parapravan* v. *Morgan*, 1 Weir 48.
(3) *Abdul Kareem*, 4 C. 10.

establishes that an abettor must either be an instigator or a conspirator. Consequently, a married woman cannot be held to abet her own abduction.[1]

Subsequent Acts Inoperative.

988. Then again, as the Code does not regard accessories after the fact in the light of abettors,[2] persons who support the abettor cannot be tried for subsequent abetment. Where, for instance, a person, makes a false charge against another, the offence is complete. Persons who support his false charge by their evidence cannot then be tried as abettors not for their previous acts, but for having given their evidence subsequently in support of the charge.[3] So, where the accused removed certain things from the house of his father with whom he was living, and gave them to a woman with whom he was on intimate terms, it was held that the woman could not be an abettor of theft[4] though on a proper case being made out, she might have been convicted of receiving stolen property. So where *A* entered the house of *B* without his permission and committed adultery with his wife, *A* could be convicted both of house-trespass and adultery, the two offences being distinct, but *B's* wife could not be convicted of the abetment of house-trespass though she may have invited *A*.[5] A person may be charged both for the abetment as well as for the commission of an offence, but if he is convicted of the main offence, he cannot be also convicted of the abetment of the same offence.[6]

Agent Innocent.

989. It will be observed that the section makes no distinction between a principal who is innocent and one who is himself guilty. In either case the offence of the abettor remains the same.[7] In England, however, in the former case the principal is regarded merely as an agent and the abettor is treated as the real principal. The difference is, however, not material, for the result is in each case the same. In England, such an offender would be punished as a principal—here he would be punished as an abettor. For example, if a person cashed a forged note in England through another who was ignorant about the forgery, the act of the latter would be the act of the former, though he was then absent : *qui facit per alium facit per se*. He will then be punished as the principal,[8] though under this section his act would be that of an abettor only. So if *A* poisons through *B*, *A* is an accessory only if *B* is amenable as a principal but not otherwise.[9]

Explanation 1.

990. The case contemplated in the first explanation is different to the cases arising under the section. It assumes the presence of two persons and it then apportions their criminal liability. The explanation relates to the same person and shows that he may be guilty as an abettor, though as a principal he may be innocent. Such a case arises where a private person instigates a police-officer to leave a scene of cognizable offence which it is his duty to prevent. Here the policeman is guilty of an illegal omission, and therefore, of an abetment of the offence committed in his presence. The private person is guilty of no such offence, as it was not his duty to interfere. He is however guilty of abetting the police-officer in his illegal omission, and, as such, he is guilty of abetment, though he was not himself bound to do the act which it was the duty of the police-officer to do.

Explanation 2.

991. Act or Effect Immaterial.—The second explanation lays down a rule which has already been considered, and which, indeed, flows from the definition of abetment. As before remarked, abetment depends upon the instigation, and not upon the effect it has upon another. As was observed in a case, "the offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which

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(1) *Jhundoo* v. *Ahmed Deen*, (1866) P. R. No. 40 ; *Phalia* v. *Jiwan Singh*, (1871) P. R; No. 6 ; *Wahabji, Mt.*, (1875) P. R. No. 14 . *Natha Singh*, (1883) P. R. No. 11, overruling *Syad Ahmed*, (1868) P. R. No. 17.

(2) *Hazarilal*, 61 I. C. (Pat.) 836.

(3) *Ram Pandal*, 9 B. L. R. (A. C.) 16 ; *Paun Pundah*, 18 W. R. 28 ; *Jaghut Mohini* v. *Madhu Sudhan*, 10 C. L. R. 4.

(4) *Loodun*, (1869) P. R. No. 11.

(5) *Sheikh Mungli*, (1871) P. R. No. 5.

(6) *Jeetoo*, 4 W. R. 23 ; *Ramnarain*, 4 W. R. 37.

(7) *Brij Mohan*, 7 N. W. P. 134.

(8) *Palmer and Hudson*, 1 New R. 96.

(9) Fost. 349.

is actually done by the person whom he abets."[1] The conviction of the abettor is, therefore, in no way dependent upon the conviction of the principal.[2] The offence of abetment is complete with the instigation, notwithstanding that the person abetted refuses to do the thing, or doing it the expected result does not follow, or that the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them.[3] So Lawrence, J., said in a case of abetting abortion: "It is immaterial whether the shrub was saving or not, or whether it was capable of procuring abortion or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the Statute[4] and he is guilty of the offence laid to his charge.[5] So in another case the prisoner was indicted for administering saffron to a female for a similar purpose, and her counsel was cross-examining her as to her having taken something else before the saffron, and also to the innocuous nature of the article, whereupon Vaughan, B.,: said: "Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient."[6] But these cases were decided upon the language of the Statute which used the words "any medicine or *other thing*." They illustrate no sound principle, and their soundness has since been disposed of by the Legislature.[7] Suppose a person commands another to commit murder by sorcery and by no other means, would that be an abetment of murder which is impossible. It appears to have been the opinion of Westropp, C.J.,[8] that it would not, but the point was not *res integra* before him. On the other hand, the Punjab Chief Court have in a considered judgment upheld the view that abetment is none the less complete because it is physically impossible to produce the effect by the means suggested.[9] That Court supports its conclusions on the analogy of section 571. The clause should probably be read in the light of illustration (*b*), as meaning that an abetment may be complete though the effect contemplated was not caused, but not if it was initially impossible.

992. Agent may be innocent.—The third explanation is amply illustrated and it formulates a rule already considered (§ 989). It really strives to make clear what was already clear from the section. The employment of a person legally incompetent to commit an offence, or of an innocent agent does not absolve the abettor from his criminal liability, on the other hand it rests undivided upon him and is thus an element of aggravation. The innocent agent is then merely his tool and the abettor is really the principal,and is so regarded and dealt with in England (§ 983). Here he is punishable as an abettor, though the principal is innocent and escapes scotfree.[10] Such are illustrations (*b*), (*c*) and (*d*). The last illustration was relied upon in a case where one *A* had sold some trees belonging to *B* to *C* with the intention that *C* should cut them down. *C* knew nothing about *B*'s interest in them. *A* did, and it was therefore held that though *C's* felling of the trees was no offence, still *A's* act was an abetment of theft of *B's* trees by *C* for which he was rightly convicted.[11]

Explanation 3.

993. The abetment of an abetment is an offence when the principal abetment was an offence. Such would be the case where a third person intervenes between the abettor and the actor. In such a case all that is required is that the substantive abetment must be the abetment of an offence. It is not necessary that such offence should be committed.

Explanation 4.

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(1) *Imamdi Bhooyah*, 21 W. R. 8; *Dinonath Burroa*, 18 W. R. 32.

(2) *Maruti Dada*, 1 B. 15, overruling *Chawan Bapaji*, therein cited; *Dinonath Burroa*, 18 W. R. 32; *Sahib Ditta*, (1885) P. R. No. 20.

(3) *Sahib Ditta*, (1885) P. R. No. 20.

(4) 43 Geo. III, c. 58, s. 2; now *see* 24 and 25 Vict., c. 100, s. 58.

(5) *Phillips*, 3 *Camp*. 73 (76).

(6) *Coe*, 6 C. & P. 403.

(7) The corresponding words of the new Statute (24 & 25 Vict, c. 100) are "any poison or other noxious things."

(8) *Pestonji Dinshai*, 10 B. H. C. R. 75.

(9) *Sahib Ditta*, (1885) P. R. No. 20.

(10) *Joan Bleadsdale*, 2 C. & K. 765; *Dhaniram*, 14 C. P. L. R, 192.

(11) *Per* Banerji, J., in *Ram Charan*, (1898) A. W. N. 147 (148).

So where *A*, the servant of *B*, was approached by *C* with the intention of robbing *B*, who reported the fact to *B*. *B* wishing to entrap *C* allowed *A* to assist *C* in robbing him whereupon *A* made over his master's goods to *C*, who was then prosecuted for abetment of theft by *A*, and the question was whether *A* had committed theft and *C* had abetted him. So far as *A* is concerned he had removed the goods with his master's consent. He could not, therefore, be held to have committed theft. The question was then reduced to this: Did *C* abet *A* for the commission of theft which in fact he did not commit, and it was held that *C* was guilty of abetting an offence. As Jackson, J., observed: "Under explanation 4 the abetment of an abetment being an offence, and the prisoner having instigated Cummins (*A*) to do that which, if committed, would have been an offence, he has himself thereby committed an offence, and inasmuch as by explanation 2 to constitute the offence of abetment, it is not necessary that the act abetted should be committed, therefore the circumstances that, owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed does not save the prisoner from the consequence of the abetment which he has been guilty of, and, therefore, he has been properly convicted."[1]

994. Consequently, as remarked before, the conviction of the abettor is in no way dependant upon the conviction of the principal. The latter may have absconded or if tried may have even been acquitted, but the abettor is not entitled to claim the same verdict on the ground that his principal has been acquitted.[2] In this respect the English rule was at one time different (§ 944), but the modern rule is now in both countries the same,[3] abetment being made in England,[4] as it is in this country, a substantive offence. So where *A* and *B* were jointly indicted for stealing, and *A* alone was separately indicted for receiving stolen goods, and at the trial no evidence was offered against *B*, and he was acquitted, in order that he might be called as a witness against *A*, and it was proved as against *A* that he had abetted *B* to steal, and that he afterwards received the goods so stolen, *A* was convicted on both the counts, Erle, C. J., observing: "We consider the conviction may be sustained as a substantive absolute felony. Suppose the accessory is captured before the principal; under the Statute[5] he may be at once tried and convicted. If afterwards the principal is taken, tried, and acquitted, has the accessory a right to be discharged? We are of opinion that he has no such right. His sentence may have expired; is any wrong done him? We think not; whether he is tried before or at the same time as the principal, he may be guilty as an accessory, although the principal be acquitted, it being by no means certain that, although acquitted, the principal is not really guilty."[6] But, of course, though the principal may not be punished, the evidence against the abettor must establish all the points necessary to complete his guilt. If, for instance, a person is charged for an abetment of murder, the murderer may not have been brought to book, but there must be evidence against the abettor to show that there had been a murder, and that the accused had instigated it.[7]

995. If, therefore, in such a case a person had been tried for committing the murder, and he was acquitted on the ground that there never had been any murder, the abettor thereto could not be convicted on a finding, however arrived at, that there had been a murder. So it was ruled by the Punjab Chief Court following the practice of the late Sudder Court at Agra that the conviction of the abettor could not be maintained if it involved findings of fact inconsistent with the findings already recorded against the principal and that in such a case, whether on appeal or on revision, the Court would be justified in reversing the findings so as to avoid the two remaining inconsistent and contradictory.[8] Where the prisoner asked a

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(1) *Troylukho Nath Chowdhury*, 4 C. 366. To the same effect, *Ghazi Khan* (1934) Pesh. 110.

(2) *Maruti Dadai*, 1 B. 15, *Umadasi Dasi* 40 C. 143.

(3) *Hughes*, 6 Jur. 177.

(4) By 11 and 12 Vict., c. 46, s. 1.

(5) 11 and 12 Vict., c. 46.

(6) *Hughes*, 6 Jur. 177; *Bell*, C. C. 242.

(7) *Askur* (1864) W. R. 12.

(8) *Lal Khan* v. *Kureem Khan*, (1866) P. R. No. 71.

native doctor to supply her with medicine for the purpose of poisoning her son-in-law, which he refused, it was held that the prisoner's act was a mere preparation and not an attempt to commit murder, but that it might be held to have been an abetment of the native doctor to abet the accused in the commission of murder within the meaning of this explanation, and therefore, punishable under sections 302 and 116 of the Code.[1]

Explanation 5.

996. The last explanation is based upon an English precedent[2] already noticed (§ 966). As before remarked, it is not necessary, and not indeed always possible that all conspirators should be equally informed of the details of the plot. This is because all conspiracies are hatched in secret and all cannot be equally trusted with its plans. Nor are all perhaps equally interested and zealous workers. As the general has his council of war, so has the arch-conspirator his chosen satellites. They form as it were his cabinet, and they are the sole repositories of the secrets, in the furtherance of which the rank and file are content to work under orders. It is, therefore, the purpose of the clause that all should be amenable to law, and a conspirator will be equally liable with his chief, though he may not be directly connected with him, and though he may not have shared his secrets.

Ahetment in British India of offences outside it.

108-A. A person abets an offence within the meaning of this Code who, in British India, abets the commission of any act without and beyond British India which would constitute an offence if committed in British India.

Illustration.

A, in British India, instigates *B* a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder.

997. Analogous Law.—This section is new, and was added to the Code by the Amending Act of 1898,[3] in order to overrule a decision of the Bombay High Court[4] in which it was held that the abetment in British India by a British subject of an offence committed in foreign territory was not an offence under the Code. This section remedies the defect existing in the Code and noticed in that case.[5]

998. Principle.—It is against international comity and the laws of nations that one State should breed conspirators threatening the peace and security of its neighbours. Conspiracies to commit offences in friendly Foreign States are therefore regarded as offences against the State itself, and they are punishable as such. But being international offences, they require the co-operation and assistance of the Foreign State concerned from where witnesses may have to be summoned. There may be cases too in which it would be a matter of high political expediency to consult the State concerned before instituting a prosecution. The Procedure Code restricts indiscriminate prosecutions accordingly.

999. Abetment of Foreign Offence.—This section provides for the punishment of abetment of the commission of an offence outside British India. It requires only that the offence abetted shall also be an offence recognized in British India, and that its abetment shall be complete in British India. If, therefore, the only act committed in British India amounts to a mere preparation, the actual abetment being committed in foreign territory, it cannot be punished under his section. So where one Baku, and her husband Tukaram, took her minor grand-daughter by name Piri, a girl under sixteen years of age, from Sholapur to Tuljapur, a place in the Nizam's dominions, her object being to dedicate her there to the goddess Amba, and thus to make her an *aradhin murli*, who generally led the life of prostitution, it was held that the mere removal of the girl from British territory did not

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(1) *Bakhtawar* (*Mt.*), (1882) P. R. No. 24 *Gazi Khan*, (1934) Pesh. 110.

(2) *Bull*, 1 Cox 281.

(3) Indian Penal Code Amendment Act (IV of 1898), s. 3.

(4) *Ganpat Rao Ramchandra*, (1894) 19 B. 105.

(5) The Report of the Select Committee *see Gazette of India*, (1897) Pt. VI, p. 238. The language used is that of West, J., in his dissentient judgment in *Moorga*, 5 B. 338 (359).

amount to abetment. " Mere intention not followed by any act cannot constitute an offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence or an attempt or abetment of the same."[1] The accused were accordingly acquitted. As regards the first requirement it follows the well-established principle that "an act authorized by the law of the country in which it takes place, cannot be the subject of a legal proceeding here."[2] And as a person cannot be tried for a substantive offence, which is not penal under the law of the land, he cannot be tried for its abetment which follows the same rule.

1000. Abetment in Foreign Territory.—This section does not deal with the abetment of an offence outside British India. Such offence is not punishable in British India.[3]

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

109. Whoever abets any offence, shall if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment be punished with the punishment provided for the offence.

Explanation.—**An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.**

Illustrations.

(*a*) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* accepts the bribe. *A* has abetted the offence defined in section 161.

(*b*) *A* instigates *B* to give false evidence. *B*, in consequence of the instigation, commits that offence. *A* is guilty of abetting that offence, and is liable to the same punishment as *B*.

(*c*) *A* and *B* conspire to poison *Z*. *A*, in pursuance of the conspiracy, procures the poison and delivers it to *B* in order that he may administer it to *Z*. *B*, in pursuance of the conspiracy, administers the poison to *Z* in *A's* absence and thereby cause *Z*'s death. Here *B* is guilty of murder. *A* is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

1001. Analogous Law.—An offence under this section constitutes a substantive offence, and it may be so charged. And the procedure applicable is the same as if the offence abetted had been committed. So as regards the power of the police to arrest, it is provided that they " may arrest without warrant, if arrest for the offence abetted may be made without warrant, but not otherwise," the same test being applied where a warrant or summons is necessary and in matters as regards bail the compounding of offences, the competency of the Court trying the offence and the measure of punishment.[4]

1002. Procedure and Practice.—The procedure for the trial of abetment generally follows the procedure applicable to the trial of the offence abetted. Consequently an abetment is triable summarily, if the offence abetted was so triable.[5] An abettor may be tried jointly with the principal offender.[6] But where the principal offence cannot be inquired into except with the previous sanction or on the complaint of a public servant or a Court as required by section 195 of the Procedure Code, a similar sanction or complaint is not necessary to the cognizance of a case for abetment of those offences. This view proceeds upon the fact that though the abetment of an offence is an offence in itself, and is punishable under separate sections of its own, still none of these sections is mentioned in section 195 of the Procedure Code. " The fact that the Legislature has not included in section 195 the sections of the Penal Code relating to abetment is probably due to the circumstances that in the

(1) *Baku*, 24 B. 287.
(2) *Per* Cockburn, C J., in *Phillips* v. *Eyre*, L. R. 4 Q. B. 225 ; Story's Conflict of Laws, § 18.
(3) *Balwant Singh*, (1918) P. R. No. 31, 48 I. C. 865 ; *Raj Bahadur*, (1918) P. R. No. 23, 47 I. C. 447.
(4) Sch. 2, Cr. P. C.
(5) Ss. 260 (*k*), 261 (*c*), Cr. P. C.
(6) S. 239, Cr. P. C. ; *Dwarka Singh*, 28 I. C. (C.) 732.

generality of cases the facts connected with the abetment are not likely to come before Court."[1] But as regards offences mentioned in section 198 of the Procedure Code, a complaint of the aggrieved party is necessary, even if the offence charged be an abetment.[2] Though having regard to the meaning of " offence " given in section 40, the term as here used would include an offence committed not only against the Code,but also under special or local law,still that term cannot be extended indefinitely to comprise rules that may have been framed under those laws.[3] A person found guilty of abetment of theft could not on the same facts be convicted of receiving stolen property,[4] nor could persons punished as principals be punished for abetment of the same offence.[5]

1003. Charge.—In a charge under this chapter, the section of the principal offence, and the section of this chapter under which the case falls should be mentioned with the circumstances which bring it under the said section.[6] A person cannot be convicted unless he is specifically charged under this section.[7]

1004. The offence of abetment falls through if the principal offence is not substantiated.[8] It is not competent to the appellate Court to alter the conviction for theft into one for its abetment under this section of which he was never charged.[9] Nor can a conviction under this section be altered to one under s. 471.[10]

1005. The charge may be worded as follows :—

" I (*name and office of Magistrate etc.*), hereby charge you (*name of accused*) as follows :—

" That *A B* (*the name of the principal, if the person is unknown* say *that an unknown person*) on the——day of——at——committed the offence of——, and that you at——abetted the said *A B* (or *person unknown*) in the commission of the said offence of——which was committed in consequence of your abetment and you have thereby committed an offence punishable under section 109 and——of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).

" And I hereby direct that you be tried on the said charge (by the said Court *if the case is committed to the Sessions*)."

1006. When the abettor is charged with the principal offender, the charge should then run thus :—

" That you——on or about the——day of——at——abetted the commission of the offence of——by——which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under sections 109 and——of the Indian Penal Code, and within the cognizance of my Court (*or* the Court of Session)."

1007. This section only deals with a case of abetment in which no *express* provision is made by this Code. It therefore does not apply to the following sections which contain such express provisions :—

Limits of the Rule.

Ss. 110-120 (specific sections on abetment).
Ss. 121-123 (abetting the waging of war).
S. 130 (abetting the escape of State prisoners).
S. 132 (abetting mutiny).
S. 134 (abetting assault of a soldier or sailor on his superior officer).
S. 136 (abetting insubordination of the same).

1008. Principle.—Four things are considered in determining the criminality of the abettor : What act he had abetted and with what intention, and what act was committed and with what intention. If there was the identity of intention of the abettor and actor and the act was committed as it was abetted, then the liability

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(1) *Abdul Kader*, 20 M. 8. To the same effect, *Jamaluddin*, (1887) P. R. No. 55.
(2) *Jit Mal*, (1888) P. R. No. 4 ; *Sardar Dayal Singh*, (1898) P. R. No. 9,
(3) *Ganda Shah*, (1894) P. R. No. 23.
(4) *Chattar Singh*, (1901) P. R. No. 15.
(5) Sch. II, Cr. P. C.
(6) Cr. Letters, 3 W. R. 5 ; 1 W. R. 9.
(7) *Darbari Chowdhery*, 60 I. C. (Pat.) 999.
(8) *Raja Khan*, 61 I. C. (C.) 800 ; *Umadasi*, 52 C. 112.
(9) *Chand Nur*, 11 B. H. C. R. (A. C.), 240 ; *Padmanabha*, 33 M. 264 ; *Singaravelu*, 14 I. C. (M.) 203 ; *Varyal*, 14 I. C. (M.) 319 ; *Govind*, 66 I. C. (Pat.) 334 ; contra *Yeditha*, 15 I. C. (M.) 85.
(10) *Authoor*, 24 I. C. (M.) 976.

of the abettor and the actor is equal. Such a case is met by the present section. But such complete union between two confederates is not always possible, and it may be that there may be a variation in act,[1] or intention[2] the effect produced,[3] or the encouragement given,[4] and again some discrimination is necessary between the abetment of heinous crimes such as murder, and those of a lesser kind. The remaining sections in this chapter consequently deal with the penalty involved in these variations. They, however, mainly relate to three facts following an abetment : (*i*) Where no offence is committed, in which case the offender is punished for what is a mere attempt to stir up crime (ss. 115, 116); (*ii*) where the act abetted is committed, in which case the offender is punished under ss. 109, 110; (*iii*) where some act different but naturally flowing from the act abetted is committed, in which case the abettor is punishable under ss. 111, 112 and 113.

1009. Meaning of Words.—"*If the act abetted is committed*": The act means here the specific offence abetted. "*No express provision,*" as has been, for instance, made by the ensuing sections, and sections 121, 130, 132, 134, 136. "*An act is—committed in consequence of abetment*". The words following paraphrase s. 107. "*Punishment provided for the offence*" : Under this code and not under any special or local law.[5]

1010. Abetment Followed by Act.—This section prescribes the penalty for abetment on commission of the act in consequence of the abetment. It excludes two classes of cases namely, (*a*) those in which the Code contains express provisions elsewhere, and (*b*) those in which the act abetted is committed but *not* in consequence of the abetment. The cases covered by express provisions have been already set out (§ 1007). In these cases the punishment will be that prescribed in those sections. In order, therefore, to see if this section applies, the Court has to first glance through the other sections hereby excluded, for this is a general provision and has no application so long as there are more specific sections applicable. If there are no such sections applicable, the question is then narrowed down to this : (*i*) What was the act abetted ; (*ii*) what was the act committed, (*iii*) is the act committed the same as the act abetted ; and (*iv*) was it committed in consequence of the abetment.

1011. As regards the first, the question is a question of fact which has to be sifted in the light of the rules discussed under sections 107 and 108. In order to establish the charge of abetment there must be evidence that an act was abetted, and that it was abetted by the person charged. The act abetted must, moreover, amount to a crime,[6] and in order to connect the abettor with the crime, it is not alone sufficient to prove that he has taken part in those steps of the transaction which are innocent, but that he had taken part in those steps of the transaction that are criminal.[7] Where, therefore, a person is charged with abetment of perjury, it is not only necessary to show that he had instigated another to make the statement which he did, but that in doing so he intended that those statements should be made falsely.[8] So where a person is charged with the abetment of forgery, it is not enough to show that he had taken part in the making of the document, but it must be shown that he knew that he was thereby promoting forgery. So where the accused wrote out a document purporting to be a *kobala* of one Khettar Nath Das then deceased, but to which no signature was affixed in his presence, it was held that the offence committed was one under this section, inasmuch as by his act he had abetted the commission of forgery whenever and by whomsoever it may have been committed.[9] So where a Hindu father after having given away in marriage his daughter, aged about 8, to one person, married her again to another, his act was held to amount to abetment within the

(i) Act Abetted.

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(1) S. 111.
(2) S. 110.
(3) S. 113.
(4) Ss. 114, 118-120.
(5) *Mg. Pukai*, 7 R. 329 F. B.
(6) *Purna Chandra* v. *Hachanalli*, 41 C. 17 ; *Raja Khan*, 61 I. C. (C.) 800.
(7) *Nim Chand Mookerjee*, 20 W. R. 41 (44).
(8) *Ib.*, p. 44 ; *Khandu Vishnu*, 1 Bom L. R. 351.
(9) *Kashi Nath Naick*, 25 C. 207.

meaning of this section.[1] It was contended in this case that as the girl was only aged 8, she had not the requisite knowledge and intelligence to commit an offence under section 494, and as there was no offence, there could be no abetment, but it was held that the case was amply covered by section 108, explanation 3, illustration (*a*).

(ii) Act Committed.

1012. Sometimes the only indication of the act abetted will be found in the act done. So where the lessee of a house allowed gamblers to congregate therein, who caused an annoyance to the neighbourhood by their noise and disorderly conduct, it was held that the lessee was rightly convicted under this section read with section 290 of the Code, as the nuisance was caused in consequence of his turning his house into a common gaming house, which he could have anticipated.[2] So in the Himalayan Bank fraud case Edge, C. J., directed the jury to find the accused, Moses and Greenway, Manager and Accountant, guilty of abetment under this section if they came to the conclusion that they had assisted the directors of the Bank by the issue of false balance sheets to obtain the sanction of the shareholders to the paying of the dividends, and of the depositors to the retention of their deposits in the Bank.[3]

1013. A person may be charged of abetment under this section, though he may not have abetted the offence committed. Thus where *A* killed his wife in consequence of a quarrel, and he then called his brother *B* to assist him in disposing of her body to which he agreed and for which purpose he accompanied him, *A* asked him to carry his child *C* which he did, and while on the way he asked him what he intended to do with the child, and *A* replied that he should either kill him or abandon him in the jungle. *B* thereupon continued to carry the child and, after proceeding with it some distance, declined to proceed any further. He then left the child with *A* and left him to call his brother who was in the neighbouring field, whom he sent to *A*, himself returning home. *A* killed *C*, and it was held that *B* was liable as an abettor both under this and section 111, his abetment consisting in the fact that after he had known of his brother's murderous intention he continued to carry the child and left him with *A*, in consequence of which he was killed.[4] In this case the abettor had the means of knowing the nature of the act committed, for the commission of which he offered facilities. He was, therefore, rightly convicted of abetment.

1014. The question in these cases is, was the act committed the same as the act abetted. This question is answered in section 111, under which it will have to be discussed. Here, however, it may be stated that the test in such cases is, was the act done such as the abettor knew was the probable consequence of his abetment. If so, he is liable in the same manner and to the same extent as if he had himself directly authorized the act. For the purpose of determining the identity of the offence committed with that abetted, it is not necessary that the two offences should be called by the same name, provided that they are otherwise identical. Where, for instance, a woman *A* volunteered to become a *sutti*, and *A* ordered her pile to be lighted, whereupon *A* fled, but *B* induced her to return, it was held that though *A* was guilty of attempted suicide, *B* was liable for abetment of homicide.[5]

Is Kidnapping a Continuing Offence?

1015. Abetment : Kidnapping.—Sometimes a person's liability for abetment may depend upon the stage at which his assistance was given. If he had assisted after the offence was already complete, his assistance *ex post facto* could not amount to abetment (§ 1016). If the offence was, on the other hand, a continuing one, abetment is in such a case still possible. For example, take the offence of kidnapping punishable under section 363 of the Code. It is now agreed that kidnapping could

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(1) *Nandlal Singh*, 6 C. W. N. 343, distinguishing *Abdul Karim*, 4 C. 10, on the ground that the parties were Hindus and there was a marriage of the girl in the usual manner.

(2) *Thandavarayudi*, 14 M. 64.

(3) *Moss*, 16 A. 88.

(4) *Sadu*, (1884) B. P. J. 207.

(5) *Saheblall*, (1863) R. J. P. J. (C.) 174.

not be so regarded.[1] consequently, there cannot be abetment of kidnapping by an act subsequent to the removal of the minor out of the custody of his guardian, since the offence does not continue so long as the minor is kept out of such guardianship.

1016. Offence Committed must be Consequential.—The same rule extends to other offences. A person cannot be convicted of the abetment of theft merely on the ground that he had subsequent knowledge of the offence.[2] This is clear from the meaning assigned to the term abetment in section 107 and to the fact that this section contemplates that the act abetted should be committed in consequence of the abetment.[3] Now, how is it to be known that an act was committed in consequence of the abetment? According to the Explanation, an act would be deemed to be so committed if it is committed (*a*) in consequence of the instigation, or (*b*) in pursuance of the conspiracy, or (*c*) with the aid which constitutes the abetment. These three clauses, it will be noticed, closely follow the three corresponding clauses of section 107, to which reference must be made for the meaning of the terms here employed (§§ 954-982). The questions that call for discussion here are, when are the acts committed to be deemed to be done in consequence of the instigation, in pursuance of the conspiracy, or with the aid of that act constituting abetment.

Explanation.

1017. In ordinary cases it is not difficult to trace an effect to its cause. *A* tells *B* to strike *C*, *B* strikes *C*. The assault on *C* is, of course, in consequence of the instigation of *A*. This is, however, the case of direct instigation, but there are cases in which the influence of instigation is left to inference. Such inference may be drawn not only from the acts and conduct of the abettor, prior to the commission of the act, but also his contemporaneous and subsequent conduct in reference to the transaction. For instance, if a person stands by while a crime is being committed by the other, he may be either a spectator or an accomplice. But, if suppose, he came and left with the actual perpetrator, would not the inference be strong that he was an abettor?[4] So again there may be circumstances when such an inference may be drawn from a mere standing by. Suppose a gentleman's house is being robbed at night and two men armed with sticks are found watching at the gate. Could they be regarded as mere spectators? And could they be regarded as otherwise than spectators, if they happened to be respectable neighbours who had probably been attracted by the sound of burglars? Where certain persons pointed out to the dacoits the houses to be robbed, and took charge of the camels of the dacoits whilst the dacoity was being committed, it was held to be a case of abetment under this section.[5] The question, in each case, is then a question of fact depending upon the proved facts and circumstances of each case.

1018. No Offence, No Abetment.—It is clear from the language of this section that there can be no abetment of an offence which is non-existent. A case in point is that of the accused who having been prosecuted by a Sergeant had been convicted of a small offence under the Motor Car Act, but oblivious of which fact he offered him Re. 1 for the withdrawal of the charge. It was held that he could not be convicted for abetment of the offence of bribery.[6] The liability of a person for abetment must be distinguished from his responsibility as a co-offender. Where the accused merely said "Beat" but took no further part in the consequent assault, he was held liable for no more than the abetment of assault under ss. 352 and 109.[7]

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(1) *Nemai Chattoraj*, 27 C. 1041, F. B.: followed in *Chekutty*, 26 M. 454; *Ram Dei*, 18 M. 380 (382); *Ram Sundar*, 19 A. 109. To the same effect, *Rakhal Nikari*, 2 C. W. N. 81; *Mula*, (1888) P. R. No. 13; *Chanda*, (1893) P. R. No. 13; *Chanda*, (1894) P. R. No. 6; followed in *Muhammad Buksh*, (1894) P. R. No. 8; *Durga Das*, (1904) P. R. No. 13; *Jaimal Singh*, (1901) P.R. No. 1.

(2) *Shumeerundeen*, 2 W. R. 40.

(3) *Raj Coomar Banerjee*, 4 Ind. Jur. (O. S.) 105.

(4) In *Jan Mahomed*, 1 W. R. 49, merely a standing by was held to constitute abetment, but it is not so.

(5) S 71; *Sita Ram Rai*, 3 A. 181.

(6) *Shamsul Huq*, 64 I. C. (C.) 369.

(7) *Mir Hyder*, 29 I. C. (M.) 88.

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Punishment of abetment if person abetted does act with different intention from that of abettor.

[*Offence*—s. 40 *Abettor*—s. 108.]

1019. Analogous Law.—This section refers to a case contemplated in section 198, explanation 3, of which illustration (*d*) furnishes a concrete example.

This section applies equally to offences under special or local laws.

1020. Procedure.—With reference to this section, it is provided by the Code of Criminal Procedure that the police may arrest without warrant if they could have done so for the offence abetted. So ordinarily, a warrant or summons will issue in the first instance according as a warrant or summons may issue for the offence abetted. The offence is bailable and compoundable if the offence abetted be bailable and compoundable. The same test applies to the jurisdiction of the Court trying the case.[1]

1021. Principle.—As remarked before, the law of abetment takes note of four things: (*a*) the act abetted, (*b*) the act done, (*c*) the intention of the abettor, and (*d*) of the actor. The last section presents a case in which there is no variation between the abetment and the act, and this section supplements the provisions of that section by enacting that a variation between the intention and knowledge of the abettor is immaterial so long as the act done is the same as the act abetted. Where even the act is different the rules formulated in the next section would have then to be called into requisition. So far as this section is concerned, it makes it inconsequential that the person abetted had an incentive of his own or no incentive at all for committing the act. He had committed it in consequence of the abetment, and his abettor must take upon his shoulders all the blame that attaches to the offence. It was he that had moved the hand of the other, and the presumption is that it would not have moved otherwise. His responsibility is, therefore, single and undivided. This does not mean that the person abetted is thereby rendered free from punishment. His liability as an offender still remains, and will be measured by the enormity of his crime and the criminality of his intention. If he was an innocent agent, then *respondeat superior*. If a *particeps criminis*, then he must suffer as much as his mentor.

1022. Offence Committed with Different Intention.—As no man can be punished for his evil intentions, so no man can be held liable if his act was prompted by his own intention provided that it was the act abetted by another. If, therefore, *A* orders *B* to kill *C*, and *B* kills him because he has a malice of his own against *C*, *A* is liable to the same extent as if *B*'s act was due to the malice of *A*. So *A* asks a railway porter *B* to remove a certain luggage from the train, and the porter removes it believing it to be *A*'s but which *A* intended to steal; he is liable for abetment of *B*'s theft, though *B* being an innocent agent is not liable for his own act.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, on the same manner and to same extent as if he had directly abetted it:

Liability of abettor when one act abetted and different act done.

Provided that the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Proviso.

(1) *Jeetoo Chowdhury*, 4 W. R. 23; *Ram Narain Josh*, 4 W. R. 37.

Illustrations.

(*a*) *A* instigates a child to put poison into the food of *Z*, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of *Y*, which is by the side of that of *Z*. Here, if the child was acting under the influnce of *A's* instigation, and the act down was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of *Y*.

(*b*) *A* instigates *B* to burn *Z's* house. *B* sets fire to the house and at the same time commits theft of property there. *A*, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(*c*) *A* instigates *B* and *C* to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. *B* and *C* break into the house, and being resisted by *Z*, one of the inmates, murder *Z*. Here, if that murder was the probable consequence of the abetment, *A* is liable to the punishment provided for murder.

1023. Analogous Law.—This statement of the law coincides with the English view. So Foster laid down the following rules : " If the principal totally and substantially varies : if solicited to commit felony of one kind, *he wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal *in substance* complies with the command, varying only in the circumstances of time or place or manner of execution in these cases the person soliciting to commit the offence will, if absent, be an accessory before the fact, or if present, a principal. *A* commands *B* to murder *C* by poison ; *B* does it by sword or other weapon, or by some other means ; *A* is accessory to this murder, for the murder of *C* was the principal object, and that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was the probable consequence of what was ordered or advised*, the person giving such order or advice will be an accessory to that felony. *A*, upon some affront given by *B*, ordered his servant to waylay him and beat him. His servant does so, and *B* dies of the beating; *A* is accessory to this murder. *A* solicits *B* to burn the house of *C* ; he does so, and the flames catch the house of *D*, which also is burnt. *A* is accessory to this felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence."[1]

1024. Illustration (*a*) follows the view of Sir Michael Foster and dissents from that of Hale, in a case in which he held that, if *A* ordered *B* to kill *C*, and *B* by mistake killed *D* but missed *C*, *A* was not accessory to the murder of *C*, because the person was different. Sir Michael Foster animadverts on this view, holding that the order was to commit murder and the fact that a wrong person was murdered was no exoneration of the crime.[2]

1025. This view is enacted in the section, and illustration (*a*) shows that the view adopted by the Legislature is that commended by Foster and is opposed to that of Lord Hale.

1026. Procedure.—The procedure in an offence under this section is the same as in the case of the offence abetted.

1027. Principle.—It is a rule of acknowledged authority that a man is responsible for the probable consequences of his own acts.[3] No man can say that he did not authorize an act when he could have foreseen that consequence. If he did not, he might and ought to have foreseen it, and he is liable to the same extent as if in fact he had foreseen it. If the rule were otherwise, Criminal law would be more compassionate to felons than civil law is to those who employ

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(1) Fost. Cr. L., 369, 370. To the same effect, 1 Hale P. C. 617 ; 2 Hawk P. C., c. 29, s. 18.

(2) Fost, Cr. L. 372 ; 1 Hawk P. C., c. 29, s. 22.

(3) S. 109, Expl.

agents. The rule, therefore, has always been that those who employ agents to perpetrate crimes must bear the brunt of liability for all acts done by the agent so long as the agent has not *substantially* varied from the terms of the abetment.

1028. Meaning of Words.—"*The act done was the probable consequence of the abetment*": This means the same thing as that the act done was in consequence of the substantial compliance of the abetment. "*And was committed,*" that is to say, that the act was done in consequence of the abetment.[1]

1029. Limits of Vicarious Liability.—Following the rule of English Law (§ 1024), this section defines the limits of the abettor's responsibility for effects produced in consequence of his abetment. Criminal law regards the criminal abettor at least as much responsible for his act as civil law makes one responsible for delegated authority. The rule here enacted makes the abettor liable for all acts of the person abetted provided that they were performed in consequence of the abetment and were its probable consequence. For instance, *A* orders *B* to burn *C's* house, and he in so doing commits a robbery; now *A*, though accessory to the burning, is not accessory to the robbery, for that is a thing of distinct and inconsequential nature.[2] So if *A* counsels *B* to steal goods of *C* on the road, and *B* breaks into *C's* house and steals them there, *A* is not accessory to the house-breaking, because it is a felony of another kind.[3] He is, however, accessory to the stealing.[4] But if in such a case *A* had counselled *B* to steal goods in *C's* house, and he broke into it, *A* would be accessory to the breaking, for it was only incident to trespass.[5] (§ 957). But a person abetting robbery is not, according to Straight, J., liable for the excessive violence therein used, which culminated in the death of the person robbed.[6] That decision so far as it may have been founded upon the facts of that case may be right, but it is no authority for enunciating a general rule that an abettor of robbery is not liable for murder if it is committed in consequence. Indeed, in abetting robbery, the abettor authorizes the use of such force as will suffice to overcome resistance. Could it be then said that the abettor has no reason to believe that it may lead to murder, and if so, why should he not be responsible for it? At any rate this is the view taken by Sir Michael Foster. (§ 1023).

True Test.

1030. At the same time Sir Douglas Straight is perfectly right in counselling strict and close construction of the highly penal provisions of this section.[7] He is also right in saying that the test in these cases must always be, whether, having regard to the immediate object of the instigation of conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts. These observations may be applied to the facts of the case which were these. *A* had obtained a decree against *B* for a sum of money which *B* reluctantly paid, but which he was anxious to recover. *B* put up with *A* and conspired with certain robbers to rob *A* while he was on his way, of which he gave the robbers information. *A* was not only robbed but murdered. *B* was held an abettor of murder.[8] Where, however, a Head Constable having arrested one Kurpa Sahu on a charge of illicit possession of country liquor promised to release him on payment of a bribe, to procure which Kurpa Sahu was sent in charge of two Chowkidars, who for that purpose beat and confined him, it was held that the maltreatment of which the accused were guilty could not be said to have been abetted by the Head Constable.[9] The question what was the probable expectation of the

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(1) S. 109 Expl.
(2) 1 Hale 617; 4 Black. 37.
(3) Plowd. 475.
(4) 1 Hale 617.
(5) Bac. Max. Reg. 16.
(6) *Mathura Das*, 6 A. 491, followed in *Girga Prasad*, 57 A. 717 (724).
(7) Fost. 370. S. 1066.
(8) *Mathura Das*, 6 A. 491. *Ghanashyam Singh*, 6 Pat. 627; relied upon in *Nawabali*, (1928) C. 752; *Suraj Kumar Sen*, (1934) C. 221 (F. B.)
(9) *Luchmun Singh*, 31 C. 710.

abettor in a given case, of course, depends upon the circumstances of each case. If a person abets one merely to beat another, it may be safely inferred that the amount of hurt he thereby sanctions, is simple or grievous hurt, but it would be extending too far the liability of the abettor to hold him liable if murder is the consequence.[1]

1031. In such a case a good deal, though not all, depends upon the intention of the abettor and the nature of the act abetted.[2] Where, for instance, three soldiers went together to rob an orchard, and two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared him and asked him what business he had there, whereupon the soldier stabbed him, it was held that only the soldier who stabbed was guilty of murder, the other two being innocent. It was considered that they had come to commit a small inconsiderable trespass, and the murder was committed upon a sudden affray without their knowledge, and that they could not, therefore, be held liable as abettors.[3] But it would have been different if they had gone to steal with a general resolution against all-comers, in which case the murder, would have been committed in prosecution of their original purpose (§§ 966-967). Indeed, where persons start with a general resolution against all-comers, whether such resolutions appears evidence to have been actually or explicitly entered into by the confederates, or may be reasonably collected from their number, arms or behaviour, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow.[4] The question then does not necessarily depend upon the abettor's intention. If the act was the probable consequence of the abetment he is liable, whatever may have been his intention. Suppose, for instance, *A* orders *B* to take a loaded gun and rob *C*, whom he has seen proceed on his way armed with a sword. *A* counsels *B* not to murder *C*, *B* attacks him, and is met with resistance, whereupon he kills him. Here *A* had not intended to abet the murder of *C*, but he knew that from the way that *B* and *C* were armed, that murder may probably be the consequence. *A* is, therefore, liable for abetment of the murder of *C*.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Abettor when liable to cumulative punishment for act abetted and for act done.

Illustration.

A instigates *B* to resist by force a distress made by a public servant. *B*, in consequence resists that distress. In offering the resistance, *B* voluntarily causes grievous hurt to the officer executing the distress. As *B* has committed both the offence of resisting the distress and the offence of voluntarily causing grievous hurt, *B* is liable to punishment for both these offences, and if *A* knew that *B* was likely voluntarily to cause grievous hurt in resisting the distress, *A* will also be liable to punishment for each of the offences.

[***Offence***—s. 40. ***Distinct offence***—s. 71.]

1032. Analogous Law.—Obviously, this section does not override the provisions of section 71, under which a person cannot be separately punished for what are the parts of the same offence. The provision for cumulative punishment made in this section was explained by the Law Commissioners to vary from the English Law[5] "in making the abettor liable to cumulative punishment if the intended offence be also committed according to the principle of this Code."[6]

1033. The words "knew to be likely to be committed" in the original section were objected to,[7] which necessitated the change of language. Appended

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(1) *Goluck Chang*, 5 W. R. 75; *Doorgessur Surmah*, 7 W. R. 97; *Girja Prasad Singh* (1935) A. 346.
(2) *Imamdi Bhooyah*, 21 W. R. 6.
(3) *Skeet*, 4 F. & F. 931; Fost, 353.
(4) Fost., 353, 354; 2 Hawk P. C. C. 29, s. 8; Russel, Bk. 1, Ch. 3, p. 163. *Sheo Barhi*, (1930) Pat. 164.
(5) Digest, Ch. I, s. 4, Art. 13.
(6) First Report, s. 212.
(7) First Report, s. 213.

to the draft section there were two illustrations, one of which, since omitted, ran as follows :—

"(a) *B*, with arms, breaks into an inhabited house at midnight, for the purpose of robbery. *A* watches at the door. *B* being resisted by *Z*, one of the inmates, murders *Z*. Here if *A* considered murder as likely to be committed by *B* in the attempt to rob the house, or in the robbing of the house, or in consequence of the robbing of the house, *A* is liable to the punishment provided for murder."

1034. Principle.—The section extends the doctrine of constructive criminality beyond the recognized limits of English Law[1] (§ 1032). But in holding the abettor liable to the punishment of a different offence which may be committed in consequence of his abetment of the intended offence if he knew that such different offence was likely to be committed in the attempt to commit the intended offence, the section only pushes to its logical consequence the rule enacted in the last section.

1035. Meaning of Words.—"*If the act for which the abettor is liable*," *i.e.* if the offence *probable* is committed in adition to the offence actually instigated and it "*constitutes a distinct offence*," for the meaning of which *see s.* 71, "*the abettor is liable for punishment for each of the offences*," *i.e.*, he is liable to cumulative sentences.

1036. Cumulative Offences.—This section materially enlarges the liability of the abettor to punishment both for the offence actually abetted as well as that which was a probable consequence of the abetment, provided that the two offences were "distinct" (§ 493), that is to say, if they were such in which cumulative sentences might be legally passed. It has already been seen as to what offences are to be considered "distinct" for this purpose (§§ 489-491). As that list is fairly full, all that need to be said here is, that if the person abetted commits not only the act abetted but also another act as a probable consequence of the abetment, and by reason thereof, the abettor may be punished for both, if such punishment would be otherwise legal. This provision does not affect the abettor's liability *aliunde*, as if in addition to abetting a theft by house-breaking, he receives stolen property, in which case he may be charged for the house-breaking and theft under this section, and for receiving stolen property independently of it.

113. When an act is abetted with the intention, on the part of the abettor, of causing a particular effect, and an act, for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Liability of Abettor for an effect caused by the act abetted different from that intended by the Abettor.

Illustration.

A instigates *B* to cause grievous hurt to *Z*. *B*, in consequence of the instigation, causes grievous hurt to *Z*. *Z* dies in consequence. Here, if *A* knew that the grievous hurt abetted was likely to cause death, *A* is liable to be punished with the punishment provided for murder.

[***Act***—s. 33. ***Intention***—s. 34. ***Abettor***—s. 108.]

1037. Analogous Law.—This section is complementary to s. 111 from which its provisions are, however, distinguishable upon grounds stated in the next article.

1038. Principle.—This section supplements the provisions of the last section which deals with the doing of a different *act* to the act abetted, while this section deals with a case where the act done is the same as the act abetted, but its *effect* is different. The liability of the abettor is also, consequently, in the two cases different. In the first case, his liability for his constructive act depends upon the determination of the question whether the act done is a probable consequence of the abetment. In this case, his liability depends upon his "*knowledge of the likelihood of the effect.*" The measure of criminal responsibility in a case arising under s. 111 is the probability of the consequence, but the measure in a case arising under this

(1) Digest, Ch. I. s. 4, Art. 13.

section is not the probability but the knowledge of the likelihood of the effect produced. An act may be probable without the abettor knowing it likely; on the other hand, the abettor may know it is likely and yet the effect may not be probable. Knowledge is subjective while probability is objective. In one sense, one cannot be said to possess knowledge of a future contingency (§§ 227, 311, 312). But, as elsewhere explained, knowledge merely includes a higher degree of belief founded upon the accumulated experience of the past, that the effect was likely under the given circumstances. Both s. 111 and this section depend upon warrantable inference; only in a case under this section, the facts warranting the inference must be stronger.

1039. Meaning of Words.—"*With the intention of causing a particular effect,*" which intention must necessarily be communicated to the principal. "*An act for which the abettor is liable*": Could this include a case under soetion 111? If so, the abettor will be liable both for his constructive act as well as for its adventitious effect (§§ 1029-1031). "*Provided he knew that the act abetted was likely*": for the meaning of which *see* s. 39.

1040. Abettor's Liability for Likely Effect.—The distinction between this and section 111 has been already considered (§ 1038). Tbat section appears to deal with abetment in which the abetment consists of the act to be done and not of the effect to be produced. The act done may, indeed, invariably thus produce the effect, but the production of the effect is neither directly intended not necessarily expressed. Under this section, however, the abettor has an object in view and he abets the principal to attain that object and not to go beyond, This sections defines his liability if the principal in attaining one result produces another which the abettor may, or may never, have bargained for. But as the primary author of the mischief, he is not wholly irresponsible for the effect produced, though he should not be taken by surprise. He is, therefore, declared liable only in case he knew that the effect produced was likely. This section does not necessarily exclude a case under s. 111, as it is conceivable that the act done may both be the probable consequence of the abetment as well as cause the effects which the abettor knew was likely. Suppose, for instance, that *A* orders *B* to take a loaded gun and waylay *C* and rob him. *C* was armed with a sword and *A* cautions *B* on no account to kill him unless to save himself. *B* attacks *C*, whereupon *C* draws his sword, *B* then fires and kills *C* and robs him. Here *A* is liable both under section 111 as well as this section, in as much as *A* knew that *C's* murder was probable. He also knew that though he wanted *B* only to rob *C*, still *B* was likely to kill him if he was resisted, and which *C* was likely to do.

1041. Of course, neither section 111 nor this section contemplates that the act abetted or the effect caused should be merely an attempt. *Prima facie* any violence to another would fall under one of two categories, *viz.*, to cause death, or hurt, whether grievous or simple.[1]

Abettor present when Offence is Committed.

114. Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

[***Act***—s. 33. ***Offence***—s. 40. ***Abettor***—s. 108.]

1042. Analogous Law.—This section deals with what is known in English Law as accession at the fact, or principal in the second degree (§ 944). An abettor who is present at the time of the commission of the crime is, in the eye of the law, regarded as an actual perpetrator of the crime, though, as a matter of fact, the offence was committed by another person altogether. In this respect this section is somewhat wider than section 34 which defines the joint liability of persons acting in "furtherance of the common intention of all." An instigator working through an innocent

(1) *Per* Fox, J., in *Nga Po Kya*, (1903) 9 Bur. L. R. 190.

agent would not be liable under section 34. He is liable under this seciton. Section 34 deals with the case of conspiracy which is not the only form of abetment dealt with in this section.

1043. It will be observed that an abettor present at the fact is not now regarded as an abettor under English Law. He becomes a principal in the second degree. In this respect the section differs, for even though present and punishable in the same manner and to the same extent as the principal offender, he does not thereby cease to be an abettor and assume the character of principal. The difference then between the two systems is merely verbal.

1044. Procedure.—The procedure applicable to an offence under this section is the same as in the case of the offence abetted.

1045. Principle.—A person who abets is not so great an offender as one who abets and is present at the scene of offence. Between him and the actual perpetrator there is nothing to discriminate. To the one there remained at any rate, the *locus pœnitentiæ*, to the other there remains nothing. He is indistinguishable from the actual offenders: he ceases to be a mere abettor and becomes liable for the offence abetted.

1046. Meaning of Words.—"*Who if absent would be liable to be punished as an abettor.*" *i.e.*, whose offence of abetment is otherwise complete.[1] "*Is present,*" not necessarily during the whole of the transaction, nor necessarily as an eye or ear witness. If a thief is inside the house committing theft and his confederate is standing outside watching, he is present at the theft. The presence required is at the time when the act abetted is committed. His presence at any other time will not be enough to charge him with the same liability. "*The act in consequence of the abetment is committed,*" for the meaning of which *see* s. 109, explanation (§§ 1010, 1016). "*He shall be deemed to have committed such offence*": The words "*shall be deemed*" imply that the change of status is only by way of legal fiction—not that he actually commits the offence he is present at,[2] though he is liable for the offence abetted.[3]

1047. Liability of Present Abettor.—In point of culpability Law discriminates between an absent abettor, and one who is present at the fact. The one is not guilty in the same degree as the other. Indeed, between a person who both abets and countenances the crime by his presence, and one who actually engages in it there is no difference. The one is as culpable as the other, and in England both are regarded as principals, the actual perpetrator being designated a principal in the first degree, the abettor being called principal in the second degree. There being no degrees of principal in the Code, both are here declared to be equally culpable, and so far as the abettor is concerned "he shall be deemed to have committed" the offence of which he was both an abettor and a witness. The words "shall be deemed" do not however mean that the abettor's status is completely merged into that of the principal. Nor is he a principal in any case. He is only regarded as a principal for the purpose of punishment.[4] Consequently, his conviction for the principal offence read with this section would amount to a previous conviction "for an offence punishable under Chapter XII or Chapter XVII of the Code," for the purpose of enhanced punishment under s. 75.[5]

1048. Proof.—Now, in order to create even the legal fiction of this section, it is essential to establish that (*i*) the person was an abettor (§ 1049) and that as such (*ii*) he was liable to be punished, even if absent from the scene of offence

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(1) *Ram Ranjan*, 42 C. 422.

(2) *Kashia Antoo*, 10 B.L.R. 26. *Cf*, the language used in a cognate section (149), where in the case there supposed the accused is declared to be guilty of that offence.

(3) *Barendra Kumar Ghosh*, 52 C. 197 (212) P. C.

(4) 4 M. H. C. App., 37; *Kashia Antoo*, 10 B. L. R. 26. This point was overlooked in *Mohamad Asgar*, 23 W. R. 11, in which an abettor present was called a "principal," which he was not.

(5) *Mahendranath*, 62 C. 629 (632); *Mg. Pu Kai*, 7 R. 329 (F. B.) contra *Kashia Antoo*, 10 B.L.R. 26, dissented from *Patethuva Raoji Bala*, 28 Bom. L. R. 1929.

(§ 1054); (*iii*) it is then to be shown that the abettor had aggravated his crime by being even present there.[1] (§§ 1052-1053).

1049. Previous Abetment Necessary.—The first requisite of an offence under this section is that the person should have been a previous abettor of the offence.[2] If he was not an abettor, his mere presence is insignificant. For he may be a bystander. And even where the mere presence amounts to abetment (§§ 952, 953), a person present may be dealt with as an abettor but he cannot be proceeded against under this section as well. For, if absent, he would not be liable to be punished as an abettor. A policeman present and doing nothing to prevent a prisoner being tortured has been held to be an abettor, by the very fact of his presence. Consequently, he cannot be punished under this section, for if he were absent he would not have been punishable as an abettor. So again, where no instigation, conspiracy or act or illegal omission is proved, and the abetment consists only of participation in the actual commission of the offence, section 109 and not this section is applicable.[3] Such a case arises where persons yield to sudden temptation, as where they join in a riotous crowd seeing them commit plunder.

Where Presence Insufficient.

1050. It has already been observed that the mere presence of a person at the commission of a crime does not condemn him to the liability of an abettor (§§ 952-953). This is true not only of a persod innocent of the crime as of one who had otherwise abetted it. A person who is present and joins with others in committing a crime may be either an abettor or a principal. But, if an abettor, he cannot be punished under this section. If, for instance, several persons join together in beating a man, and one of them actually causes grievous hurt, he will be guilty of an offence under section 325, but others who have assisted him by their presence and encouragement cannot merely on that account be punished under this section.[4] So where the five accused illegally rescued one Dhunuk from the lawful custody of the police, who had arrested him for causing grievous hurt, and who to effect that purpose beat the Sub-Inspector so as to cause him grievous hurt, the question was whether the mere joining in beating the Police Sub-Inspector rendered them liable to punishment under this section, and it was held that it did not, for *in addition* to showing that they were present when the beating took place, there must have been given evidence to show that whether by conspiracy, intentional aiding or instigation by illegal act or omission they had already abetted the assault before they took part in it.[5] So where seven persons joined in mortgaging a piece of land to another, at the time of the registration the two accused falsely personated two of the mortgagors and affixed false signatures to the registration indorsements. One of the mortgagors was then present, and he was prosecuted for abetment, but it was held that there being no presumption of common dishonest intention, or evidence of previous abetment his mere presence as a silent witness of the fraud was not an illegal omission rendering him liable as an abettor of any offence committed by the personators.[6] So the mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly informed the authorities does not constitute him an accomplice, unless

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(1) *Niruni* (*Mt.*), 7 W. R. 49; *Abhi Missar* v. *Lachmi Narayan*, 27 C. 366; explaining *Chatradhari Goala*, 2 C. W. N. 49; *Ram Ranjan*, 42 C. 422; *Keshwarlal* v. *Girish Chunder*, 29 A. 498; *Yeditha*, 15 I. C. (M.) 85.

(2) *Barendra Kumar Ghosh* 52 C. 197 P. C. *Mahendranath* 62 C. 629 (632); *Ram Ranjan*, 42 C. 422; *Nga Po Kyone*, 11 R. 354; *Krishnaswami*, 51 M. 263.

(3) *Abdulla Khan* (1899) P. R. No. 15; *Gandu*, (1923) L. 170.

(4) *Abhi Missar* v. *Lachmi Narayan*, 27 C. 566, explaining the *contra* in *Chatradhari Goala*, 2 C. W. N. 49, as follows: "We have referred to the learned Judges who passed the judgment reported in *Chatradhari Goala*, on which the Sessions Judge relies, and we are authorised by them to state it was not intended to declare that the mere presence is an abettor of any person would, under the term's of section 114, render him liable for the offence committed, and it has been explained that in that case it was found that the abetment had been committed before the actual presence of the accused at the commission of the offence abetted."

(5) *Abhi Missar*, 27 C. 566.

(6) *Tun Aung Gaw*. 3 L. B. R. 222.

it is shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiation for its payment.[1]

Admissible Evidence.

1051. It is thus apparent that no one can be convicted of a constructive offence under this section, unless, he is shown to have been first an abettor, and then present at the commission of the offence. Such previous abetment may, of course, be proved or inferred by hie subsequent co-operation, but this is not the invariable rule. Suppose, for instance, that a number of thieves enter a house at night and while they are looting it, one of the men stands outside the house to watch ; is it not reasonable to suppose that he was a co-conspirator, and that he was watching in pursuance of that conspiracy ? In such a case his mere presence is sufficient to prove previous abetment, and he may, therefore, be legitimately convicted under this section of abetment of the offence which the thieves within may have committed.[2] But now suppose that in such a case the latter commit murder whilst committing the theft ; could the gate-keeper be punished as an abettor of murder under this section. No : because (*a*) there is no evidence of previous abetment of murder, and (*b*) because he was not present at it (§ 1052).

1052. When is an Abettor Present.—This raises the question when is a person " present " at the commission of the offence which he has abetted. In the last example the man at the gate was not actually present inside the house, and yet he was held to be liable as one so present. The word " present " does not, therefore, necessarily mean present as an ear or eye-witness of the transaction ; he is in the eye of the law present, if he is near enough to afford assistance, should occasion arise.[3] The word " present " has been, therefore, used in its legal and not literal sense as meaning sufficiently near to render assistance.[4] A strict actual immediate presence, such a presence as would make one an eye or ear-witness of what passes, is not then required. Constructive presence is enough, if it was such as may be inferred as due to a common design and intended to achieve a common purpose, and if it is sufficiently near to afford to the other confederates sufficient aid and encouragement. So that if several persons set out together, or in small parties, upon one common design, be it murder or some other felony or for any other purpose unlawful in itself, and each takes the part assigned to him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise or to favour, if need be, the escape of those who are more immediately engaged ; they are all, in the eye of the law, present at it ; provided the fact be committed, for it was made a common cause with them ; each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise.[5]

1053. Such is the case where one commits theft in a house and throws the stolen property to an accomplice posted outside to receive it,[6] or where a pick-pocket steals and throws the stolen article to another who disappears with it.[7] Consequently, it is not even necessary that the confederate should have been present during the whole of the transaction. Such was the case of the two prisoners Kelly and McCarty[8] who were indicted for stealing oats, the facts of

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(1) *Deodhar Singh*, 27 C. 144 ; *Deo* v. *Aundan Pershad*, 33 C. 649 ; distinguishing *Chando Chandaline*, 24 W. R. 55, in which the question was as to the sufficiency of accomplice evidence to justify a conviction.

(2) *Khandu Vithu Sathee*, 1 B. L. R. 351 ; *Charles Gogerly*, (1818) R. & R. 343 ; *Dhani*, 27 P. L. R. 716 ; *Patethuva*, 97 I. C. (B.) 737.

(3) *Stewart*, R. & R. 363 ; *Kelley*, R. & R. 421.

(4) *Stewart*, R. & R. 363 ; *Kelley*, R. & R. 421 ; *Bingley*, R. & R. 446.

(5) Fost, 350, 2 Hawk. P. C., c. 29, ss. 7, 8; 1 Russ., (6th Ed.) 162; *Howell*, 9 C. & P. 437 ; *Vanderstein*, 10 Cox. (Irish) 177.

(6) *Owen*, R. & Mood. C. C. R. 96 ; *Coggins*, 12 Cox. 517.

(7) *Hilton*, 1 Bell C. C. 20, in which, however, the jury convicted the accomplice of only receiving stolen property, evidence as to the community of purpose being wanting.

(8) *Kelley*, 2 C. & K. 379.

which have been given elsewhere (§ 966). There the two had conspired to steal their employer's oats, and McCarthy put them in a place from where Kelly afterwards removed them. Kelly was not present when McCarthy put them under Kelly's train ; McCarthy was not present when Kelly removed them; still Maule, J., said : " I think the evidence shows that this was all one transaction in which both concurred ; and I think that having concurred and both being present at some parts of the transaction, both may be convicted,"[1] and they were both convicted as principals. Where, however, the abettor was at such a distance from the theft as not to be able to assist, he was held not to be " present " aiding and abetting the theft. So where *A* and *B* went to steal two horses and *A* left *B* half a mile from the scene of theft, and where he brought the two horses stolen, when both went away with them. It was held that *B* could not be held to have been present at *A's* theft.[2] The same view was taken in another case in which the servant had left the door open to let in the thieves and then left the premises twenty minutes before the thief came.[3] So where three men were indicted for wounding the prosecutor and it appeared that one of them, the prisoner, only came up after the wound had been inflicted, it was held that he was only an abettor not present at the fact, though it appeared that the prisoner had kicked the prosecutor several times after he came up.[4] So if two start to commit theft, and one of them be apprehended as soon as he enters the house, he was held not to be present when the other entered afterwards and committed the theft.[5]

1054. Community of Purpose Essential.—It has been remarked before that the mere presence of the abettor at the fact does not make him liable to the enhanced penalty prescribed by this section (§ 1050).

1055. An abettor must not only be present, but he must have been present as an abettor of the offence committed, which implies that his abetment must continue down to the time of the commission of the offence. An abettor may at any time before that event change his mind, and withdraw from the abetment. The law allows a *locus pœnitentiæ* in such cases ; and if he distinctly withdraws at any moment before the final act is done, he cannot be held liable as an abettor present at the fact.[6] Examples have already been given of cases in which an abettor though liable for abetment of one offence was not held liable for the commission of a wholly different offence, though committed in his presence (§ 957). So it has been elsewhere provided by the Code that " if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly is guilty of that offence."[7] Both under this as well as under section 149 of the Code, the presence of the abettor at the fact and the community of purpose are essential. Indeed, it will sometimes be a question whether a given case falls under this section or under section 149. The two sections present some common features but at the same time they materially differ both as to their applicability as well as in the after-effects of the resultant conviction, for while a conviction under this section does not count as a previous conviction one under section 149 undoubtedly does for the purpose of enhanced punishment under section 75.[8]

1056. A case under section 149 arises only when the persons composing the unlawful assembly are at least five persons. There is of course no such limit fixed for an abetment under this section. A person under section 149 need not be " present " at the time of the committing of the offence—it is sufficient if he was then a member of the " unlawful assembly " which committed that offence. Under

This Section and Section 149 Compared.

(1) *Kelly*, 2 C. & K. 379
(2) *Kelly*, R. & R. 421.
(3) *Jafferies*, 3 Cox. 85.
(4) *McShane*, C. & M. 212.
(5) *Johnson*, C. & M. 218.
(6) *Amrita Govinda*, 10 B. H. C. R. 497.
(7) S. 149.
(8) This difference is due to the difference in the language of the two sections. A person under the section is only "deemed to have committed" the other offence, while section 149 declares him "guilty of that offence."

this section his presence is essential. Both sections, however, deal with constructive criminality, and in both cases the object is to punish abettors whose assistance is extended to the time of the commission of the offence. When their number is or exceeds five, law takes a more serious view of their conduct, and regards them all as principals, and punishable as such, irrespective of their individual contribution to the violence used or of the offence committed. It would thus appear that rioters are then all liable to be convicted as principals, and there can be no abetment of a riot within the meaning of this section, though it is quite conceivable that rioters may be even further liable to be punished under this section if in addition to rioting they had abetted any other offence which might be committed by the mob under their orders or instigation, or in prosecution of the common object.[1]

1057. Then again the section has no application where the abettor is not only present, but takes part in the commission of the offence. So where a blow is struck by *A* in the presence of, and by the order of *B*, there is no question of abetment, for both are principals in the transaction, in the same way as if the two had actually joined in the beating, in which case both would be held jointly responsible for the effect their beating had produced upon their victim.[2] In such cases law apportions the individual responsibility of offenders, if it can, but where this is not possible, it holds them all jointly responsible for the consequence.

1058. Confession of Co-accused.—Though an abettor may be legally tried jointly with the principal offender, it was formerly held that as the abettor was not tried jointly with him for the *same* offence, a confession made by him was not admissible in evidence against his co-accused.[3] This view was perfectly logical on section 30 of the Indian Evidence Act as it then stood, though even then the tendency was to strain the point in favour of their admissibility, for the Courts could not afford to lose so good an evidence. It was consequently laid down in some cases that a present abettor, tried conjointly with another, was really being tried for the same offence so that the confession of one was admissible against the other.[4] The amendment of the section in 1891[5] has now legalized this view, as the word "offence" as used in that section is enacted to include the abetment of, or attempt to commit the offence.

115. Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

Abetment of offence punisbable with death or transportation for life if offence not committed.

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

if act causing harm be done in consequence.

Illustration.

A instigates *B* to murder *Z*. The offence is not committed. If *B* had murdered *Z*, he would have been subject to the punishment of death or transportation for life. Therefore *A* is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to *Z* in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

[***Offence***—s. 40. ***Hurt***—s. 319.]

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(1) Cf. *Dadan Gazi*, 10 C. W. N. 890 (891).
(2) *Mohamed Asger*, 2 W. R. 11.
(3) *Nur Ahmad*, (1874) P. R. No. 8; *Amrita Govinda*, 10 B. H. C. R. 497.
(4) *Bag Shah*, (1879) P. R. No. 3; *Thakur Singh*, (1882) P. R. No. 32; *Tejo*, (1885) P. R. No. 39.
(5) Act III of 1891.

1059. Analogous Law.—This and the next section deal with abetment not otherwise provided for. In both cases the abetment is abortive and does not result in the commission of the offence abetted. These two sections were added since the original draft. They supplement the provisions of section 109 which prescribes the penalty of the abettor "if the act abetted is committed in consequence." This section provides for the abetment of more heinous crimes in which the offence abetted is either not committed at all, or is only partially committed, or if committed, it is not in consequence of the abetment.

1060. Charge.—An offence under this section may be charged as follows :—

"I (*name and office of Magistrate or Judge*) hereby charge you (*name of accused*) as follows :—

"That you, on or about the——day of——at——abetted the commission by one *A B* of an offence of——punishable with death (*or* transportation for life), which said offence was not committed in cosequence of the abetment, and thereby committed an offence punishable under s. 115 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge [by the said Court (*in the case of committal to the Sessions*]."

1061. Procedure.—The offence under this section is non-bailable : otherwise the offence is cognizable and compoundable, if the offence abetted is cognizable and compoundable ; and it is triable by the same Magistrate as the offence abetted.

1062. Principle.—It is, of course, by no means an essential ingredient of the offence of abetment that the act abetted should be committed, or that the effect intended should be produced.[1] Such abetment being ineffectual is naturally deserving of lenient punishment. Such would be the case where the accused gave aconite to a woman to win the love of her husband, in consequence of which two persons, other than the husband, died. He was held guilty under ss. 302/115.[2]

1063. Meaning of Words.—"*Express provision*," that is for the punishment of the offences of abetment punishable with death or transportation, *e.g.*, s. 121 ; of course, an offence under s. 117 is not such an offence.[3]

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both ;

Abetment of offence punishable with imprisonment, if offence be not committed.

and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

if Abettor or Person abetted be a public servant whose duty it is to prevent offence.

Illustrations.

(*a*) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* refuses to accept the bribe. *A* is punishable under this section.[4]

(*b*) *A* instigates *B* to give false evidence. Here, if *B* does not give false evidence, *A* has nevertheless committed the offence defined in this section, and is punishable accordingly.

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(1) *Ganesh*, 34 B. 394.
(2) *Amode Ali*, 58 C. 1228.
(3) *Dwaraka Nath Goswami*, 60 C. 427 ; Contra *Santa Singh*, (1933) L. 660.
(4) *Ramachandriah*, 51 M. 86.

(*c*) *A*, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, *A* is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) *B* abets the commission of robbery by *A*, a police officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, *B* is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

[***Public servant***—s. 21. ***Offence***—s. 40]

1064. Analogous Law.—This section is really a continuation of the last, the two together exhausting abetment not followed up by the offence abetted.

1065. Principle.—This section discriminates between the peace-officers and the public, the abetment of the former being regarded as doubly penal. The reason for this difference is obvious. If the public incur no greater liability for tampering with those whose duty it is to prevent crime, it will be difficult to maintain that high standard of integrity and honesty which it is in the interest of the public that peace-officers should possess. The enhanced penalty, it will be observed, applies only to public servants "whose duty it is to prevent the commission of such offence." Other public servants fall into the general category.

1066. Meaning of Words.—"*Abets an offence punishable with imprisonment*," *i.e.*, as a substantive and not as an alternative sentence. Offences punishable with fine only are thus excluded, though the sentence of imprisonment would even then be awarded in default of payment of fine. "*Offence be not committed in consequence of the abetment*," for the meaning of which *see* s. 109 (§ 1016). "*No express provision made*," *e.g.*, ss. 121-123, 130, 132, 134 and 136. "*Whose duty it is to prevent the commission of such offence*," *e.g.*,a civil surgeon is a public servant, but he is not a public servant qualified to prevent the commission of such offences.[1]

1067. Abortive Abetment.—An abetment that fails in its purpose is not visited in law by the same rigour as one which fulfils its purpose. Such a case may arise not only when no offence is committed in consequence of the crime, but also when the offence committed is not the offence abetted, though it may be more heinous, but inasmuch as the abettor cannot be held accountable for it, it is not the full measure of his responsilibity. But inasmuch as such an abetment may have led, though distantly, to the commission of that crime, it is laid down that he shall be liable to one-fourth of the punishment provided for the offence he had abetted. Such was held to be the case of one who had abetted the offence of bigamy on the part of a woman whose husband was alive.[2]

1068. The words "if that offence be not committed" are inapt and may lead to difficulty in construction. Suppose, for instance, that a man abets theft on the road[3] and the person abetted commits theft in a building.[4] Is the abettor liable to the penal consequences of this section or of section 109? It has been held that in such a case the two offences are distinct, and that the abettor is not liable under section 109 (§§ 1016-1017). But an offence committed does not become a different offence from the offence abetted merely because it is punishable under a different section. As observed before, if the two are *substantially* one, then the abettor is liable for the offence committed, and he cannot say that because the offence he had abetted fell under one section, and the offence committed falls under another section that therefore the two offences are different for the purpose of his punishment. The question has been already discussed at some length and reference must be made to it for the purpose of ascertaining whether the offence committed was committed in consequence of the abetment, and whether the offence committed is the same as the offence abetted within the meaning of this section (§§ 1010, 1016, 1017).

Paragraph 2.

1069. Turning now to the second clause, it will be observed that the public servants there sopken of are not all public servants, as that term is defined in the Code. The object of the clause is to provide for enhanced punishment only if the person abetting or abetted is "a public

(1) *Ram Nath Surma Biswas*, 21 W. R. 9.
(2) *Sanwar*, 10 S. L. R. 171.
(3) S. 379.
(4) S. 380.

servant whose duty it is to prevent the commission of such offence," that is to say, if the abetment is of a public servant whose duty as such public servant is to prevent the commission of the very offence abetted. Where therefore, the prisoner was "feeling his way" if the civil surgeon will accept a bribe, and the latter stopped him from making further advances, it was held that the offence of abetment was complete but it was an offence punishable under the first clause and not under the second clause of this section. And this because though the civil surgeon was undoubtedly a public servant, still he was not a public servant whose duty it was as a public servant to prevent the offering of bribes. It is not his duty to prevent the commission of such offence of bribing any further than it is the duty of every good citizen to do what he can to keep people about him honest, and to prevent the commission of any offence whatever. Cases might be readily supposed to which this latter half of the section would directly apply; for instance, it is the duty of a customs-house officer to prevent fraud upon the revenue in the way of smuggling, and consequently, abetting him in the commission of such a fraud would be abetting the commission of an offence by a public servant, whose duty it is to prevent the commission of such offence?[1] In the case of the attempt to bribe the civil surgeon the proper measure of punishment was that laid down in the first paragraph. The same rule would apply to an offer of a bribe made to a police-officer, for bribery is not a cognizable offence or one which it is the duty of a police-officer to prevent. Illustrations (*a*) and (*b*) consequently fall under the first clause, while illustrations (*c*) and (*d*) are instances of the operation of the second clause. As this section applies also to special or local laws,[2] it has a wider application than the Code of which it is a part. Consequently, a pleader who sent a printed circular to the other pleaders inviting them to send him cases offering to share with them his fee in the case, was held to be guilty of abetment of an offence under section 36 of the Legal Practitioners Act, and therefore, punishable under this section.[3]

117. Whoever abets the commission of an offence by the public generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Abetting commission of offence by the public or by more than ten persons.

Illustration.

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession, *A* has committed the offence defined in this section.

[***Public***—s. 12. ***Offence***—s. 40]

1070. Analogous Law.—This section stood as clause 93 in the draft Bill which contained the following additional illustration[4]:—

"(*b*) *A* inserts in a newspaper an article advising soldiers to shoot every commanding officer who uses them harshly. *A* has committed the offence defined in this clause."

1070-A. Two objections were taken to this clause (*i*) that it was too vague and would lead to malicious prosecutions, unless the instigation be confined to some overt acts like the illustrations; and (*ii*) that the number "ten" was arbitrarily fixed. It was said that the substitution of the words "or any class of persons" should be an improvement. The force of the first objection was conceded, and the commissioners recommended that "it may be most expedient to define the manner of instigation by the terms used in clause 113 (now s. 124-A) relating to attempts to excite feelings of disaffection to the Government of such terms as may be settled when that clause comes under consideration."[5] This suggestion was not, however, acceded to.

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(1) *Ram Noth Surma Biswas*, 21 W. R. 9. P. C.
(2) S. 40.
(3) *Purbati Charan Chatterji*, 7 A. 498 (504).
(4) Cl. 98, now s. 114.
(5) First Report, s. 205.

1071. Procedure.—The procedure applicable to an offence under this section is the same as in the case of the offence abetted. The offence can be tried as a summons case.[1]

1072. Proof.—The points requiring proof are—

(1) the accused had abetted ;

(2) the commission of an act ;

(3) which was an offence under the Code, or any special or local law ;[2]

(4) and that the persons abetted were at least 11 persons, or the public generally.[3]

1073. Charge.—In framing the charge the following form may be adopted :—

"I (*name and office of Magistrate or Judge*) hereby charge you (*name of the accused*) as follows :—

"That you,——on or about the——day——at——, abetted the commission of the offence of——by——numbering more than ten persons (*or* the public generally) by (*state the act done by accused in instigation*), and thereby committed an offence punishable under s. 117 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge (*add* by the said Court in case of committal)."

1074. Principle.—The definition of abetment does not require that the persons abetted should be defined and not be a fluctuating body of men. This section proceeds on the same assumption. Consequently, one may be punished for abetment though the prosecution may be unable to point to the men abetted. Such persons may be "the public" a term which means as it has been defined to include, "any class of the public or any community."[4] (§ 105). It is not necessary under this section that the offence abetted should be committed. Indeed, when it is so, the abettor will be visited by the severer penalty provided in other sections.

1075. It will be observed that the abetment under this section involves the commission of an offence "by any number or class of persons exceeding ten" who must commit the offence collectively and not individually. Where, for instance, the prisoners abetted 12 coolies in breaking their separate contracts it was held that inasmuch as each breach of contract was a separate offence under s. 492 by each coolie, the abetment of such breach could not be punished under this section, notwithstanding that more than 10 coolies broke their contracts in consequence of such abetment.[5] The posting of a leaflet, inciting the public to commit an offence would not be punished under this section, if it was removed before anybody could have read it. Such posting falls short of abetment defined under s. 107.[6]

Concealing design to commit offence punishable with death or transportation for life.

118. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or transportation for life,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed;

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years ; and in either case, shall also be liable to fine.

if offence be not committed.

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(1) *Narsinha Narayan*, 33 B. 353.
(2) *Ganesh Waman Joshi*, 55 B. 233 ; *Ganesh Woman Joshi*, *Ib*. *Konda Satyavatamma*, 134 I. C. (M) 87 ; *Joti Prasad Gupta*, (1932) A. 18, *Contra Mohan Lal Saksena*, (1930), O. 497.
(3) *Ganesh Woman Joshi*, *Ib*.
(4) S. 12.
(5) 3 W. R. Cr. 24.
(6) *Parimal Chatterji*, (1932) C. 760.

Illustration.

A, knowing that a dacoity is about to be committed at *B*, falsely informs the Magistrate that a dacoity is about to be committed at *C*, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at *B* in pursuance of the design. *A* is punishable under this section.

[***Voluntarily***—s. 39. ***Offence***—s. 40. ***Illegal Omission***—s. 43.]

1076. Analogous Law.—The concealment of a design to commit an offence constitutes an abetment, within the meaning of s. 107, and such abetment is an offence when the person making the concealment was under legal obligation to disclose it (§ 980).

1077. For persons who are under such obligation, *see* § 981, and s. 44 of the Code of Criminal Procedure.[1]

1078. This and the next two following sections deal with concealment previous to the commission of an offence. Subsequent concealment is penalized by ss. 202 and 203. The former are directed to the *prevention* of crime, the latter to *punishing them*.

1079. Procedure.—An offence under this section is non-bailable, if the offence concealed is committed, otherwise the offence is bailable. In other respects the procedure is the same as in the case of the offence abetted.

1080. Proof.—An offence under this section requires proof of the following particulars :—

(1) the existence of the design to commit an offence,
(2) which offence was one punishable with death or transportation for life,
(3) that accused concealed the existence of such design—
  (*a*) by his act, or
  (*b*) by an illegal omission, or
  (*c*) by his knowingly making false representation,
(4) that the concealment was made voluntarily, and
(5) intending thereby to facilitate or knowing that he would thereby facilitate the commission of such offence,

to which may be added the aggravating circumstance,

(6) that the offence concealed was committed.

1081. Charge.—The following is an appropriate form of a charge under this section :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of the accused*) as follows:—

"That you,——on or about the——day of——at——, with the intention of facilitating or with the knowledge that you will thereby facilitate the commission of the offence of——(*specify the act*) (*or* omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 118 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge (*or* in the case of committal by the said Court)."

1082. Principle.—This and the next two following sections deal with the law of criminal concealment—the essence of the crime consisting in the facility thereby given to offenders for the perpetration of crime. This section recognized concealment as of two kinds: (*a*) concealment by misrepresentation, and (*b*) concealment by non-disclosure. The former affects the public generally, the latter only affects those upon whom it lies to make the disclosure. All the three sections only apply to offences punishable with imprisonment. They exclude those which are punishable with fine only. And as the sections make it clear, the concealment to be criminal, must be intentional or, at least, with knoweldge that it will thereby facilitate the commission of crime.

1083. Meaning of Words.—"*Thereby facilitate the commission of an offence*": The offering of facility may in itself constitute abetment. When it is so, the offender may be liable as an abettor. "*Conceals*" means conceals from the

(1) Act V of 1898.

public servants entrusted with the duty of preventing offences. A Sub-Inspector of Police aware of an impending dacoity may conceal the fact as much from his subordinates as he may conceal it from his superior officers who direct and control him in his executive duties. "*The existence of a design*" which does not necessarily mean a plot. But it must be something more than a mere mental determination to commit a crime. But the expresion of that determination converts it into a design "*Any representation.....respecting such design*": A representation is a categorical statement of fact. It is not a mere expression of opinion. But the form is immaterial, if it was a representation, though it was expressed in the form of an opinion. "*If that offence be committed,*" the test of identity being its essential character rather than the sections of the Code.

1084. Criminal Concealment when Penal.—This and the next two following sections deal with the law of criminal concealment as a branch of the law of abetment. As the liability in such cases may as much depend upon false representation as on illegal omission, the highly penal rules here laid down require strict construction. The subject of concealment as treated in the section may consist of (*a*) false representation (*b*) an act, or (*c*) an illegal omission.

1085. Criminally False Representation.—So far as the question of false representation is concerned, the section affects the public generally. For no one has a right to demand another to speak, but if he speaks he has no right to speak falsely. But however much may a false statement be reprobated by morality, law has no power to punish it as such. It visits a false speaker with its penalty, if his falsehood has deceived some one, or, if at any rate, it was intended to cause deception on a subject affecting public peace. And even then it makes allowance for thoughtless lies spoken on insufficient data and with no ulterior object in view. The statements which law regards criminal must be (*a*) known to be false; (*b*) they must be made respecting a design and the hall-mark of criminality is stamped on them (*c*) they are made with intent to facilitate or knowing it likely that he would thereby facilitate the commission of an offence punishable with death, transportation or imprisonment. Consequently, it is not every false statement that is criminal. To be criminal it must answer the requirements of the above tests. Now, in the first place, what is a representation? As before remarked (§ 1083), it is not a mere expression of opinion or the statement of a probable contingency, or the suggestion of a possible hypothesis. It must be a categorical assertion, at least an assertion having that effect, whatever may have been its form. Suppose, for instance, in the illustration appended to the section, *A* were to say to the Magistrate "I hear that the dacoity rumoured to be committed at *B* will be committed at *C*"—the statement may be perfectly innocuous in itself, for *A* may be merely giving expression to hearsay, or he may be adroitly suggesting to the Magistrate the relaxation of his vigilance at *B* so that the dacoity may the more easily be committed. In the former case the statement would not amount to a representation at all, though in the latter case it will be a representation within the meaning of this section.

1086. The fact that a representation is made is not enough; it must be false to the knowledge of the maker. This will exclude the repetition of an idle rumour, of what is no more than an intelligent anticipation of a likely event. Lastly, the false representation must be made with intent to facilitate, or knowing it likely that he will thereby facilitate the commission of an offence. It is this element that tinctures the concealment with criminality, as it facilitates the perpetration of crime by making its prevention difficult. As, however, the object of law is to prevent the commission of serious crime, the last requisite confines the operation of the rule to offences punishable with imprisonment.

1087. Concealment by an Act or Illegal Omission.—Turning next to concealment by any act, cases are conceivable when the authorities may be easily deluded by a feint. In such a case there may be no word spoken, but, nevertheless, the purpose intended and the effect likely to be produced is the same. If, for instance, in the illustration given, suppose that *A* instead of misinforming the Magistrate about the

scene of dacoity were to drop tools and things of the dacoits in the direction of *C* thereby making the Magistrate believe that the dacoits had taken that course, would the result be any different? As regards wilful misrepresentations and acts the rule is the same, and it is applicable alike to all, whether public servants or otherwise. But as regards illegal omissions the rule is different, for the public are under no obligation to furnish the authorities with information concerning offences other than those specified in s. 44 of the Code of Criminal Procedure.[1] In such offences it is the duty which the public share equally with the police, Magistrates and others to inform the authorities about "the commission of, or of the intention of any other person to commit" them.[2] Village headmen, accountants, landholders and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards are similarly enjoined with the duty of communicating to the nearest Magistrate, or to the officer in charge of the nearest police station any information, which he may obtain respecting the commission of or intention to commit in or near their village any non-bailable offence, or any offence punishable under ss. 143, 145, 147 or 148 of the Code, and of certain other offences committed or intended to be committed at any place out of British India near such village.[3] In such cases, then, there is on the part of the persons so named a further statutory obligation to assist the authorities in the manner and to the extent therein required. Persons who omit to comply with such statutory requirements are then guilty of illegal omission for which they may be liable under this section, if it is prompted by the intention or knowledge of facilitating the commission of those offences, and if the omission was made "voluntarily."[4] (§§ 310-313).

1088. As regards the police and Magistrates within their jurisdiction their duties are more extensive, and as they are specially retained for the preservation of peace and suppression of disorder, their responsibilities are commensurately far greater. But in both cases the test is the same, namely, whether the concealment was wilful and whether it was made with the intent or knowledge of thereby facilitating the commission of the offence. The fact that the omission was likely to facilitate the commission of the offence is material and must be clearly established.[5] Added to it must be established knowledge of the design and knowledge of the value of its suppression.

Public servant concealing design to commit offence which it is his duty to prevent.

119. Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed;

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

if offence be punishable with death etc.;

or, if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years;

if offence be not committed.

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

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(1) The offences here specified are ss. 121-126, 130, 144, 145, 147, 148, 302-304, 382, 392-399, 402, 435, 436, 449, 450, 456, 460.

(2) S. 44, Cr. P. C.

(3) S. 45, Cr. P. C. No one is however bound to report a case of bribery; *Malik Daud* (1887) P. R. No. 30.

(4) *Jhugroo*, 4 W. R. 2.

(5) *Kesree*, (1866) 1 Agra 31.

Illustration.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that *B* designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here *A* has, by an illegal omission concealed the existence of *B*'s design, and is liable to punishment accerding to the provision of this section.

[***Public servant***—s. 21. ***Offence***—s. 40.]

1089. Analogous Law.—This section is a class section and applies only to public servants whose duty it is as such public servants to prevent the suppression of offences. Otherwise the section is the same as section 118.

1090. Procedure.—An offence under this section is non-bailable if the offence concealed is committed, or if it is punishable with death or transportation for life otherwise it is bailable.[1] It is cognizable and compoundable if the offence abetted is so, and it is triable by the Court by which the offence abetted is triable.

1091. Proof.—The facts necessary to establish an offence under this section are the following :—

(1) The existence of the design to commit an offence ;
(2) That the accused was a public servant ;
(3) That it was his duty to prevent the commission of that offence ;
(4) That he concealed the existence of such design—
  (*a*) by his act, or
  (*b*) by his illegal omission, or
  (*c*) by his knowingly false representation ;
(5) That the concealment was made voluntarily ;
(6) That the accused thereby intended to facilitate, or knew that he would thereby facilitate the commission of such offence, to which may be proved by way of aggravation, if the facts warrant it ; and
(7) That the offence concealed was committed.

1092. Charge.—The charge under this section should be framed on the same lines as a charge under section 118, the following clause being added :—

"That you——on or about the——day of——at——being a public servant whose duty it was to prevent the commission of the offence of——with the intention of facilitating, etc."

1093. Principle.—This section is the adaptation of s. 118 to public servants. It prescribes an enhanced penalty applicable to the case of public servants, whose duty it is, as such public servants, to prevent the commission of the offence the design to commit which they conceal.

1094. The liability of the public servants is under this section circumscribed by their duty. They only incur the graver consequences of this section if they conceal a design to commit an offence *which it is their duty to prevent*. The meaning of this phrase has already been set out under the last section. (§ 1087).

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

Concealing design to commit offence punishable with imprisonment.

shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth,

if offence be committed.

be not committed to one-eighth of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

and, if the offence

if offence be not committed.

[***Offence***—s. 40.]

1095. Analogous Law.—This section is complementary to s. 118 which applies only to offences punishable with death or transportation for life. This section

(1) S. 159, Act XVIII of 1923.

extends the same rule to offences punishable with imprisonment. All offences, save only those punishable with a fine, are thus included in the two sections. The offences so excluded are too trivial to require prevention by such drastic rules.

1096. Procedure and Proof.—The procedure relating to an offence under this section is exactly the same as in the case of the offence abetted. The evidence must establish the same points as in a case under s. 118 except that, instead of proving that the offence concealed was punishable with death or transportation, it must be proved that it was punishable with imprisonment (§ 1079).

1097. Charge.—The charge should similarly follow the wording of the form set out under s. 118 (§ 1081).

CHAPTER V-A.

CRIMINAL CONSPIRACY.

Definition of criminal conspiracy.

120-A. When two or more persons agree to do, or cause to be done—

(1) an illegal act, or

(2) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—**It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.**

1098. Analogous Law.—This Chapter comprising sections 120-A and 120-B was enacted by the Indian Criminal Law Amendment Act 1913.[1] Its scope is explained by the following Statement of Objects and Reasons:[2]

"The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and section 121-A of that Code. Under the latter provision, it is an offence to conspire to commit any of the offences punishable by section 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof, or to overawe, by means of criminal force or show of criminal force, the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission shou'd take place in pursuance thereof. Under section 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularized in section 121-A conspiracy *per se* is not an offence under the Indian Penal Code,

"On the other hand by the Common Law of England if two or more persons agree together to do anything contrary to Law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree; commit the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

"Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in section 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English Law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months, or with fine, or with both."

1099. This definition in this section is taken from that formulated by Lord Brampton,[3] who defined a conspiracy thus ; "If two or more persons agree together to do something contrary to law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the crime of conspiracy." The gist of the offence here separated and enlarged is implied in the offence of abetment as defined in section 107, "secondly;" but this Chapter is justified on the ground that cases occur

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(1) Act VIII of 1913.
(2) *Gazette of India*, (1913) Pt. 5, p. 44.
(3) *Quinn* v. *Leatham*, (1901) A. C. 495 (528).

which could not be punished as those of abetment which naturally implies a closer connection between the criminal and the crime.

English Law.

1100. As the avowed object of the Legislature in enacting this Chapter was to assimilate the Indian to English Criminal Law with an additional safeguard that the conspiracy must be followed up by an overt act, it will be instructive to see in what light the English Common Law views the offence of criminal conspiracy.

1101. Conspiracy is an offence peculiar to the English Law and its present form has been gradual and marks three distinct stages in its evolution. In its first stage (1290 A.D.-1611 A.D.) the offence, though formulated at common law appears to have been confined to a conspiracy to obstruct or pervert or defeat or delay justice, or to exort under colour of office, and even as such it remained without any adequate sentence. The offence, however, assumed a more concrete form in 1611 A.D., when in a decided case[1] it was for the first time settled that the agreement for a conspiracy was indictable as a substantive offence even when nothing had been done to execute it. The third and final stage in its development was reached some years later in 1665 A.D., when the Judges declared that "all confederacies whatsoever wrongfully to prejudice a third person are highly criminal."[2]

1102. This has since been held to include all combinations which involve violation of the private rights of individuals, which, if done by a single person, would give a civil though not a criminal remedy against the delinquent. Sir Robert Wright thinks that the inception of this development lies on the misunderstanding of a leading case by Hawkins[3] which led to a crop of cases without adequate examination of the data upon which it was founded. He analyses the decisions to show that, as a general rule, a combination to injure a private person is not criminal unless the means to be employed are criminal, that is, in other words, conspiracy as such is not punishable save when it is a conspiracy to commit a crime. Modern legal opinion endorses this view, but against it there is the accumulated weight of decided cases,[4] though they are by no means unanimous, some still confining the operation of the rule to a conspiracy to commit an offence.[5] The English parentage ascribed to this chapter, so far as it relates to a conspiracy to do an illegal act or by illegal means, is consequently of doubtful legality and policy.

1103. Criminal conspiracy has been the subject of legislation from very early period in England. As already stated, in 1305 A.D., an Ordinance[6] was passed to punish persons conspiring to corrupt the course of justice. Several statutes now exist prescribing penalties for criminal conspiracies to commit various offences, such as murder,[7] to cause explosion,[8] or those relating to unions,[9] or those fomenting trade disputes.[10] It is of the essence of a conspiracy that two or more persons should agree to do an unlawful act, which agreement is then stated to be an overt act sufficient to complete the offence.[11] The proviso to this section is intended to overrule this view so far as it relates to a conspiracy other than a conspiracy to commit an offence, and limit that offence to an overt act done in furtherance but independently of the conspiracy (§ 1113).

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(1) *Poulterer's case*, (1611) 9 Co. Rep. 55; *Kinnersley*, (1719) 1 Stra. 93; cited *per* Wright on Conspiracy; Encyclopædia of the Laws of England, *tit.* Conspiracy.

(2) Hawk, Pleas of the Crown, Bk. 1, C. 72, s. 2.

(3) *Starling*, (1665) Sid. 174, cited *per* Wright on Conspiracy, pp. 37-43.

(4) *Rowlands*, (1851) 17 Q. B. 671; *Lumley* v. *Gye*, (1853) 22 L. J. Q. B. 471; *O'Connell*, 1 Cox 413; *Painell*, 14 Cox 508; *Mulcahy*, L. R. 3 H. L. 306; *Kromme*, (1892) 17 Cox 492; *Quinn* v. *Leatham*, (1901) A. C. 495. The law laid down in *Quinn* v. *Leatham*, has so far as it relates to acts done in furtherance or contemplation of a trade dispute, been altered by the Trade Disputes Act, 1906, ss. 1, 3, 4 and 5 (3) (6 Ed. VII, c. 47).

(5) *Turner*, 13 East 228; *Stratton*, 1 Camp. 549-*n*.

(6) 33 Sdw. 1.

(7) (1861) 24 and 25 Vict., c. 100 s. 4.

(8) (1883) 46 and 47 Vict., c. 3, s. 3.

(9) 34 and 35 Vict., c. 31, s. 2; 39 and 40 Vict., c. 22, s. 16.

(10) 38 and 39 Vict., c. 86, s. 3.

(11) *Mulcahy*, L. R. 3 H. L. 306 (326); *O'Connel*, 5 St. T. (N. S.) 1.

1104. But while in this respect the Indian definition is narrower than its English prototype, in another respect the offence here is much wider inasmuch while here a criminal conspiracy as such is punishable, the English common law in England stands discredited[1] and has been greatly modified by Statute, for which the Indian Statute law furnishes no corresponding analogy. Moreover, under English Law, since the husband and wife are treated as one person, they form an exception, but this exception too is not acceded to in this Chapter. The result of this sweeping enactment is to make a mere breach of contract by two or more persons punishable as a crime. If, for instance, the husband and his wife agree to sell their house and then think better of it and refuse to convey they would be liable to be imprisoned under the next section though the Civil Court may not have enforced specific performance of their contract. Other instances could be multiplied to illustrate the absurdity of this legislation.

1105. The Statement of Objects and Reasons appears in this respect to be inaccurate, since it goes beyond merely assimilating the criminal law of India to that in force in England. The distinction is important inasmuch as an act may be illegal without being criminal,[2] and cases in England have clearly pointed out that a man may do acts prejudicial to the civil rights of others without being indicted for conspiracy. So an indictment will not lie for a conspiracy to commit a mere civil trespass[3] or a conspiracy to deprive a man of an office under an illegal trading company.

1106. Certain conspiracies are otherwise punishable as distinct offences under the Code. Taking them into account, the Code now deals with the following conspiracies :—

(1) Conspiracy to wage war (S. 121-A).
(2) Thugi (s. 311).
(3) Belonging to a gang of thieves (s. 401).
(4) Being a member of an assembly of dacoits (s. 402).
(5) Abetment by conspiracy (s. 107, "*Secondly*").
(6) Conspiracy to commit an offence.
(7) Conspiracy to do an illegal act.

1107. Principle.—The constituent elements of the offence of criminal conspiracy are (1) an agreement between one or more persons, (2) to do an illegal act, (3) to do a legal act by illegal means, (4) an overt act done in pursuance of the conspiracy. The first three ingredients suffice for the definition of a criminal conspiracy under English Common Law, but in the case of a conspiracy other than a conspiracy to commit an offence, this section further requires the doing of an overt act in furtherance of the conspiracy. In other words, while an overt act is necessary under both laws, English Law considers the mutual consultation and agreement as a sufficient overt act,[4] whereas the Code in one instance goes a step further and requires some act independent of it. But the offence here is in other respects much wider.

1108. Meaning of Words.—"*An illegal act*" within the meaning of s. 43. "*Some act.....is done.....in pursuance thereof*" : The word "act" here also includes an illegal omission. Two soldiers *A* and *B* conspire to blow up a powder magazine. *A* is on sentry duty when *B* passes him ; *A* does not challenge him. Both *A* and *B* are guilty of criminal conspiracy inasmuch *A's* failure to challenge *B* was an illegal omission being an act done in pursuance of the conspiracy between *A* and *B*. But if in this case *A* had gone to sleep when *B* passed, *A* was unquestionably guilty of an illegal omission, but not being in pursuance of the conspiracy it is not such an act as is necessary to constitute the crime. "*Is merely incidental to that object*" : The explanation refers only to clause 1, and is intended to show that the illegal act need not be material to the object of the conspiracy.

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(1) Wright on Conspiracy.
(2) S. 43.
(3) *Turner*, 13 East, 228, dissented from *per* Lord Campbell in *Rowland*, 17 Q. B. 671, but re-established in *Mogul Steamship Co.* v. *MacGregor Gow & Co.*, 33 Q. B. D. 591.
(4) *Mulcahy*, L. R. 3 N. L. 306 (326); *O'Connell*, 5 St. T. (N. S.) 1.

1109. Essentials of Criminal Conspiracy.—The four essential ingredients of a criminal conspiracy have been already set out (§ 1107). Shortly stated, the offence involves (*i*) an *agreement* to do, (*ii*) an illegal act, or (*iii*) by illegal means, (*iv*) the agreement being followed by an overt act.

(i) Agreement

1110. It will be observed that there can be no conspiracy without an agreement which is an advancement of the intention which each has conceived in his mind, which then passes from a *secret* intention to the stage of mutual consultation and concert, proof of which may be available in the evidence of an accomplice which must, however, be definitive as to the agreement " to do or cause to be done " the act charged ; which, again, must be shown to be illegal within the meaning ascribed to that term in section 43 which generally follows the English Law.[1] It is, of course immaterial that the offence agreed on is one which one of the conspirators could not singly commit. So in an English case where a woman who erroneously believed herself with child conspired with another to procure abortion, she was held liable to be convicted of conspiracy to procure abortion although if she had merely done the act to herself with like intent she could not have been convicted.[2] It will be observed that many acts of conspiracy to be found in the law books would be punishable here as amounting to abetment, as for example, conspiring to obtain money[3] or goods by false pretence,[4] conspiring to defraud the public by mock-action[5] or by forcing up the price of shares by circulating false rumours,[6] and the like.

(ii) Act Illegal.

1111. To amount to the offence of criminal conspiracy an agreement must be to do that which is contrary to or forbidden by law. Being a highly technical offence, this ingredient of the crime is essential and must be strictly proved.[7] An agreement which is immoral or against public policy, or in restraint of trade or otherwise of such a character that the Courts will not enforce it is not necessarily *illegal*.[8] But since an act may be illegal without being criminal it follows that an agreement to do an illegal act may amount to criminal conspiracy though it may not be punishable as such.[9] It may be an offence to conspire with another to do an act which, if done alone, would not be criminal *e.g.*, procuring a woman to become a prostitute,[10] or to have illicit connection with a man.[11]

(iii) Means Illegal.

1112. The end does not justify the means in criminal law. If, therefore, one conspires with another to employ illegal means to achieve a legal purpose, one may be convicted of conspiracy. It is not difficult to conceive of such cases. For instance, it is not illegal to undersell a rival trader, but it would be illegal for the latter to combine to ruin the seller of cheap goods by inducing to give credit to a bankrupt purchaser and thereby cause him loss.[12]

(iv) Overt Act.

1113. The doing of an overt act, independent of the agreement, is a step further in prosecution of the object of the conspiracy and stamps it as criminal within the meaning of this section. This overt act here must be something distinct from that tending to prove merely the agreement.[13] The question is one of fact dependent upon the circumstances of each case. For instance, if *A* and *B* agree to murder *C*, letters passed between them as to the movements of *C* may either prove the agreement, or be overt acts in furtherance of its purpose. It all depends upon their nature and context. So where the accused were found

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(1) *Rowlands*, 17 Q. B. 671 ; *Parnel*, 14 Cox. 505 ; *O'Connel*, 11 Cl. & Fin. 155 ; *Gulab Singh*, 35 I. C. (A.) 991 ; *Billinghurst*, (1924) C. 18.

(2) *Witchurch*, 24 Q. B. D. 420.

(3) *Kenrick*, 5 Q. B. 49.

(4) *Orman*, 14 Cox. 381.

(5) *Lewis*, 11 Cox. 404.

(6) *Aspinall*, 20 B. D. 48 (59) ; *Scott* v. *Brown*, (1892) 2 Q. B. 724 ; *Mogul Steamship Co.* v. *MacGregor Gow & Co.*, 23 Q. B. D. 598.

(7) *Amritalal*, 42 C. 957.

(8) *O'Connel*, 11 Cl. & Fin. 155.

(9) *Witchurch*, 24 Q. B. D. 420.

(10) *Howell*, 4 F. & F. 160.

(11) *Delaval*, 3 Bur. 1434 ; *Grey* (*Lord*), 9 St. Tr. 127; *Mears*, 2 Den. 79.

(12) *Esdaile*, 1 F. & F. 213; S. C. *sub. nom. Brown*, 7 Cox. 442.

(13) *Gulab Singh*, 35 I. C. (A.) 991; *Kalidas Basu*, 39 C. L. J. 151.

to have conspired to import firearms and ammunition in contravention of the Arms Act they were held guilty of this offence.[1]

Explanation.

1114. The explanation follows the general principle that an illegal act cannot be justified by reason of mistake, accident or the like. But the illegal act must have some bearing on the object of the agreement, otherwise the two cannot be connected. For instance, suppose *A* and *B* agree to murder *C*. One of them *A* goes to purchase a revolver in a false name. Both are guilty because *A*'s illegal act, though not the murder of *C* in which *B* had conspired, is yet incidental to that object.

Punishment of criminal conspiracy.

120-B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both.

1115. Analogous Law.—This section is of course not retrospective,[2] but an offence made punishable under it may be otherwise dealt with as an abetment though conspiracy is a substantive offence, and is distinct from abetment.[3] This section prescribes punishment for really two offences of varying gravity, *viz.*, (*i*) criminal conspiracy as such, and (*ii*) criminal conspiracy to commit an offence punishable with at least two years. The section is, moreover, supplementary, as criminal conspiracies though not expressly provided by the Code, were before the enactment of this section treated as abetment, which again, when of the more serious character is the subject of express and separate penalties.[4]

1116. Procedure and Practice.—Section 196-A of the Criminal Procedure Code provides for previous sanction of the Local Government to the institution of a prosecution for this offence where its object is to commit any non-cognizable offence, or a cognizable offence not punishable with death.[5] As regards procedure the offence under clause 1 follows that applicable to the offence which is the object of the conspiracy—that is to say, it is cognizable—warrant or summons—bailable or non-bailable as the offence which is the object of the conspiracy. It is not compoundable and triable by the Court of Session if the offence which is the object of the conspiracy is triable exclusively by such Court ; in the case of all other offences it is triable by the Court of Sessions—Presidency Magistrate or a Magistrate of the First Class. If the offence falls under clause 2, a warrant or a summons may issue in the first instance. It is bailable and not compoundable and is triable by the Presidency Magistrate or a Magistrate of the First Class.

1117. Charge.—No person can be convicted of this offence without a proper complaint and a charge.[6] In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiring with persons known then such persons must be named in the charge, otherwise the charge would fail.[7] An indictment for conspiracy must contain a statement of the facts relied upon as constituting the offence in ordinary and concise language, with as much certainty as the nature of the case will admit.[8] Strictly speaking, in

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(1) *Kalidas Basu*, 39 C. L. J. 151 ; to the same effect, *Bachcha Babu*, (1935) A. 162.
(2) *Monmohan*, 35 I. C. (C.) 999.
(3) *Chandi Ram*, (1926) S. 174.
(4) *E.g.*, ss. 121A-123, 128-130, 131-138A, 150, 157, 164, 212-216A, 221, 236, 244, 257, 267, 294-A, 305, 306, 400-402, 411-414, 460.
(5) *Thakur Das*, 40 A. 41.
(6) *Bhikhari Singh*, 13 Pat. 729.
(7) *Lalit Mohan*, 8 I. C. (C.) 1059. Names, of co-conspirators must be disclosed; *Perrins*, 72 J. P. 144.
(8) *Mackenzie*, (1892) 2 Q. B. 519; *ex-parte Wilkins*, 64 L. J. M. C. 221; *McKenzie*, (1903) I K. B. 56; *Pulin Behary*, 16 I. C. (C.) 257, *Amritalal*, 42 C. 957; *Haji Samo*, (1927) S. 161;

cases where an offence has been committed in pursuance of a conspiracy, there should not be any conviction for conspiracy, but for abetment of the offence, for conspiracy followed by an act done to carry out the purpose of conspiracy amounts to abetment.[1]

1118. The charge should run thus :—

"I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you, on or about the —— day of —— at —— agreed with (*name of* the co-conspirator), to do (*or* cause to be done) an illegal act, to wit——(*or* an act to wit——which is not illegal by illegal means to wit——) and that you did some acts, to wit —— besides the agreement in pursuance of the said agreement to commit the offence of——punishable with death (*or transportation, etc.*) and thereby committed an offence punishable under s. 120-B of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

1119. Proof.—This is a highly technical offence and all its ingredients must be strictly proved.[2] Where two persons were tried for an offence under section 120B read with s. 302, I. P.C., and one of them was acquitted, the other could not be convicted of the offence under this section.[3] Where an accused was fined under ss. 302-120-B read with sections 302 and 364 and the verdict of the jury was silent about the charge under section 302, but found him guilty under ss. 120B and 364 it was held that since the verdict of the jury did not negative, the charge under section 302 a retrial under that section was ordered.[4] The points requiring proof are : —

(1) That the accused agreed with another.
(2) To do an act, or caused it to be done.
(3) That such act was illegal or was done by illegal means.
(4) Proof of an overt act if the agreement was not an agreement to commit an offence.

1119-A. It is of the very essence of conspiracy that the conspirators should plot and act in secret. Direct evidence of agreement is not, therefore, always available. It has then to be established by the evidence of acts and conduct which connect the crime with common design in which the conspirators have probably been all assigned a part.[5] As Buller, J., said in a case: "In indictments of this kind, there are two things to be considered : first, whether any conspiracy exists ; and next, what share the prisoner took in the conspiracy.....Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, *viz.*, that he consented to the extent that the others did."[6]

1119-B. The fact that two persons were co-operating for the attainment of the same end is some indication, though not necessarily the evidence of conspiracy. Bull in England and Schmidt on the Continent were engaged in forging a plate. While Schmidt was on the Continent, Bull ordered an innocent agent to manufacture the plate. Both Bull and Schmidt took delivery of it. On their trial, it was contended for Schmidt that he was only an accessory before the fact, and that so far as he was concerned it was as good as if Bull had himself manufactured the plate, whereupon Reid, C.J., said : "That reasoning would be good if the actual maker had been a guilty party, because he would stand in a different position to those who had counselled him to the commission of the crime. But it altogether fails where the immediate agent is an innocent one. Then, those who have plotted and arranged that he should do the particular act are themselves principals. Suppose the prisoners had been both abroad, and that, having planned the forgery, one of them had given the order for the plate by letter, can it be doubted that they would be indicted as principals ; and can it make any difference that one of them is in this country?

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(1) *Harsha Nath*, 42 C. 1152; *Amritalal*, *ib.*, 957.
(2) *Mihan Singh*, 5 L. 1,
(3) *Kasem Ali*, 101 I. C, (C.) 481, *Prafulla K. Roy*, (1926) C, 345,
(4) *Osmans*, (1924) C. 809.
(5) *Brisac*, 4 East 164 (171).
(6) *Hardy*, 1 Gurney's Ed. (369) ; 2 Starke's Ev. (2nd Ed.) 234.

It seems to me, then, that the circumstance of the immediate agent in this forgery being an innocent person renders the rule of law as to principal and accessory inapplicable."[1] To which Alderson, B., added: If a person does an act of this kind, with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons; and if two have agreed to employ him, he is the agent of both. In this case, therefore, it is a question for the jury whether the prisoners were jointly acting in procuring this plate to be made. If they were, then the engraver acts on behalf of both. It makes no difference whether they were in England or elsewhere; when they have once agreed to do the thing, the act of one is the act of all, although the rest be absent at the time."[2] So where some of the confederates inveigle themselves into the confidence of an innocent person and lure him to take the bait, all are guilty of the crime as principals.[3] They will, however, be principals or abettors here according to the part they have taken in the plot.

1120. Principle.—The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment.

1121. Meaning of Words.—"*Where no express provision is made in this Code for punishment of such a conspiracy*": Express provisions are made in sections 121-A, 311, 401 and 402.[4] The provision need not specify the offence as one of conspiracy.

1122. Evidence of Conspiracy.—Direct evidence is seldom available to prove a conspiracy. Even when available, it is tainted, being that of an accomplice and requires corroboration. Consequently, conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.[5] It is from this point of view that overt acts may properly be looked to as evidence of the existence of a concerted intention. The criminality of the conspiracy is independent of the criminality of the overt acts,[6] but a man's guilt must be established by proof of facts and not merely proof of his character.[7] The prosecution may go into evidence on the nature of the conspiracy before it gives evidence to connect the accused with it.[8] The acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against all,[9] but they must directly tend to the proof or disproof of the matter in issue: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried."

1123. Such evidence may comprise printed handbills or placards or speeches of co-conspirators and resolutions at their meetings.[10] But before all such evidence is admissible there must be proof of a conspiracy and that the accused were members of the same conspiracy and that the act in question was done in furtherance of the common design. But if *A* and *B* are charged with a conspiracy to cheat *P*, evidence is admissible to prove that they had similarly cheated *R*

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(1) *Bull*, 1 Cox 281.

(2) *Bull*, 1 Cox 281; *Percy Henry Buxa*, 11 Bom. L. R. 1153.

(3) *Moore's case*, 1 Leach 314 (*Ringdropping*) *case*.

(4) In *Udha Singh*, 10 S. L. R. 69, 35 I. C. 670, it was wrongly stated that the only such case was that under s. 121-A.

(5) *Per* Gross, J., in *Brisac*, 4 East, 171, followed *per* Willes, J., in *Mulcahy*, 3 H. L. 306 (317): "It is perfectly true that the darkcovertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof." *Per* Sir Lawrence Peel, C. J., in *Hadger* cited in Starkie on Ev. 132; *Monmohan*, 35 I C. (C.) 999 (1000); *Harsha Nath*, 42 C. 1153; *Balmokand*, (1915) P. R. No. 17, 28 I. C. 738.

(6) *Harsha Nath*, 42 C. 1153.

(7) *Amritalal*, 42 C. 957.

(8) *Hammond*, 2 Esp. 719.

(9) S. 10, Indian Evidence Act (I of 1872); *Makin* v. *Attorney-General*, (1894) A. C. 57.

(10) *Duffield*, 5 Cox. 404; *Annappa*, 9 Bom. L. R. 347 (349); *Barendra*, 37 C.467; *Amritala* 42 C. 957.

and S.[1] The rule in this respect is formulated in the Indian Evidence Act.[2] Conspiracy may be proved by the evidence of the conduct of the accused and the surrounding circumstances both before and after the commission of the offence without proving any overt act of the accused.[3] But the conduct and the surrounding circumstances must bear upon the offence and must not be too remote. For instance, the facts that the accused was an associate of the conspirators and was anxious to escape observation and was doing his best to conceal his whereabouts after the date of the occurrence connected with the criminal conspiracies, or was assisting the conspirators in their defence; though all relevant fall short of the proof of an *agreement* which is the gist of the crime.[4]

1124. As the crime of conspiracy involves the agreement of at least two persons, if two persons are tried together for conspiring with one another, and there is no charge of conspiring with any one else, they must be both acquitted or both convicted.[5] It is not, however, necessary that the two conspirators should be jointly tried or both tried, for one of them might be pardoned or tried afterwards but if one of the two is tried and acquitted, the conviction of the other cannot stand.[6] But otherwise one of two conspirators may be convicted of conspiracy in the absence of the other, if the Court is satisfied that the other conspirator was also guilty, and would have been convicted if he had been before the Court.[7]

1125. Where two conspirators are jointly tried, the confession of one is relevant against the other.[8] It is, of course, not necessary that all conspirators should join the conspiracy at the same time. Some may form it, while others may join it afterwards. In that case they will be all equally guilty.[9]

1126. It will be noticed that proof of an independent overt act is not required where the conspiracy is to commit an offence, such evidence being only necessary in cases punishable under clause 2. (§ 1107).

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(1) *Stenson*, 12 Cox. III.

(2) Indian Evidence Act (I of 1872), s. 10; *Abani Bhusan*, 38 C. 169; *Nirmal Chandra*, (1927) C. 265; *Bishambhar Nath*, (1926) O. 161; *Haji Samo*, (1927) S. 161.

(3) *Duffield*, 5 Cox. 404; *Annappa*, 9 Bom. L. R. 347 (449); *Barendra*, 37 C. 467; *Jamo Allarakhia*, 9 S. L. R. 223, *Kishin Chand*, 20 S. L. R. 18.

(4) *Rakhal Chandra*, (1930) C. 647 F. B.

(5) *Manning*, 12 Q. B. D. 241; *Plummer*, (1902) 2 K. B. 339; *Gulab Singh*, 35 I. C. (A). 991; *Jogjiban Ghose*, 9 C. L. J. 663.

(6) *Cooke*, 5 B. & C. 538; *Plummer*, (1902) 2 K. B. 339. If one obtains immunity from punishment, the other may be validly convicted; *Duguid*, 75 L J. K. B. 470.

(7) *Beechey*, (1916) 85 L. J. (P. C.) 32.

(8) S. 30, Evidence Act (I of 1872); *Abani Bhusan*, 38 C. 169.

(9) *Balmokand*, (1915) P. R. No. 17; *Kali Munda*, 27 C. 797; *Barindra*, 27 C. 467 (506)

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

1127. Topical Introduction.—This chapter comprises ten sections, the first three of which deal with preparation,[1] conspiracy,[2] and the actual waging of war against the King.[3] Section 123 deals with abetment by criminal concealment, and in this respect it is an aggravated form of the offence punishable under sections 118 and 120. Sections 125-127 refer to hostile acts directed against any Asiatic power in alliance with the King. The two groups of sections are thus directed to the securing of external and internal peace. Section 124-A is directed against sedition which may be regarded as a precautionary section intended to avert internal commotion and civil war. Sections 121-123 and 124-A are thus directed to the preservation of the State. Sections 125-127 to the preservation of allied foreign States, and the remaining sections have the same object in view, though they are not directly conducive to its preservation. There are thus four principal offences dealt with in this chapter: (*i*) Waging war against the King (ss. 121, 121A, 122, 123), (*ii*) waging war against an Asiatic ally (ss. 125, 126, 127), (*iii*) overawing the Government (ss. 124, 124A), and (*iv*) permitting or aiding the escape of a State prisoner or a prisoner of war (ss. 128, 129, 130).

121. Whoever wages war against the Queen, or attempts to wage such war or abets the waging of such war, shall be punished with death, or transportation for life and shall also be liable to fine.[4]

Waging or attempting to wage war, or abetting waging of war against the Queen.

Illustrations.

(*a*) *A* joins an insurrection against the Queen. *A* has committed the offence defined in the section.

(*b*) *A* in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. *A* is guilty of abetting the waging of war against the Queen.

[***Queen***—s. 13. ***Abets***—s. 107.]

1128. Analogous Law.—This chapter was the subject of much comment at the hands of the Law Commissioners. The natives of India were not subject to the English Law of High Treason.[5] There was no corresponding law in the Regulations of the Company. The Council of India had no power to enact such law and it was a necessary part of the Code. The Commissioners, then, recommended that a draft of the new law should be adopted and referred to the Home Authorities, and this was done.[6] The action taken by them was to consult their law advisers who declared in favour of the power to pass these sections by the Council of India. An Act of Parliament to explain and define the powers of that Council was also passed, and any doubt that might have existed as to the competency of the Indian Legislature to enact these rules was set at rest by an Act of the body in whom are centred all the legislative powers of the British Constitution.[7]

1129. Procedure and Practice.—An offence under this section is non-cognizable, non-bailable, non-compoundable, and exclusively triable by the Court of Sessions. It is an offence in which the Magistrate may issue warrant in the first instance. No prosecution under this section can be initiated except "upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf."[8] Such order or authority must be strictly proved in the manner laid down by s. 78 of the Indian Evidence Act, and the identity of the prisoner with the person named in the order or authority of the Government must be

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(1) S. 122.
(2) S. 121-A.
(3) S. 121.
(4) The words "and shall also be liable to fine" were substituted for the words "and shall forfeit all his property," by the Penal Code Amendment Act (XVI of 1921) which came into force on the 29th September 1921.
(5) For Historical Survey of English Law on High Treason See 1 Penal Law (4th Ed.) pp. 734, 739.
(6) Second Report, S. 14.
(7) See *Ib.*, S. 4.
(8) S. 196, Cr. P. C.

established.[1] A similar sanction is also required for a prosecution under the English Statute, but in England a prosecution must commence within six months of the grant of sanction. There is, however, no period fixed within which sanction for a prosecution may be applied for.

1130. Proof.—The evidence required to establish a case under this section must be directed to the proving of the following points :—

(1) That the accused "waged war" or attempted to do so or abetted the same.
(2) That such war was against the King.

1131. Charge.—The following form may be adopted in framing charge under this section :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of accused person*) as follows :—

"That you——on or about the——day of——at——waged war (*or* attempted to wage war, *or* abetted the waging of war) against His Majesty the Emperor of India and thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session (*or if the charge is framed by a Presidency Magistrate*, High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."[2]

1132. Principle.—All states have the same right of self-preservation as their subjects, and States like men have, from time immenorial, enacted safeguards for their own preservation and protection. In monarchical forms of Governments, the right was exalted into a sacred right, indeed as sacred as the person of Gods and so the violation of one as the other was considered a *lese majestie—lese majestie human*, being an offence against the power, crown, dignity, and majesty of that but too visible God, whose throne was upon earth ; *lese majestie divine*, being an offence against the power, crown, dignity and majesty of the invisible God, whose throne is in heaven.[3] *Lese majestie* of the civil law now corresponds to High Treason of the English law, which comprises of the following :—

(*i*) When a man doth compass or imagine the death of the King, his Queen or of his eldest son and heir ;
(*ii*) When a man violates the King's companion, his eldest daughter unmarried, or the wife of the eldest son and heir ;
(*iii*) If a man levy war against the King in his realm ;
(*iv*) If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere ;
(*v*) If a man counterfeit the King's Great or Privy Seal ;
(*vi*) If a man make or pass counterfeit coin ;
(*vii*) If a man slay the Chancellor, the Treasurer or the King's Judges.

1133. After enumerating these seven cases of treason the Statute expressly prohibits other cases being treated as treasons without the authority of the King and Parliament.

1134. Of these seven clauses the first two were omitted as it was considered unlikely for the English King to visit India,[4] which, however, His Majesty did in the cold season of 1912.

1135. Offences mentioned in clauses (*v*) and (*vi*) are not high treasons by any means, and they have been relegated to their proper place in the Code. The two remaining clauses (*iv*) and (*vii*) have, however, been enacted here in their modified form as sections 122 to 124.

1136. Meaning of Words.—"*Whoever wages war*" : The word "whoever" is acknowledged to be a substitute for "if a man" in the Statute of Treasons[5] and has been used to include both British subjects and foreigners. "*Wages war*" is similarly acknowledged to be a substitute for "*levying war*" in the English Statute, and is used in the same sense.[6] It is to be understood in its ordinary

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(1) *Aung Do*, (1886) S. J. L. B. 389; *Sham Khan*, (1890) P. R. No. 16.
(2) Form No. XXVIII, Sch. V. Cr. P. C.
(3) Bentham's Constitutional Code, Vol. X; Bk. I, Ch. VII, p. 39.
(4) Note C, pp. 118, 119, Second Report, s. 5.
(5) Second Report, s. 13.
(6) *Aung Hla*, 9 R. 404.

sense, and overt acts, such as collection of men, arms and ammunition for that purpose, do not amount to waging war.[1] "*Attempts to wage such war*": What is an attempt? It is something more than a mere preparation. It is a definite commencement of war. "*Abets the waging of such war*": The term "abets" is used in the sense defined in section 107.

1137. Persons Bound.—This section applies to "whoever" wages war against the King,—a word which has been advisedly chosen, and which unmistakably applies to British subjects as well as foreigners, the former owing allegiance by birth or naturalisation, the latter by their residence. In this respect, the Code follows the English Law and it is in accordance with *de jure gentium*[2] which admits the right of the foreigners to enter the country only upon the tacit condition that as they rely upon its protection, they also subject themselves to its laws.[3] The law above stated relates to alien residents. But it is different in the case of an alien enemy who invades the other state, because his own state is at war with it. Such a person may be killed in war, or if he is caught alive, he is, and must be held, as a prisoner of war. But a foreigner may take up arms without the sanction of his state, which is in fact on friendly terms with the state he is attacking. Such a one is called an alien *amy* and may be killed, if found arms in hand, otherwise he cannot be killed without a trial. The trial may be held by a Court-martial, if the ordinary laws of the land have been legally suspended, otherwise it must be held by the civil Courts and under the ordinary law.

1138. The subject of a state cannot throw over allegiance by joining the armed forces of an alien enemy or a lawful belligerant and plead that he could not be tried as an ordinary rebel.[4] But this is not an invariable rule, for a British subject may be naturalized in a foreign state, in which case, he ceases to owe any allegiance to the King and will be treated, in every respect, as a foreigner.[5]

1139. Lastly, as remarked by Mr. Forsythe, allegiance by the English Law is correlative with protection,[6] and "where the Sovereign can no longer *de jure* protect his subjects, their allegiance ceases. Upon this principle allegiance ceases by conquest, or by cession of territory under a treaty."[7]

1140. What is "Waging War".—Turning next to the phrase "waging war," it will be observed that the section deals with three stages of complicity in waging war against the King, namely, abetment, attempt and actual war. The offence of abetment is under this section a distinct and complete offence. This was justified by the Law Commissioners in the following words: "We have made the abetting of hostilities against the Government in certain cases, a separate offence, instead of leaving it to the operation of the general law laid down in the chapter on abetment. We have done so for two reasons. In the first place, war may be waged against the Government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the British territories, who should abet a subject of the British Government in waging war against that Government; but they should not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British Government.

(i) Abetment.

1141. "In the second place, we agree with the great body of legislators in thinking, that though in general a person who has been a party to a criminal design, which has not been carried into effect, ought not to be punished as

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(1) *Barindra*, 37 C. 467.

(2) Allegiance follows protection as a matter of course: *Protectio trahit subjectionem, et subjectio protectionem* ("Allegiance and protection are reciprocally due from subject and the sovereign")—*Calvin's case*, 7 Rep. 1. It is a right which, says Sir Michael Foster, "the law of nature giveth, and no law of society hath taken away."

(3) Cf. Bk. II, Ch. VIII, S. 1, cited in the Commissioner's Report, S. 13.

(4) 27 St. Tr. 613 Dyer, 300 (*b*).

(5) Const. Law, p. 334, See *per* Lord Mansfield in *Fabrigas* v. *Mastyn*, Cow. p. 161

(6) *Calvin's case*, 7 Rep. 5.

(7) Const. Law, p. 334; see *per* Lord Mansfield in *Fabrigas* v. *Mastyn*, Cow. p. 161.

severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State for State-crimes and especially the most heinous and formidable State-crimes have this peculiarity that, if they are successfully committed the criminal is almost always secure from punishment. The murderer is in greater danger after victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against reasonable designs which have been carried no further than plots and preparations. We have, therefore, not thought it expedient to leave such plots and preparations to the ordinary law of abetment. That law is framed on principles which, though they appear to us quite sound, as respects the great majority of offences, would be inapplicable here. Under that general law a conspiracy for the subversion of the Government, would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions and interchange promises of fidelity. A conspiracy for the subversion of the Government, which should be carried as far as the Gunpowder treason, or the assassination plot against William III, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged cheque. We have therefore, thought it absolutely necessary to make separate provision for the previous abetting of great State offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law."[1]

1142. Since this was written, a new section has been added to the Code making conspiracies to commit offences under this section punishable.[2] The combined effect of the two sections is then to make conspiracies, abetment and attempt to wage war as much punishable as the actual waging of war itself. It will be convenient to discuss here the effect of these several acts as, in spite of the illogical arrangement of the sections, they all form an integral branch of a subject in which the different degrees of criminality depend upon the different degrees of development that a plot to overthrow the Government may have attained. In its normal evolution a plot to wage war must begin with a conspiracy in which the ways and means are discussed and settled. It requires at least two persons to conspire; but there is no limit to their number. If there are five or more persons in a conspiracy it then becomes an "unlawful assembly."[3] A conspiracy is by its nature secret in its organization. But it may be incited by words which may or may not be publicly spoken or published. Even these words do not go unpunished.[4] The Code then punishes as *lese majestie* not only cabals and conspiracies, but even words spoken or written to excite disaffection towards the Government. Thus, the Legislature maintains a tight grip on all hostile combinations, added to which the Viceroy possesses the power of deporting persons whom he may suspect of exciting or promoting external or internal commotion.[5] As this power may be exercised without a trial, without warning, and without the offender, if a native, having recourse to the *habeas corpus*,[6] or the writ of mainprize,[7] the executive Government often find it a readier weapon to use than the more deliberate procedure of a trial. But the exercise of such power, though legal, is extraordinary, and there is nothing like it in English law. And in recent years it has been considered that its exercise has

(1) Note C. Reprint, p. 119. The reference in the text to previous and subsequent abetment follows the original classification which was not approved by the Legislature.

(2) S. 121-A added by Act XXVII of 1870.

(3) S. 141.

(4) S. 124-A.

(5) Reg. III of 1818; substance re-enacted by Act XXIV of 1850, and Act III of 1858; *Ameer Khan*, 6 B. L. R. 459.

(6) It was held by Norman, J., in *Ameer Khan*, 6 B. L. R. 392. O. A, 6 B. L. R. 459, in which the question will be found exhaustively reviewed.

(7) *Ameer Khan*, 6 B. L. R. 456, in which it was held that if the writ was not obsolete, it was not within the competency of the Indian High Courts to issue it, and that in any case it only applied to bailable offences.

in some cases led to its abuse. The procedure under the Code, is therefore, the only regular way of combating conspiracies.

1143. Criminal Conspiracy to Wage War.—Such a conspiracy may consist of secret or open combination to (*i*) levy or attempt to levy war against the King, or it may have for its object (*ii*) the overthrow of the Government, or (*iii*) the overawing by means of criminal force, or the show of criminal force, the Government of India or any Local Government.[1] In order then that a conspiracy should be punishable, it must be shown to possess one or more of these objects. Otherwise a conspiracy is not otherwise punishable under the Code, unless it amounts to an abetment, that is, unless it is accompanied by an act or illegal omission.[2] In England, a conspiracy to levy war is not treason though, if the design and conspiracy be either to kill or depose, imprison or restrain the King, and if the way and method of effecting these is by levying war for that purpose, then it is high treason though no war be levied. But there may be a war levied without any design upon the King's person. As, for example, if persons do assemble and act with force in opposition to some law which they think inconvenient, and hope thereby to get it repealed, it is levying a war and treason, though purposing and designing it would not be treason in England,[3] though it is a declared offence under the next section.

1144. There is really no difference between the English and Indian law. The former makes it treason to overawe the King, while the latter makes it similarly a grave offence to overawe the Central and Local Governments, which are the only substitutes of the King in this country. There is, however, one material difference between the two systems. Under the English rule, there must be evidence of an overt act, while under the explanation to s. 124-A, there need be no act or illegal omission to make conspiracy an offence. Again, in England, at least two witnesses are required for a conviction, but there is no such rule here. It will have to be presently considered as to what constitutes the overawing, by means of criminal force, the Government. Here it is only necessary to observe that a plot to levy war, though it may not amount to abetment is punishable as an offence. If, therefore, *A* and *B* decide to wage war, though they may lack the power, and though it may have been a passing thought, still they are guilty of an offence. Blackstone speaks of the tyrant as having executed a subject Dionysis, barely for dreaming that he had killed him, which was held for a sufficient proof that he had thought thereof in his waking hours."[4] "But such," he says, " is not the temper of the English Law, in which an open or *overt* act is required to convict the traitor." It has been already stated that no such overt act is here required, and if two merely agree to levy war, the offence is complete under the Code, though it may not be under English Law. Of course, a person may join a conspiracy after it has been formed or leave it at any time before the conspirators wage war in which case he could not be convicted under this section.[5]

1145. Preparation, Attempt, and Levying of War.—Indeed, the mere agreement of the two would be an " act " sufficient to constitute an abetment under this Code (§§ 952, 954). Consequently, even such an agreement is not required to constitute an offence under the next section. As preparation is something more than an agreement, it is sufficient to constitute an offence under the next section, though it will probably then also amount to abetment. Such preparation may consist of the collection of men, arms and ammunition, sketches and plans of forts and government buildings, of roads, bridges and the like—in fact, of all such materials as are required for the purpose of war. Even the collection of supplies may afford some evidence of the design though, without more, it would not prove the crime (§§ 963, 970). A conspiracy may thus lead to abetment, of an abetment of an attempt which is a direct hostile movement in contemplation of the war. In view of the far-reaching law, it is probably not necessary to draw a very clear line between

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(1) S. 121-A.
(2) *Subrahmania Ayyar*, 25 M. 61, P. C.; *Hasrat Mohani*, (1922) B. 284.
(3) *Per* Holt, C. J., in *Sir John Friend*, 13 St. Tr. 1 (61).
(4) *Plutarch's Lives*, 4 Black 72.
(5) *Goman Saya*, 21 I. C. (Bur.) 658.

an abetment and an attempt, though a distinction may be usefully drawn between a conspiracy and an abetment (§§ 964, 968, 969). For the present purpose, any conspiracy with an overt act will amount to an abetment. An assembly armed and arrayed in a war-like manner for any treasonable purpose would be guilty of an attempt to wage war ; and so lifting and marching, without coming to a battle or an action, have been held to be sufficient overt acts within the requirements of the English Statute.[1] For this purpose, no specified number of persons is necessary.[2] Indeed, one person possessed of a weapon of precision may work more mischief than a whole battalion of troops indifferently armed. The offence consists not in the number of men or their manner or equipment as in the inclination of their mind. So Foster says : " There is no difference between those insurrections, which have carried the appearance of any army formed under leaders and provided with military weapons and with drums, colours, etc., and those other disorderly tumultuous assemblies which have been drawn together and conducted for purposes manifestly unlawful, but without any of the ordinary show and apparatus of war before mentioned.....In the case of *Damaree*[3] and *Purchase*,[4] there was nothing given in evidence of the usual pageantry of war, no military weapons, no banners, nor drums, nor any previous consultation previous to the rising ; and yet the want of these circumstances weighed nothing with the Court, though the prisoner's counsel insisted much on that matter. The number of insurgents supplied the want of military weapons, and they were provided with axes, crows and other tools of the like nature, proper for the mischief they intended to effect : *Furor arma ministrat.* The true criterion, therefore, in all these cases is : *Qui animo,* Did the parties assemble ?"[5]

1146. The specific intention is then the essence of the offence. The number of men assembled, their war-cries, their arms and accoutrements may be evidence of their intention, but nevertheless it is upon the prosecution to furnish and establish that the intention of the accused was to levy war. Indeed, every hostile act of a person against the men or measure of Government cannot be magnified into the waging of war against the King. " There is a diversity between levying of war and committing of a great riot, a rout or an unlawful assembly. For example, as if three, or four or more do rise to burn or put down an enclosure in Dale, which the lord of the Manor in Dale hath made there in that particular place ; this or the like is a riot a rout or an unlawful assembly, and no treason. But if they had risen of purpose to alter religion established within the realm or laws, or to go from town to town generally, and to cast down enclosures, this is levying of war (though there be no great number of the conspirators within the purview of this Statute), because the pretence is public and general and not private in particluar."[6] The old reports are full of cases in which attempts were made to enlarge the rule by establishing a constructive treason, but neither the Judges nor the jurists have ever tolerated such an extension of the doctrine. So Lord Hale wrote : " How dangerous it is by construction and analogy to make treason, where the letter of the law has not done it. For such a method admits of no limits or bounds, but runs as far and wide as the wit and invention of accusers and the detestation of persons accused will carry man."[7]

Constructive Treason.

1147. There is, however, one sense in which the language of the section may be said to necessarily countenance constructive treason. The section says, " Whoever wages war against the King " which must mean against the person of the King. Now there can be no war against the King in this sense in India, for the King is not here, though his Government is. Strictly speaking there can be no waging of war against the King, and the inapt expression here is only a remainder that the section was closely copied from the Statute of Treasons, which was passed at a time when the

(1) Foster, 218.
(2) 3 Coke's Inst. 9.
(3) 15 St. Tr. 522 (606-609).
(4) 15 St. Tr. 651 (699).
(5) Foster, Cr. L., 208.
(6) *Coke*, 3 Inst. 9 ; *per* Luders in 15 St Tr. 444, note.
(7) 1 Hale P. C. 145, 146.

power and position of the King was very different to what it is now. Such war is, therefore, only constructively possible here, as indeed, it is in England under the altered Constitution. So Lord Mansfield, L. C., told the jury in Lord George Gordon's case : " There are two kinds of levying war—one, against the person of the King : to imprison, to dethrone, or to kill him, or to make him change measures or remove counsellors ; the other, which is said to be levied against the Majesty of the King, or, in other words, his legal capacity ; as when a multitude rise and assemble to attain by force and violence any object of a general public nature, that is levying war against the Majesty of the King ; most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property and to overturn Government, and by force of arms to restrain the King from reigning according to law."[1]

1148. Three Elements in Levying War.—The foregoing discussion, would then, support the following rules :—

(1) That the word " King " in the section must not be understood in its literal sense, as it is used in the figurative sense as meaning, head of the State, and as the external embodiment of lawful constitution and Government.

(2) That there can be no waging of war against the King, unless it amounts to an insurrection against the State cr its measures, which must be manifested by the generality of design.

(3) That there can be no waging of war where the attack is personal and particular, and not general and subversive of the State or its authority.

1149. The first rule has been made sufficiently clear and calls for no further comment. The second rule requires further discussion. It has been stated that there is no waging of war against the King, when the object was to redress a private wrong or to procure some private advantage. Riots between two great factions, however lawless or violent, are of this nature. Such riots frequently take place in this country over land, or crops or other disputed right to property, Such rioters may even defy the authorities called in to restore peace. They may even attack them in the fury of the moment. But they do not on that account cease to be rioters, nor does their offence cease to be rioting. But it is not necessarily always so. For the rioters may gain courage by the success they may have achieved and they may transfer their grievance from their opponents to the authorities and commence burning down offices, force jails and release prisoners. It would then be no longer a riot, but shall have become a war, in which the participants may or may not observe' the laws and courtesies of war.

1150. Such was really the origin of the American War of Independence. It began in a series of riots which all developed into a great war.[2] The Lord George Gordon riots did not assume that magnitude. But nevertheless, the facts found were held to be sufficient to hold the rioters guilty of levying war. These riots originated in the repeal of an Act whereby the disabilities under which the Roman Catholics had laboured were all removed.[3] This emancipation of the Roman Catholics aroused bitter hostility from the Protestants, who created riots in various parts of the country. The said Lord was a leader of a Scottish party. It was not denied on his part that the alleged facts, if proved, would constitute the levying of war. He, however, disputed the facts on which he was acquitted.[4] In Frost's case also, there was no evidence of compassing and designing to put down the authority of the Queen, but it was only a rising to proclaim Chartism as the law of the land. The accused was, therefore, acquitted.[5]

1151. These facts would, however, constitute an offence under section 124 of the Code, as they would at least amount to the overawing the Government by criminal force. In two other cases the collecting of men, and their pulling down

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(1) *Lord George Gordon*, 21 St. Tr. 485 (614).
(2) 3 Lecky's Hist. of Eng., 329.
(3) 18 Geo. III, c. 6; repealing 11 and 12 Will III,c. 4.
(4) (1780) *Lord George Gordon*, 21 St. Tr. 485.
(5) *Frost*, 4 St. Tr. (N. S.), pp. 439-443.

houses was held to amount to the levying of war,[1] but these were cases of constructive treason, and their correctness was questioned by contemporary jurists.[2]

1152. Still less justifiable was the decision in which an attack being made on the conspirators to overthrow the British Government, by the Police with a view to arresting them, the latter defended themselves attacking and fighting their arrestors. Their attack was held to constitute the waging of war under this section, but it is clear that in attacking the Police, their object was merely to get rid of them.[3]

1153. Sedition and Abetting War.—So long as a man only tries to inflame feeling to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he can be held to be guilty of instigating and therefore of abetting the waging of war. The main purpose of the instigation should be the waging of war. It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator. Where the speech delivered by the accused amounted at the worst to a prophecy or even a threat that violence may be necessary in future and did not suggest action here and now or stimulate any one to such action, it is not an abetment of war.[4]

Conspiracy to commit offences punishable by section 121.

121-A. Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years, [and shall also be liable to fine.][5]

Explanation.—**To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.**

[***Queen***—s. 13. ***British India***—s. 15. ***Government of India***—s. 16
Conspires—s. 107. ***Act or omission***—s. 107. ***Criminal force***—s. 350.
Local Government—s. 3 (29), ***General Clauses Act*** (X of 1897).]

1154. Analogous Law.—This section which follows the English Law[6] is new and was added by the Indian Penal Code Amendment Act of 1870.[7] It is declared subject to the provisions of Chapters IV, V and XXIII, of the Code.[8] Sir James Stephen, who was then the law-member and as such responsible for the amendment, says that it was intended as the equivalent of the English Treason-Felony Act.[9] This Statute[10] was passed to get rid of an anomaly that existed in the English Law under which, while levying war against the King was treason, conspiracy to levy war against him was a mere misdemeanour. This anomaly was recognised, but its effect was attempted to be got over by treating a conspiracy to levy war against the King as an overt act of compassing the King's death, and thereby falling within the Statute of Treasons. But this was the introducton of " constructive treason " odious to English law,[11] on which the cases in the reports are bewilderingly contradictory, but they need no longer be referred to in view of the Legislation of 1848.

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(1) *Dammaree*, 15 St. Tr. 521; *Messenger*, 6 St. Tr. 897.

(2) *See* Mr. Luder's Note on *Dammaree*, 15 St. Tr. 443.

(3) *Pan Thin*, 20 I. C. (Bur.) 904.

(4) *Hasrat Mohani*, (1922) B. 284.

(5) The words "and shall also be liable to fine" were added by s. 3 of the Indian Penal Code Amendment Act (XVI of 1921), which came into force on the 29th September 1921.

(6) East P. C. 96; *Horne* v. *Tooke*, 1 East P. C. 98; *Hardy*, East P. C. 99; *Stone*, East P. C. 99; *Frost*, 9 C. & P. 129; *Easdaile*, 1 F. & F. 213.

(7) Act XXVII of 1870, s. 4.

(8) *Ib.*, s. 13.

(9) 3 Cr. L. 308.

(10) (1848), 11 and 12 Vict., c. 12, s. 3

(11) *Russell* (*William Lord*), 9 St. Tr. 695, 698, 699, 703. But the doctrine nevertheless obtained recognition in *Sir John Friend's case*, 13 St. Tr. 61, 110, 113; *Hardy and Horn Tooke*, Eyre, C. J.'s charge to the grand jury, 24 St. Tr. 203.

1155. Procedure and Practice.—This is another section in which no Court can take cognizance of the offence unless upon complaint made by the order of, or under authority from, the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf.[1] Where the Complainant omitted to name an accused person in his petition of complaint made with the sanction of the Local Government to prosecute for offences falling within this and the following next two sections, it was held that the accused not so named stood discharged from the trial initiated on such a complaint, even though his name appeared in the sanction authorising the complaint. Nor could such defect be remedied by a subsequent application applying for the issue of a process against such an accused.[2]

1156. An offence under this section is not cognizable, but a warrant may issue in the first instance. It is non-bailable, and non-compoundable and is exclusively triable by the Court of Session.

1157. Proof.—The points to be proved are :—

(1) That the accused had conspired ;

(2) That the conspiracy related to an offence described in s. 121, or was to deprive the King of his sovereignty or to overawe by means of criminal force or the show of criminal force the Central or Local Government.

In this connection it may be noted that :—

(3) The act and statements of a co-conspirator are admissible against others, provided that it is established that the former was a member of the same conspiracy as the latter,

(4) and that the act was done in furtherance of the conspiracy.

Conspiracy may then be proved in either of two or both ways, that is—

(*a*) By direct evidence, in which case the acts and statements of one co-conspirator are admissible against other members of the conspiracy ; or

(*b*) it may be established by proof of the acts of the different persons.

1158. Charge.—A charge of conspiracy under this section with persons "known and unknown" is bad in law ; since the charge must state the names of persons known.[3] The charge for an offence under this section may be worded thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name the accused*) as follows :—

"That you——on or about the——day of——at——(*if the place is within British India, mention so*), conspired to wage war (*or* to abet the waging of war against the Emperor of India (*or* conspired to deprive the Emperor of his sovereignty of British India or some part thereof, *or* conspired to overawe by means of criminal force or show of criminal force, the Government of India *or* of the Local Government, *in which case specify the act constituting the offence*), and thereby committed an offence punishable under section 121-A of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

1159. Principle.—Prior to the enactment of this section, a conspiracy, as such, was not punishable otherwise than as an abetment and for that purpose it was necessary to prove that any act or illegal omission had taken place in pursuance of the conspiracy. Under this section seditious conspiracy is punishable as a substantive offence, and apart from any act or illegal omission that may have taken place in pursuance thereof. This section has thus provided a special punishment for an act which may not even amount to the abetment of an offence, but which the Legislature regards a heinous crime in view of the grave consequence which it may otherwise entail.

1160. Meaning of Words.—"*Whoever*," for the meaning of which *see* s. 121. "*Within* or *without British India*": As to the power of the Government of

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(1) S. 196, Cr. P. C.
(2) *Lalit Mohan Chakravarthy*, 8 I. C. 1059.
(3) *Lalit Mohan Chakravarthy*, 8 I. C. (C), (C.) 1059.

India to punish ex-territorial offences, *see* s. 4. "*To deprive the Queen of the sovereignty of British India*": This is the echo of the English Statute against conspiracies,[1] in which the corresponding phrase is " to deprive or depose him (King) or them (his successors) from the style, honour or the King's name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries." "*To overawe by means of criminal force*": This phrase has been also used in section 141, and means that the force used is to put the Government concerned in awe, so that it fears to do that which it has a mind and will to do, and which the law empowers it to do.

1161. Treasonable Conspiracy.—A conspiracy has been before defined to be a combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful means[2] (§ 964). The subject of treasonable conspiracy had in part to be anticipated in the foregoing discussion for the purposes of tracing treason to its genesis (§ 1140). A treasonable conspiracy must be at least a conspiracy or agreement between two or more persons to subvert the existing Central Government or to overawe it or the various Local Governments.[3] A conspiracy of this description has necessarily as its goal some political and general purpose, and not merely a private or personal advantage. This is, however the object which may not be always apparent. Its object may be, indeed, professedly religious, but if it offends against the rule, it will be treated as a conspiracy, whatever may have been its purpose and object.

1162. Such was the conspiracy unearthed in 1871 in the well-known Wahabe case,[4] in which the accused Amir Khan had been convicted for conspiring with certain frontier fanatics for the waging of war in British India. Ameer Khan was a religious fanatic and his object in compassing the overthrow of the British Government was *Jehad*[5] as a part of his pious duty as inculcated in the Kuran.[6] He was convicted and his conviction was upheld by the High Court where Couch, C.J., with two other Judges, held that the conspiracy had been proved (*a*) by the evidence of accomplices which was supported by (*b*) the letters written to and by Ameer Khan at the time of the conspiracy and relating thereto. The admissibility of these letters had been objected to on the ground that they had been discovered after the arrest, but it was held that they were admissible, if their previous existence was proved. It was also laid down that the acts and statements of all persons engaged in a conspiracy constituted the evidence of *res gestæ* against each of the conspirators.[7]

1163. Actual Injury Immaterial.—It is not of the essence of the offence of such conspiracy that the accused was prompted by patriotic attachment to his own country, or that his acts had not produced any effect.[8] As Kenyon, C.J., said "The criminality did not rest on an invitation to the French to invade the country. If according to Lord Mansfield in *Rex* v. *Hensey*,[9] the communication was likely to be of use to the French to enable them to annoy us, defend themselves or shape their attacks, sending such a paper with a view of its going to the enemy was undoubtedly high treason.[10] In this case as in another[11] the charge was that the accused had collected intelligence as to the disposition of the British naval and military forces and of the sailings of the British squadron, and sent it by special messengers to the French King who was then at war with England. The communications, however, being intercepted, never reached their destination but it was considered to be immaterial, for the offence consists in the attempt to injure and not in the injury done.[12] But the attempt must be criminal, for there can be no conspiracy without criminality ,and such criminality cannot be inferred from the holding of mere correspondence with the King's enemies, unless it shows betrayal to them some state secret likely

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(1) 36 Geo. III, c. 7.
(2) *Mulcahy*, L. R. 3 ; H. L. 317.
(3) *Noni Gopal*, 38 C. 559 ; *Nilkuntha*, 35 M. 247 ; *Pulin Behary*, 16 I. C. (C) 257.
(4) *Ameer Khan*, 6 B. L. R., 392.
(5) Lit. means " endeavour, " popularly means " a holy war against all infidels."
(6) Sale's Kuran, Ch. 2, p. 23 ; Ch. 22, pp. 277, 278.
(7) *Ameer Khan*, 6 B. L. R. 392.
(8) *Nilkantha* 35 M. 247 ; *Ganesh*, 34 B. 394.
(9) 19 St.Tr. 1341.
(10) *De La Motte*, 21 St. Tr. 876 (807)
(11) *Sir Richard Grahme*, 12 St. Tr. 645.
(12) *Gregg*, 14 St. Tr. 1371; *De La Motte*, 21 St. Tr. 687 (807) ; *Nilkantha*, 35 M. 247.

to be turned to account against the King. For as Holt, C. J., told the jury "loose words spoken, without relation to any act or design are not treason or an overt act; but arguments and persuasion to engage in such design or resolution, and directing or proposing the best way for effecting it, are overt acts of high treason inasmuch as if two agree together to kill the King, though the agreement be verbal only, and not reduced to writing; likewise, consulting together for such a purpose is an overt act of treason."[1]

Collecting arms, etc., with intention of waging war against the Queen.

122. Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, [and shall also be liable to fine.][2]

1164. Analogous Law.—This is one of the case in which a mere preparation to commit an offence, *i.e.*, of waging war against the King is an offence under the Code. The section is in accordance with English law, under which the collection of men and materials will be an "overt act" to compass, imagine and intend to depose the king which is the test of criminality. So in a Council of nine Judges the majority of seven held one Patrick Harding guilty of treason for having hired sixteen men to wage war against the joint Sovereigns (William and Mary) in 1691. In that year the English were at war with the French King who was supporting the restoration of James, and Harding had procured men and sent them across the channel to join the French army, whereupon he was convicted of treason.[3]

1165. Procedure and Practice.—All offences under this chapter (except s. 127) require the complaint made by order of or under authority from the Government for the valid prosecution of the accused.[4] The offence under this section is not cognizable, but warrant may issue in the first instance. It is not bailable, not compoundable, and is exclusively within the jurisdiction of the Court of Session.

1166. Proof.—The points to be proved in an offence under this section are:—

(1) That the accused collected men, arms, etc.;
(2) That he did so to wage war;
(3) That such war was against the King.

1167. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That you——on or about the—— day of——at——collected men (*or* arms or ammunition) (*if any other means were adopted, mention them*) with the intention of waging war (*or* being prepared to wage war) against the Emperor of India, and thereby committed an offence punishable under section 122 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

1168. Principle.—This section is intended to nip treason in the bud, by visiting with high penalty, a preparation for waging war whether immediately or in the future. A person who collects arms to wage war in some remote future is as much within the prohibition of the section as one who is ready to declare war as soon as his preparations are complete. As to collection of men and arms does not necessarily signify a desire to wage war against the King, the presence of such an intention is material in constituting an offence under this section. Even where the accused is shown to have had no such intention, if a native, he may be dealt with under the provisions of the Indian Arms Act for which, however, the sanction of the District Magistrate is necessary.

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(1) *Charnock*, 12 St. Tr. 1377 (1452).

(2) The words "and shall also be liable to fine" were substituted for the words, "and shall forfeit his property" by s. 2 of the Indian Penal Code Amendment Act (XVI of 1921) which came into force on the 29th September 1921.

(3) *Patrick Harding*, 12 St. Tr. 645, *note*.

(4) S. 196 Cr. P. C.

1169. The offence under this section does not depend upon the quality of the arms and ammunition, or upon their precision or efficiency. A person who collets bows and arrows, axes and catapults would be as much within the rule as another who collect Mauser rifles or Howitzer machine guns; only in the one case the Government may not consider it advisable to sanction prosecution, while in the other it may measure its security by the nature of the threatened danger.

1170. Bombs are not ammunition within the meaning of the section, but a person who collects bombs may be charged for "otherwise preparing to wage war," if the other ingredients essential to constitute the offence are present. A person who collects bombs with the intention of using them against obnoxious or high officers of Government may undoubtedly be guilty of an offence under the last section, but it is doubtful if he can be said to thereby wage war against the King.

Concealing with intent to facilitate design to wage war.

123. Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

1171. Analogous Law.—This section is the adaptation of section 118 which lays down the general rule on the subject and from which it is scarcely distinguishable.

1172. Under section 44 of the Code of Criminal Procedure every person aware of the commission of, or of the intention of, any other person to commit any offence made punishable amongst others, under sections 121, 121-A, 122, 123, 124, 124-A, 125, 126 and 130 is bound to give information to the nearest police-officer or Magistrate of such commission or intention.

For a general commentary on this section *see* section 118.

1173. Procedure and Practice.—An offence under this section requires the complaint made by order of or authority from the Government before prosecution.[1] It is non-cognizable, but warrant may issue in the first instance. It is non-bailable, non-compoundable and is exclusively triable by the Court of Session.

1174. Proof.—The points requiring proof under this section are:—

(1) The existence of a design to wage war against the King;
(2) That the accused knew of such design;
(3) That he concealed the same;
(4) That he thereby—
  (*a*) intended to facilitate the waging of such war; *or*
  (*b*) that he knew that it was likely that such concealment would facilitate the same.

1175. Charge.—The charge may be framed as follows:—

"I (*name and office of the Magistrate, etc.*), charge you (*name of the accused*) as follows:—

"That you——knowing that on or about——day of——at——certain persons had designed to wage war against the Emperor, concealed the existence of the said design by (*specify the act or omission*) intending by such concealment to facilitate (*or* knowing it to be likely that such concealment would facilitate) the waging of such war, and thereby committed an offence punishable under section 123 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.

124. Whoever, with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant Governor or Member of Council,

(1) S. 196, Cr. P. C.

assaults or wrongfully restrains or attempts wrongfully to restrain or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council.

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Governor-General of India***—s. 16. ***Presidency***—s. 18.
Wrongful Restraint—s. 339. ***Assaults***—s. 351.]

1176. Analogous Law.—This section is again an enlargement of section 121-A, which covers most of what is made punishable under this section, which was clause 3 of the original draft bill and has been, therefore, probably allowed to stand.

1177. Procedure and Proof.—No prosecution under this section can be instituted without the previous complaint made by order of, or authority from, the Government.[1] The offence is non-cognizable but warrant may issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

1178. The points requiring proof are :—

(1) Assault or attempt, etc., by the accused ;
(2) That the person assaulted, etc., was one of the persons described in the section ;
(3) That the assault, etc., was with the intention of inducing or compelling the persons to exercise or refrain from exercising his lawful power.

1179. Charge.—The charge may be framed as follows :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——at——with the intention of inducing (*here enter the name and designation of the person wronged*) to induce him to exercise (*or* refrain him from exercising a lawful power) as such governor (*or* as the case may be) assaulted him and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court, on the said charge."[2]

1180. Assault on High Officers.—This section has been enacted to provide a specially deterrent sentence for an assault or wrongful restraint committed on high officers of Government who are required for carrying on the administration of the country and who should be free from the fear of personal harm while discharging their legal duties. The protection only extends to them so long as they exercise any of their lawful powers, it being immaterial if they were rightly or properly exercised. If, however, the assault was committed to induce the person to refrain from exercising an unlawful power, the assailant would have to be dealt with under the ordinary law.

1181. It may be noted that as they stand, the words " inducing or compelling " qualify both the words " to exercise or refrain from exercising " any of the lawful powers, the result being that a person may be visited with the condign punishment provided by the section, not only for inducing or compelling a person to refrain from exercising his lawful power, but also for inducing or compelling him to exercise them ; in other words, for inducing or compelling him to do his duty. This may appear hard but such is the meaning.

1182. The term " whoever " in this section would naturally be persons amenable to the jurisdiction of the Indian Courts. Otherwise, the offence may be committed though there may be no Court competent to try the offender. Such a case arose in 1779 out of a deadlock created in the Madras Council owing to the arbitrary action of Lord Pigot, Governor of Madras, who refused to sign the proceedings of his Council, and who was thereupon arrested and confined for a period of eight months till his death. On the motion of his brother, the House of Commons prayed the King to order the prosecution of his Councillors which was done. The Councillors

(1) S. 196, Cr. P. C. (2) Form XXVIII, Sch. V., Cr. P. C.

were all convicted and sentenced to pay a fine of £1,000 each, by Lord Mansfield who held that the imprisonment was not justified by necessity, which alone would have justified their action, and that, in the absence of such necessity, the Councillors were guilty of treason.[1]

Sedition.

124-A. Whoever by words, either spoken or written, or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added or with imprisonment which may extend to three years, to which fine may be added or with fine.

Explanation 1.—**The expression "disaffection" includes disloyalty and all feelings of enmity.**

Explanation 2.—**Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration, by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.**

Explanation 3.—**Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.**

1183. Analogous Law.—The original s. 124-A which was inserted by Act XXVII of 1870, s. 5 was repealed by s. 4 of the Indian Penal Code Amendment Act, 1898[2] and this section substituted for it. Chapters IV and V of this Code apply to offences punishable under this section.[3]

English and Indian Rules Distinguished.

1184. This section defines the offence of sedition which is punishable as seditious libel under English law from which its provisions have been borrowed; and since it adopts the leading words of the statute, the meaning of which have long been settled, it should be interpreted in the light of that law. But while it is so, English Law presents some noticeable divergence which should not be overlooked. In the first place, the law of sedition is regarded in England as a branch of the law of defamation, and as English law makes the difference between spoken and written libel, the same difference marks the laws of seditious libel which, however, is absent from the Code. So while it is perfectly true to say in England that words *merely spoken* against the King or his ministers cannot amount to treason,[4] it will be absurd to apply the rule to India. But even in England, there are cases to show that words merely spoken amount to sedition if they refer to the King, though they will not, if they referred to any other leading public character.[5] Again, in the former case it cannot be pleaded as a defence that the words are true, though in the case of the latter truth will be a sufficient justification. An exhaustive historical retrospect leading to the enactment of this section will be found set out in the previous edition of this work.[6]

1185. Supplementary Provisions.—This section applies, not only to a person committing an offence against the Government established in British India but also against the ruling Prince of an Indian State, by reason of an enactment known as the "Indian States (Protection against Disaffection) Act of 1922[7] In addition to this section enacted to punish sedition, there is section 108 of the

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(1) *Sir George Stratton*, 21 St. Tr. 567.
(2) Act IV of 1898.
(3) *See* the Indian Penal Code Amendment Act, 1870 (XXVII of 1870) s. 13.
(4) *Hugh Pine*, Cro. Car. 117.
(5) *Franklin*, 9 St. Tr. 225; 17 St. Tr. 626; *O'Brien* (*Ex-Parte*), 15 Cox. 108.
(6) *See* 1 Penal Law 4th Ed. pp. 764-767 §§ 1229-1236.
(7) s. 3.

Criminal Procedure Code, under which persons may be prevented from disseminating seditious matter.

1186. Procedure and Practice.—This section is one of those in which no Court can take cognizance of the offence "unless upon the complaint made by order of, or under authority from the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf."[1] As regards this section it has been held that the order or sanction required need not necessarily specify the seditious matter in respect of which the prosecution has been ordered or sanctioned, and that, even were it otherwise, the section bars only the "cognizance" and not its trial after committal.[2] But the sanction or complaint is only required to prevent vexatious prosecution. It does not take the place of a complaint which must conform to its legal requirement,[3] which alone initiates the prosecution, and upon the fact of which the Magistrate is empowered to act. A commitment of the accused upon the evidence recorded *before* the sanction of Government is therefore obviously illegal.[4]

1187. The venue of the offence is laid where the sedition was written or spoken or where it was published by the authority or with the assent of the accused.[5] In this respect too the procedure follows the analogy of defamation.

1188. An offence under this section is non-cognizable, but warrant may issue in the first instance. It is both non-bailable and non-compoundable. It is triable by the Court of Session, Chief Presidency Magistrate, or District Magistrate, or a Magistrate of the first class specially empowered by the Local Government in that behalf.

1189. An accused person may be legally tried and convicted at one trial under this section and section 153-A on charges framed on three disconnected articles published in a newspaper.[6] A trial for sedition under this section should be by a special jury.[7]

1190. Proof.—The points requiring proof in a case under this section are :—

(1) That the accused wrote or spoke the words or made the signs or representations or did some other act complained of.
(2) That the accused thereby brought or attempted to bring into hatred or contempt ; or excited or attempted to excite disaffection.
(3) That such disaffection was towards the King or Government of India.

1191. The publication of seditious matter may be proved by proof of the manuscript being in the handwriting of the accused and proof that it was printed and published although there be no evidence that the printing and publication was by the direction of the accused. Nor it is necessary to prove that the matter was actually posted.[8] But where the accused had posted such matter ; but its delivery was intercepted, the offence would only amount to an attempt.[9] But it would amount to publication, if the matter addressed not to a private individual but to the representative of a large number of men (*e.g.*, Captain of a School) is opened by anybody.[10]

1192. Charge.—The charge under this section may be framed as follows :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——on or about——day of——at——by writing *or* speaking) the words (*mention them*, *or* by signs *ar* by visible representation *or* otherwise) brought, *or* attempted to bring) into hatred or contempt *or* excited *or* attempted to excite disaffection towards) His Majesty the Emperor *or* the Government established by law in British India) and thereby committed an offence punishable under section 124-A of the Indian Penal Code and within my cognizance *for* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."[11]

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(1) S. 196, Cr. P. C.
(2) *Bal Gangadhar Tilak*, 22 B. 112 ; *Apurba Krishna Bose*, 35 C. 141.
(3) S. 4 (*h*), Cr. P. C. ; *Apurba Krishna Bose*, 35 C. 141 (150).
(4) *Mulla Abdulla Rahim*, (1882) P. R. No. 28.
(5) *Bal Gangadhar Tilak*, 22 B. 112 (129) ; *Chellam Pillai*, (1928) R. 276.
(6) *Tilak, Bal Gangadhar*, 33 B. 221.
(7) *Phillip* v. *Spratt*, (1928) B. 74.
(8) *Surendra Narayan*, 39 C. 522.
(9) *Surendra Narayan*, 39 C. 522.
(10) *Suresh Chandra*, 39 C. 606.
(11) Form XXVIII (2), Sch. V, Cr. P. C.

1193. Principle.—Sedition is nothing but libel though it is not subject to the same rule. Where a person is defamed he is punishable under s. 500; if a libel affects a class or community, it would be an offence under s. 153-A; if it is of the state, it is an offence under this section. Sedition is nothing but defamation of the established Government. It is, indeed, therefore, called seditious libel in England. The essence of the offence is the intention to excite disaffection towards the Government. The offence owes its gravity to the fact that it is calculated to foster and promote popular discontent, and that such discontent leads to insurrection and revolution. At the same time, no Government can safely place itself beyond criticism. Such restrictive legislation would defeat the very object it was intended to serve. Consequently, the Legislature recognizes the right of the public to criticize its acts and measures, but such criticism may be strong but not malignant, nor should it be made a theme for exciting popular discontent against the very Government.[1] A person may express an opinion hostile to Government; it is not sedition; but it becomes sedition the moment it affects its vital existence. Thus a statement "we must mend this Government" is not seditious, but a statement "we must mend or end this Government" may be so. The incitement of disaffection, of course, depends not only upon the words spoken, as on the time when, the place where, and the manner in which they are spoken.

1194. Meaning of Words.—"*Whoever.....brings,*" which has been held to include not only the author but also the printer and publisher of sedition. But since no one can be said to bring another into contempt without intending or knowing it, a person who prints or publishes matter in ignorance of its seditious character cannot be held liable under the section (§ 1200). "*By words either spoken or written, or by signs or visible representation*": Compare the opening words of section 499 which are similar. Sedition may be published by speech or writing, pictures, woodcuts or engraving of any kind.[2] The exhibition of flags is a mode of using "signs or visible representations."[3] What about the seditious speech published by gramophone? Would it be publication by signs? No. But it will be publication "*otherwise.*" "*Brings into hatred or contempt*": Its "hatred" may lead people to rebel for its overthrow, and its "contempt" may induce the people to defy its mandate. "*Excites disaffection*": These words are taken from the English Statute and are intended to cover the same ground. They imply nothing short of disloyalty. "*The Government established by law in British India*": It includes not only the system but also the persons taken collectively who govern[4] (§ 1218).

1195. What is Sedition.—This section defines and at the same time prescribes the punishment for sedition. But in defining the offence it uses words the meanings of which have still to be investigated. For instance, it speaks of hatred, contempt and disaffection, but at the same time it speaks of disapprobation without exciting hatred, contempt and disaffection. Then again, it speaks of "bringing or attempting to bring the Government into hatred or contempt." When is a person said to "bring" or attempt to bring Government into hatred or contempt," and what is to be understood by these terms; and when is a person said to "excite" or "attempt to excite" disaffection towards the Government, and what is disaffection, and what is disapprobation without being disaffection, hatred or contempt, —these are the questions upon which the abstract rule here enunciated sheds no light. But as remarked before, these are terms which have by long usage acquired a settled meaning, upon the appreciation of which depends the proper working of the rule which as an offence, law regards only as next to treason.

1196. Sedition of the King.—It will be observed that the section speaks of sedition as directed either against His Majesty or against his Government. So far as the sedition relates to His Majesty, it is settled in England, that sedition in

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(1) *Mon Mohan*, 38 C. 253; *Joy Chandra*, 38 C. 214 (Burden of proof of intention).
(2) *Sullivan*, 11 Cox, 44 (51).
(3) Second Report, s. 24, citing Eng. Dig., Ch. II, art. 5, s. 3.
(4) *Khiteesh Chandra*, 59 C. 1197, following; *Besant*, 39 M. 1085; *Sunderlal*, 42 A. 233 (F. B.)

that case means nothing more than defamation. In other words, whatever amounts to defamation is sedition of the person defamed, the King, and *Scandalum Magnatum* if he be a peer of the realm, or a Judge or any great officer of the Crown.[1] The degree of the guilt in such cases depends upon the position of the person defamed. There is no Statute corresponding to the *Scandalum Magnatum* Act here, and therefore, except when the defamation relates to the king it will be treated as an ordinary offence punishable under section 500 of the Code. But defamation of the King will be punishable under this section, though in that case, it can only be on a State prosecution ordered or sanctioned by Government, as required by section 196 of the Procedure Code. Now in order to constitute this crime it has been held that the words spoken must be something more than mere words of vulgar abuse. To call the King a coward or a fool will not be a sedition.[2] But any words which strike at the King's private life and conduct, which impute to him any corrupt or partial views, or assigns bad motives for his policy, which insinuate that he is a tyrant, and does not take a lively interest in the welfare of his subjects, or which charge him with deliberately favouring or oppressing any individual or class of men in distinction to the rest of his subjects[3] which strike at the root of his title to the Crown or call his legitimacy in question will be seditious.[4] But to say that the King had broken his coronation oath,[5] or that he is a liar and a deceiver, or that he has treacherously betrayed the interests of his subjects and allies, and prostituted the honor of his Crown[6] or that he is insane[7] will be no sedition, though it will amount to defamation. But to say that the King is misled by his ministers, or that he takes an erroneous view of some great question of policy is not seditious, but as Lord Ellenborough, C.J., remarked : " It must be with perfect decency and respect, and without any imputation of bad motives."[8]

1197. Sedition of the State.—Even greater latitude is permitted in criticizing the Government but as the explanation makes it clear, it is a latitude and not a license. The criticism may be trenchant and incisive, but it must not go beyond what would be called a fair criticism. So where the *Morning Chronicle* wrote : " What a crowd of blessings rush upon one's mind that might be bestowed upon the country, in the event of a total change of system," Lord Ellenborough directed the jury that the sentence admitted of an innocent interpretation ; that the fair meaning of the expression " change of system " was a change of political system, not a change in the frame of the established Government, but in the measures of policy which had been for some time pursued, " and that by 'total change of system' was certainly not meant subversion or demolition."[9] Here, it will be noticed, there was an attack on the system and not the frame of the Government. But everything depends upon the context, as such an attack on Imperialism may imply an attack on Government.[10]

1198. But where the accused wrote : " Every preacher runneth to the queen now, as though he were to be directed by her to tarry for reformations to be had for matters of the Chruch. If the Magistrates will agree, all is well ; if they will not, they are not of the Church, and it is a shame to tarry for them, or for a Parliament or proclamation," all the Judges agreed that it was an incitement to insurrection and sedition.[11] The law on the subject was thus summed up by Lord Fitzgerald when he was a Judge in Ireland : " Sedition is a crime against society nearly

(1) But a distinction between a peer and a commoner is alien to the spirit of the English Common Law. It is the creation of two ancient Statutes (3 Edw. I, Westminister I. c. 342 ; Rich II, St. 1, s. 5 , 12 Rich. II, c. 11. All these Statutes are directed to penalizing by imprisonment the speaker of " false news or tales, and horrible and false lies," concerning the high officers therein specified.

(2) Odger's Libel (2nd Ed.) 481.

(3) *Dr. Shebbeare*, 3 T. R. 430, *note*,

(4) *Clerk*, 1 Barnard 304 ; *Knell, ib.*, 305; *Nutt, ib.*, 306. The title and character of the King is guarded by Statute 6 Anne, c. 7, s. 7.

(5) *Oliver St. John*, (1615) Nov. 105,

(6) *John Wilkes*, 19 St, Tr. 1075. So held also regarding certain letters of Junius in *Woodfall*, 5 Burr. 2661 ; *Alman, ib.*, 2686.

(7) *Harvey*, 2 B. & C. 257.

(8) *Lambert and Perry*, 2 Camp, 398.

(9) *Lambert and Perry*, 2 Camp, 398.

(10) *Zaman*, (1933) C. 140.

(11) (1765) Digest of the Law of Libel, by a gentleman of the Inner Temple, 64.

allied to that of treason, and it frequently precedes treason by a short interval. Sedition is in itself a comprehensive term, and it embraces all those practices whether by word, deed, or writing which are calculated to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the Government, and laws of the empire. The objects of sedition generally are, to induce discontent and insurrection, to stir up opposition to the Government, and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war: to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."[1]

1199. Analysis of Sedition.—In considering the question the following points call for discussion: (*i*) what was the intention of the speaker; (*ii*) what effect did his words produce; (*iii*) were the words such as were likely to cause disaffection, or produce hatred or contempt of Government.

1200. No Intention: No Sedition.—Sedition is a crime, and for all crime there must be criminal intent,[2] which is a question fact[3] to be found upon the facts of each case against the accused or where there are more than one accused, against every one of them.[4] But such intention may be presumed if the natural and necessary consequence of the words employed is to bring into hatred or contempt the Government or to excite disaffection,[5] otherwise the intention may be gathered from the writing in dispute and which may be compared for that purpose with other writings and words spoken by the accused at or about the same time on the same or similar subject. But in order to use other articles than that complained of as seditious for the purpose of showing the meaning of certain expressions used in the article complained of, and also to show the intention of the writer it is necessary to show who the writer was, and that all the articles produced were by the same hand. Where the writer, printer and publisher of a newspaper are tried for this offence, it may be that the writer is guilty of sedition, but the printer and publisher cannot be punished unless it is established that the concealed object of the writer was shared by them.[6]

(1) Intention.

1201. So in an indictment against the accused Henry Hunt and others for unlawfully meeting together with persons unknown for the purpose of formenting discontent and disaffection, at which meeting Hunt presided, it was held that resolutions passed at a previous meeting assembled a short time before in a distant place, and at which Hunt had also presided, and in pursuance of which the meeting charged was held, were admissible in evidence to shew the intent of the accused in attending the meeting in question.[7] So where the accused was charged for seditious writing, it was held to be perfectly competent to the accused to produce other writing of his own, showing a course of consistent conduct negativing that inference.[8] So in a case where the accused was charged of publishing a seditious liblel in the form of an address to the electors of Westminister, Best, J., (afterwards Lord Wynford) directed the "jury to consider whether the address

(1) *Sullivan & Piggot*, 11 Cox. 54, 55.

(2) So Kenyon, C. J., told the jury in the case of *John Reeves* 26 St. Tr. 530 (592), "You must be convinced of, in order to find the defendant guilty, the *quo animo* with which this publication was made by the party." The necessity of intention was admitted in *Amba Prasad*, 20 A. 55 (69). F. B.; *Bal Gangadhar Tilak*, 22 B. 112; *Ganesh Balwant*, 12 Bom. L. R. 21; *Jogendra Chandra Bose*, 19 C. 35 (44). The contrary held in *Ram Nath*, (1905) P. R. No. 1, that the effect of the amended section was to render the offence independent of intention is, of course, untenable.

(3) *Ganesh Balwant*. 34 B. 378.

(4) *Mon Mohan*, 38 C. 253.

(5) *Collins* 9 C. & P. 456; *Lovett, ib.*, 462; *Curline* 2 St. Tr. (N. S.), 464; *Bal Gangadhar Tilak* 22 B. 112; *Ganesh Balwant*, 34 B. 374; *Mon Mohan*, 38 C. 253; *Chidambaram Pillai*, 1 I. C. (M.) 42; *Harisarvothama*, 32 M. 378.

(6) *Mon Mohan*, 38 C. 253.

(7) *Henry Hunt*, (1820) 3 B. & A. 566.

(8) *Bhaskar*, 8 Bom. L. R. 421 (441, 442).

contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel, if of the latter, it was. That the question whether it was pnblished with the intention alleged in the information, was for their consideration. That the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that if its contents were likely to excite sedition, etc., (as was alleged), the defendant must be presumed to intend that which his act was likely to produce."[1]

1202. As the section is worded, it may then be said that where the effect of a writing is to excite disaffection, intention to excite disaffection will be presumed, and it is then for the accused to shew that he never intended that the result should be as it has been. But in order to raise this presumption, the disaffection must be directly and necessarily traced to the sedition, for it may be *post hoc*, but it is not necessarily *propter hoc*. The question of intention is a question of fact, and is a material matter for the consideration of the jury,[2] who have to decide whether the effect produced was the result of the sedition, and where it has produced no effect, whether the nature of the sedition, was such as was likely to excite disaffection. Such intention cannot be inferred from isolated expression such as that the people of Bengal are trodden under the feet of strangers[3] or rasping criticism upon any measure of Government such as Lord Morley's Reforms,[4] or advising workmen, or the attainment of *Swaraj* unless it is used in a sense incompatible with the maintenance of British supremacy in India.[5] The fact that the Government has ordered the prosecution or that they had resolved that the writing was seditious ought not to weigh with the jury in the least. As Lord Kenyon remarked: "The accused is not to be crushed by the name of his prosecutor."[6]

1203. In considering the intention of the accused, and the effect his writings are likely to produce, it becomes necessary to take into consideration the state of the country and of the public mind at the date of the publication.[7] So the mere republication in Ireland, during a time of political excitement and threatened, insurrection, extracts from American papers expressing sympathy with the Fenians and inciting all Irishmen to rebel, without one word of editorial comment or disapproval, was held to amount to sedition.[8] So again, while there is nothing illegal in advocating the boycott of foreign goods if it is intended to promote indigenous industries, it becomes seditious if the intention is to get rid of the English from India.[9] Such was held to be the intention of the accused, who at the time of intense communal tension ascribed the Hindu-Muhammadan riots in Calcutta to the policy of Government to divide and rule, and who, it was alleged, had in pursuance of such policy fomented them.[10]

(2) Time and Place of Publication.

1204. Not only the time but the place and people amongst whom the writing is circulated is material. A seditious libel against the King of England may pass unnoticed in Berlin. It may cause a riot in London. So, very little incitement is needed to produce an effect upon people already disaffected than upon those who are contented and loyal. So on a prosecution of the editor of a Marathi paper called *Kesari* for seditious writing Strachey, J., told the jury: "In considering what sort of effect these articles should be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important

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(1) *Burdett (Sir Francis)*, 1 St. Tr. (N. S.), 1-170.
(2) *Ib., Ganesh Balwant*, 34 B. 378.
(3) *Joy Chandra Sarkar*, 38 C. 214.
(4) *Mon Mohan*, 38 C. 253.
(5) *Subramania*, 32 M. 3.
(6) *Per* Lord Kenyon, C. J., in *Reeves Peake*, App. Cas. 84.
(7) *Per* Fitzgerald, in *Sullivan*, 11 Cox. 50 (59).
(8) *Pigott*, 11 Cox. 47.
(9) *Chidambaram Pillai*, 1 I. C. (M.) 42; *Subramania*, 32 M. 3; *Mon Mohan*, 38 C. 253.
(10) *Gopal Lal Sanyan*, (1927) C. 751.

point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication. An article which, if published in England or among highly educated people, would produce no effect at all—such as an article on cow killing—might, if published among Hindus in India, produce the utmost possible excitement. An article which, if published at a time of profound peace, prosperity, and contentment, would excite no bad feeling might, at a time of agitation and unrest, excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opinion, it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yacht Club in Bombay; but what you have to consider is their effect not upon Englishmen, or Parsis, or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they are circulated and read—Hindus, Mahrattas, inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time.....when these articles were disseminated among them."[1] And so he went on to say that "in the next place in judging of the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your common sense, your knowledge of the world, your understanding of the meaning of the words, and your experience of the way in which a man writes when he is animated by a particular feeling."[2]

(3) Form Immaterial.

1205. Moreover, in order to judge of the intention of the writer the real and not the literal sense of his writing must be considered. As it was said in the same case: "A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. You have to look through the form, and look to the real object; you have to consider whether the form of a poem or discussion is genuine, or whether it has been adopted merely to disguise the real seditious intention of the writer."[3] But for this purpose the text must be understood by the context. "You are not to take this paragraph in the indictment by itself, but from the whole as laid and as proved, you are to judge of the meaning and intention of the parties here."[4] So also the learned Bombay Judge added: "In judging of the intention of the writer or publisher you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference to the context. You must consider each passage in connection with the others, and with the general drift of the whole."[5]

1206. For instance, where an article imputed wholesale bribery to the ministerial officers of the Courts and to the lower officers of the Police force, and expressed grave doubts as to whether Government ever enquired into the truth of the grievances as it is occupied so much with investigations of boycott, dacoity and seditious matters etc., and it was published in a seditious atmosphere, it was held to amount to a sedition.[6] This only shows that in considering the question of sedition regard must be had to the time and place of its utterance the mental state of the populace and its effect upon them. A criticism however trenchant might fall short of sedition if it is addressed to a thinking populace. It would be sedition if it is addressed to an inflamatory people.

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(1) *Tilak (Bal Gangadhar)*, 22 B. 112; *Damadaya*, 1 R. 211. *Satyendranath Majumdar*, 34 C. W. N. 1095; *Satya Ranjan*, 56 C. 1085.

(2) *Ib.*

(3) *Tilak (Bal Gangadhar)*, 22 B. 112.

(4) *Per* Clerk, L. J., in *Joseph Gerrald*, 23 St. Tr. 803 (999).

(5) *Mon Mohan*, 38 C. 253, *Tilak (Bal Gangadhar)*, 22 B. 112; *Damdaya*, 1 R. 211; *Dandeker* (V. S.) 122 I. C. (A.) 596.

(6) *Jay Chandra Sarkar*, 38 C. 214.

(4) Treatises and Reports Excepted.

1207. And for this purpose it is necessary to see the nature and character of the writing, and the purpose for which it was written. A political treatise, or an essay, would, for instance, be treated differently to a tract expressly written for circulation. "In a free country like ours," says Lord Kenyon, C. J., "the production of a political author should not be too hardly dealt with. The jury should recollect that they are dealing with a class of articles which, if written in a fair spirit and *bona fide*, might be productive of great public good, and were often necessary for public protection." They should therefore, "deal with them in a broad spirit, allowing a fair and wide margin, looking upon the whole not on isolated words."[1] So Strachey, J., said: "A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles. In this general character and tendency that you must judge the intention by looking at every passage so far as it throws light upon this."[2] So again, the fact that the accused was smarting under a grievance, or was honestly indignant at some act of a Government official, is material, as it tends to explain the language used and thus rebuts any presumption of seditious intention. For such a man cannot be expected to speak or write as calmly and deliberately as if he were discussing matters in which he felt no special interest.[3] For this purpose, it is permissible to the accused to give evidence of the circumstances which led up to the writing, and this was conceded in the *Kesari* case in which the learned Judge said: "You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence."[4] Publication of a report of the proceedings of a Court of justice is not seditious even though the report may reproduce *in extenso* the seditious writing which is the subject-matter of the charge. But it does not justify republication of other articles which may have been filed but not used as evidence in the case.[5]

1208. Judging of Cause from Effect.—Where a seditious utterance is immediately followed up by tumult or insurrection, the jury may well consider it as the result of the sedition, though even in such a case the fact is not conclusive, for the accused may show that the rioters had a grievance of their own and would have revolted apart from his exhortations. A person who lights a match in a gunpowder magazine may be said to have set it ablaze, but it can scarcely be said that it was his intention. He may have been careless, but carelessness is a defect in character: it is not a crime. It has been held in the Punjab that the amendment of the section in 1898 has had the effect of rendering intention immaterial, if the accused does something defined in the first part of the section, which brings the Government into hatred and contempt.[6] But the words used are "*brings* into contempt," and no one can be said to *bring* another into hatred without intending to do so. Moreover, there is nothing in the section to set it free from the general exceptions to which the Code generally is subject, and which makes criminality depend upon the presence of criminal intention. Suppose a mad man was to indulge in a fiercely seditious lampoon on the Government; would it be said that insanity was in his case no defence?

1209. When is Disaffection Likely.—Similarly, the third question about the likelihood of the utterance causing disaffection, is a question of fact which the jury have to decide, having regard to the nature and character of the writing, the time and occasion for it, the people to whom it was addressed, and their susceptibilities (if any) pandered to. Indeed, all the facts before noticed as reflecting upon the speaker's intention are equally material in judging of the likely result of

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(1) *Per* Kenyon, C. J., in *Reeves*, 26 St. Tr. 530.
(2) *Tilak* (*Bal Gangadhar*), 22 B. 112.
(3) *Per* Littledale, J., in *Collins*, 9 C. & P. 460.
(4) *Tilak* (*Bal Gangadhar*), 22 B. 112.
(5) *Apurba Krishna*, 35 C. (154).
(6) *Per* Robertson, J., in *Ramnath*, (1904) P. R. No. 1

his words. For the facts which make a result probable are also the facts which weigh with the speaker in addressing his audience. But for them, his speaking will be a tinkling cymbal producing no conviction and no effect.

1210. In considering the likelihood of a certain result it is not irrelevant to consider the position and standing of the accused, and the natural influence his words are likely to convey to another. A person of no influence or character in a locality, may speak sedition, but his may be a cry in the wilderness for no one will pay any attention to them. If, however, the same words be spoken by another who is a popular favourite or to whom the people are otherwise bound by ties of religion or social intimacy, they may produce a very different effect. And as every speaker presumably knows the effect his words are likely to produce on his audience the fact is as material to establish his intention as it is in determining the effect his utterance is likely to produce. So Strachey, J., informed the jury : " Then you have to look at the standing and position of the prisoner Tilak. He is a man of influence and importance among the people ; he would be in a position to know what effect such articles would probably produce in their minds."[1]

Truth How Far a Defence.

1211. Truth coupled with publication for the public good is a sufficient answer to a charge of defamation, but it is not to one of sedition.[2] Various reasons are given for the rule, but the true reasons appear to be the difference between a private individual and a civil body such as the State. In the one case the plea is allowed on the ground of public benefit, but no State can suffer its own effacement on that ground. As Batty, J., told the jury : " A Government, however, imperfect it may be, is always better than no Government at all, and that no community can allow individuals to excite feelings which must necessarily weaken and impair the usefulness of Government."[3] So in a case where one Richard Franklin was indicted for printing and publishing a seditious libel in the form of " a letter from the Hague " in his newspaper called the *Craftsmen*, and his counsel attempted to justify the allegations on the ground of truth, Raymound, C. J., interrupted him saying : As for your saying that you can prove what is charged on the defendant to be true, it is my opinion, that it is not material whether the fact charged in a libel be true or false, if the prosecution is by indictment or information." But though it is never a complete answer to sedition, it does not appear to be inadmissible to explain the writer's intention. He is allowed to prove the motive which prompted his writing and is not the publication of truth a motive about which the accused may give evidence ? So where the accused was charged with having asserted that his American fellow-subjects had been inhumanly murdered by the King's troops at Lexington, and the defence called an officer who had been there present, Lord Mansfield admitted his evidence not to show that the troops had behaved inhumanly, but that they had been employed on behalf of the King.[4] Moreover, truth though not a vindiction may be always be proved in mitigation of the offence. As Lord Mansfield said : " It may vary the degree of mischief, malice or guilt, but it is totally immaterial as to the constitution of the crime upon the record, whether the words refer to something that had existed, and misrepresent such existing facts, or are an entire fiction."[5]

1212. **" Brings or attempts to bring or excite."**—It is not every utterance or writing tending to beget an ill opinion of Government that is to be held seditious. This was at one time the tendency in England where the doctrine was pushed to its utmost, often to ridiculous length. So it was said that " if persons should not be called to account for possessing the people with an ill opinion of the

(1) *Tilak (Bal Gangadhar)*, 22 B. 112. To the same effect, *per* Batty, J., in *Bhaskar*, 8 Bom. L. R. 421 (440-441.)

(2) *Franklin*, (1731) 17 St. Tr. 625 (658, 659) ; *Duffy*, 9 Ir. L. R. 329 ; *O'Brien* Ex parte *Williams*, 12 Q. B. D. 29

(3) *Bhaskar*, 8 Bom. L. R. 421 (437).

(4) *Horne*, Cowp 762.

(5) *Ib.*: to the same effect, *O'Brien*. 12 Ir. Cr. L. 29.

Government, no Government could exist ; for it is very necessary for the Governments that the people should have a good opinion of it."[1] And so Lord Ellenborough, C. J., told the jury in 1804 : " It is no new doctrine that if a publication be calculated to alienate the affections of the people by bringing the Government into disesteem whether the expedient be by ridicule or obloquy.....it is a crime,"[2] If these *dicta* be held to represent the modern view of the law, then it will be difficult to say what is not sedition. Moreover how are they then to be reconciled with the more recent judicial pronouncements on the subject : " The people have a right to discuss any grievances that they may have to complain of."[3] "A journalist may canvass and censure the acts of the Government and their public policy—and, indeed, it is his duty. It might be the province of the press to point out the weakness or imbecility of a Government when it was done for the public good."[4] Indeed, at one time the tendency of the Courts appears to have been to connect even the most trivial acts of obscenity with sedition, it being sagely argued that to destroy morality was to destroy the peace of a Government, since Government was no more than public order. So Sir Charles Sedley was indicted before the Court of the Star Chamber for exposing his naked body from a balcony in Covent Garden.[5] So a man, was executed for *predicting* the King's death.[6] And morality and politics in course of time became so entangled in English Law that even the modern statute relating to sedition has not been able to distinguish that offence from " blasphemous " writings.[7] English Law does not, therefore, represent a mine undefiled of sound precedents upon which an indiscriminate draught may be made for illustration of the rule here codified. At the same time with this necessary reservation, there is no reason why English precedents should not be used to illumine and illustrate a subject which owes its language and thought to them and which have served as a model to the Indian codifier.

1213. Thus the three words " hatred, contempt, and disaffection " are words of English Law. And in understanding their meaning regard must be had to the sense they bear in English Law. An offence under the Code is not complete unless the words spoken or written have been published, and either they constitute an attempt to bring into hatred the Government, or do bring it into hatred.

1214. What is an Attempt.—Now, what is the character and meaning of an attempt as used in this connexion ? " An attempt," said Jenkins, C. J., " is an intentional, premeditated action, which if it fails in its object, fails through circumstances independent of the person who seeks its accomplishment. If its failure is to be attributed to something which he cannot control, its failure is no excuse."[8] Attempt is merely trying.[9] Both a person attempting and a person accomplishing have the same object, the same intention. They both make the same effort. And if one succeeds and the other does not, it may be the seed in the one case has been sown on uncongenial soil. In judging then of the culpability of an utterance what the jury has to find is whether it was ordinarily sufficient to produce the effect

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(1) *Per* Lord Holt, C. J. in *Tutchin*, (1704) 5 St. Tr. 532 ; *Lambert*, 2 Camp. 400. These *dicta* are considered obsolete in England (Odger's Libel, 2nd Ed., p. 484), but they were curiously cited with approval by Ranade, J., in *Ramachandra Narayan*, 22 B. 152, F. B.

(2) *Cobbett*, 29 St. Tr. 49.

(3) *Collins*, 9 Car. & P. 461.

(4) *Per* Fitzgerald, J., in *Sullivan and Piggott*, 11 Cox. 54 (57).

(5) *Sir Charles Sedley*, 2 Str. 791. The following are other cases which must be regarded as now wholly obsolete. To say that the laws of the realm were contrary to the laws of God, 2 Roll. Ab. 78 ; or that a King abusing his power may be opposed (*Brewster*, Hil. T., 15 Car., 11 K. B.) ; or that the King has no hereditary right, though the treatise contained no reflection upon the then Government (*Tutchin*, 14 St. Tr. 1095) ; or that the late revolution was destructive of English laws (*Dr. Brown*, 11 Mad. 86.) ; or that it was unjust (*Richard Nutt*, Dig. Law Libel, 68.) *Thomas Paine* (Author of Rights of Man), for libel therein published, 22 St. Tr. 357 ; *Burdett*, 1 St. Tr. (N.S.), 3 B. & Ald. 717.

(6) *Williams*, 2 Rolls. R. 88.

(7) 60 Geo. III, and 1 Geo. IV, c. 8, s. I, cited *ante*, § 136.

(8) *Luxman Narayan Joshi*, 2 Bom. L. R. 286; cited *per* Batty, J., in *Bhaskar*, 8 Bom. L. R. 421 (439).

(9) *Bhaskar*, 8 Bom. L. R. 421 (439).

mentioned in the section.[1] If it was, it is immaterial that it did not have that effect. A certain amount of speculation must necessarily enter into such calculation. But the finding must be based upon reason and human probabilities and the general experiences of mankind. It must not be a mere conjecture based upon no intelligible data. Such data will be supplied by the language used, its true meaning and central thought, and the sense and impression they are likely to convey or produce upon those to whom they are addressed. Again, in considering this question regard must be had to the character, nature and susceptibilities of the people to whom the words are addressed, and by whom they were read. A realistic picture of a butcher slaughtering a cow will convey much more to a Hindu community than it will to a Mahomedan congregation. On the other hand, words conveying innuendoes and covert suggestion in the form of an allegory may convey nothing to a people not accustomed to that form of language. To an educated man versed in current politics the most harmless satire may appear as seditious. One is not unaccustomed to hear a long drawn sermon built on a few words of scriptural text. But this is a work of imagination which the jury have to keep under rein in judging the man in the dock. They have to decide not what the prisoner might have meant, but what he must, probably did, mean by his words. They have further to say whether the words used were with the intention of producing hatred or contempt against the Government. In determining whether the intention with which any document is published, is or is not seditious, the writer must be deemed to intend the consequence which would naturally flow from his work, taking into consideration the time and the circumstances of the case.[2] The jury have in effect to say to themselves : " We think the prisoner did use those words intending to cause popular hatred of the Government and we think they were enough to carry that intention home". The guilt of the prisoner is then complete, irrespective of the result produced.

1215. Such was held to be the case of Tilak who had given publicity to an imaginary conversation of Sivaji in which he deplored the ascendency of the outcast foreigners, and depicted the golden era he had left. The utterance was published in the Marathi paper *Kesari* which had a wide circulation in the Deccan. It was published at a time when the popular mind was in a ferment on account of the plague preventive measures of the Government. Within a week of the publication of the articles, two Englishmen were shot dead in Poona, and while it was conceded that the prosecution could not produce evidence to show that these murders were directly caused by the publication of these articles, still the fact was mentioned by counsel, leaving the jury to form an opinion as to their being the probable effect of the articles. The jury convicted the prisoner by majority.[3] So in another case, the writer described a Darbar in Hell in which the Emperor wanted to choose as his successor some one possessing the qualities of cruelty and savagery in a pre-eminent degree and out of three candidates his choice was stated to have fallen on one who pressed forward his claims as a champion villain. He was described as wearing boots and a coat and a head-gear shaped like a masons's hod. He smoked from a wooden pipe and had a cane in one hand. Batty, J., charged the jury to say if the allegorical representation was not to ridicule British rule in India, and the jury answered in the affirmative.[4] These are cases in which sedition was couched in the form of a poem or an allegory.

1216. But sedition may be preached in a thousand ways, sometimes directly, sometimes indirectly, sometimes in the guise of a candid friend, sometimes out of sincere conviction. But in most of such cases, the question is a question of intention and construction. In one case the defendant was indicted for publishing what purported to be a resolution of persons calling themselves the " General Convention " containing the statement that " the people of Birmingham are the best judges of their own right to meet in the Bull-ring or elsewhere ; and are the best judges of their own power and resources to obtain justice." The jury were told that the

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(1) *Bal Gangadhar Tilak*, 22 B. 112. *ib.*, 528, P. C.
(2) *Vinayaka Narayan*, 2 Bom. L. R. 304.
(3) *Tilak Bal Gangadhar*, 22 B. 112, O A.,
(4) *Bhaskar*, 8 Bom. L. R. 421 (443).

first sentence was not seditious and that the second would be if it meant to suggest that the people should make use of physical force as their own resource to obtain justice, and if it was intended to arouse the people to disorder and tumult. The jury acquitted the prisoner.[1] In another case the writer referred to a circular said to have been issued by Canada intending to throw off the English yoke and lamenting that India should have become so callous and shameless as not to feel the humiliation of being laughed at by all nations for losing such vast god-like country. It was held by the Full Bench that the language used was seditious.[2] In this case the writer had suggested the use of force for securing independence; but where the accused in a speech charged his audience to work for and secure *Swaraj*, his words were held not to be seditious, as *Swaraj* being self-government, there was nothing seditious in demanding it, as it was perfectly consistent with British rule.[3] To attribute "the sad state of the country to the influence of French gold on those who have the conduct of affairs" was held to be seditious libel.[4] The same view was taken of an announcement made for the relief of the widows and orphans of our beloved American fellow-subjects "who, faithful to the character of Englishmen preferring death to slavery, were for that reason only inhumanly murdered by the king's troops."[5] So were the words of a sermon: "'Darkness has long cast her veil over the land. Persecution and tyranny have carried universal sway. Magisterial powers have long been a scourge to the liberties and rights of the people."[6]

1217. All these are cases where the words were unconnected with any resultant effect. Where, however, they actually produced the effect described in the section, the case is then comparatively easier. For it then remains only to connect the effect with the cause, though this by itself is not always an easy task. Indeed, as history teaches us, the creation of a political cataclysm is seldom the result of a single speech or writing, though it may have been prompted by it. But this is enough in law, which looks to anything producing an effect whether singly or joined with others as the cause of it. And it is indeed not even an essential element of legal causation that the effect in fact should be directly traced to that thing alone, for it is sufficient if its connection is so probable that a reasonable man would, under the circumstances, believe in its existence.[7]

1218. Hatred : Contempt : Disaffection.—Assuming now that a person speaks or writes words, which produce a certain effect upon the popular mind, the next requirement of the section is that by those words he must bring or attempt to bring His Majesty or the Government into hatred or contempt, or that he should thereby excite or attempt to excite *disaffection*. It is not every inflammatory speech or writing that is seditious. In order to be seditious, it must produce or attempt to produce those feelings against the Government. But feelings among whom, the section does not say. Such feeling may then be produced either among subjects, or among people who owe no allegiance to the King. Suppose, for instance, an Indian was to deliver a seditious lecture at Tokio; would he be liable to prosecution on his return home to India? It would appear that he would be so liable, for though he could not excite "disaffection" among his audience, he could certainly "bring into hatred or contempt" His Majesty or his Government, and it is enough for the offence. But what is "hatred or contempt" of Government? The two words do not mean the same thing, though they have certainly much in common. They are, however, easily distinguishable. Hatred implies an ill-will, while contempt implies a low opinion. One shuns an object hated, but an object of contempt may be the subject of pity. One may pity but wish well an object of contempt, but one usually wishes evil of one hated. Hatred and contempt are the state of mind in relation to an object. In the case of a person such as the King, such a feeling requires no explanation. But as a feeling against the Government it may not be quite obvious.

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(1) *Collins*, 9 C. & P. 460.
(2) *Ramachandra Narayan*, 22 B. 152, F. B.
(3) *Tutchin*. 14 St. Tr. 1095.
(4) *John Horne*, 20 St. Tr. 651.
(5) *Winterbotham*, 22 St. Tr. 873 (875).
(6) *Veni Bhusan*, 34 C. 994.
(7) S. 4, Indian Evidence Act (I of 1872).

Now, looked at as a concept, Government is an abstraction. As such, it is as much inconceivable as an abstract horse or man. In the mind it is always associated with some person or persons in whom are centred for the time being the functions of Government. It is in this sense that the term has been defined for general purposes in the Code.[1] But it is not to be understood in this sense here. It is here used in its impersonal sense as meaning the existing political system as distinguished from any particular set of administrators.[2] "It means the person or persons collectively in succession who are authorised to administer Government for the time being."[3] Consequently, the hatred of such Government does not mean hatred of any of its composing members. Such hatred if expressed in words may amount to defamation, but it is not sedition. In this respect the English rule is identical. So where Langley said to the Mayor of Salisbury whilst in the execution of his office, "Mr. Mayor, I do not care for you; you are a rogue and a rascal," it was held that the words were not indictable, though the Mayor might and ought to have instantly bound him over to be of good behaviour.[4]

Hatred of State, Not of its Servant.

1219. The hatred and contempt here spoken of must then be hatred and contempt of the State, or of the established form of Government. But such hatred and contempt is possible even on expression of the privileged "disapprobation" of its measures or action within the meaning of the explanations.[5] Now since he may express the strongest condemnation of such measures, and he may do so "severely and even unreasonably, perversely and unfairly,"[6] it is conceivable that a criticism that heaps condemnation on a responsible minister of Government may not improbably reflect upon the Government for in common parlance the abstract notion is only reached by idealizing the concrete. How is then the critic to escape sedition while levelling his venomed darts against the acts and measures of Government? Suppose one were to say: "This Government is perfect, but it employs judges who murder law and ministers who murder men," and another were to say: "Down with this viper Government. Its judges are just and ministers considerate, but we must change the Government because it is foreign," which statement would be seditious or would only be merely an expression of one's disapprobation of the act of Government? That such a criticism would undoubtedly be treated as seditious seems to admit of no doubt.[7] What is then the difference? It is submitted, it is only one of degree. It may be added that the words "hatred and contempt" were only added to the section in 1898. They did not exist before.

1220. Disaffection.—Next to hatred and contempt the section speaks of disaffection. This is an important word, and its exact meaning has to be understood. "The word disaffection," said Petheram, C. J., "implies a feeling contrary to affection. It includes disloyalty and all feelings of enmity"[8] towards the Government. The word "disaffection," be it noted, is a word invariably employed to denote disloyalty or discontent of servants or subjects in relation to their employer or political superior. An employer of labour may speak of his hands as disaffected, but in doing so he probably employs a figure of speech; for the words appear to be reserved to import political discontent, enmity or hatred,[9] proceeding from a

(1) S. 17.

(2) *Tilak Bal Gangadhar*, 22 B. 112 (135). *Kitheesh Chunder*, 59 C. 1197.

(3) *Bhaskar* 8 Bom. L. R. 421 (438). *Sojoni Kanda Das*, (1930) C. 244 (F. B.).

(4) *Langley*, 2 Salk 697; to the same effect, *Rogers*, 7 M. 28; *Nani bux*, (1925) S. 59.

(5) Expl. 2 and 3; *Arjan Singh*, (1930) L. 156.

(6) *Tilak Bal Gangadhar* 22 B. 112 (130).

(7) Cf. *Tutchin*, 14 St. Tr. 1095, in which a charge against Government of employing corrupt ministers was held to be seditious; *Richard Franklin*, 17 St. Tr. 629 (671).

(8) *Jogendra Chunder Bose*, 19 C. 44; *Bal Gangadhar Tilak*, 22 B. 112 (134). The charge in this case is marred by a lamentable mistake and misquotation, in consequence of which the Judge allowed himself to say that "Disaffection is the *absence* of affection," a statement of law which was twice repeated, but which the learned Judge afterwards withdrew. It was probably reminiscent of the scriptural text: "Those, who do not love me hate me."

(9) *Ramchandra Narayan*, 22 B. 152 F. B.; *Bhaskar*, 8 Bom. L. R. 421 (437); *Amba Prashad*, 20 A. 55 (68), F. B.; *Jogendra Chunder Bose*, 19 C. 44.

spirit of opposition and resistance. The word "disaffection," moreover, implies discontentment of a body of men, and not only of a person or two. It implies that a section of the public are discontended with the existing system of Government, and would, if they could, attempt to subvert it. Disaffection is then disapprobation, but it is disapprobation intensified by hatred and a desire for opposing or retaliatory action. In this way though the two words are allied as genera and species, still in their connotations they are so far apart that for all practical purposes they could scarcely be confused for each other. Now as disaffection is the invariable precursor of rebellion, it is the concern of the State to see that there is no disaffection, and some States ensure it on the principle of lopping off tall poppies, whilst others take the more reasonable course of punishing sedition and reforming their constitution.

1221. This section lays down the penalty that preachers of sedition have to suffer. Whether they excite disaffection or attempt to excite disaffection, they are in each case equally guilty. And their criminality does not cease even if failing to excite disaffection, their words only bring the Government into hatred or contempt. Indeed, the same speech or writing may produce different feelings in different minds. One may feel contempt, another hatred, and a third may feel disaffected by the same speech at the same time. And it is possible for the same person to feel hatred and contempt as well as disaffection in the senses these words have been used. It is not therefore necessary to say which feeling was engendered at a given time, nor is it possible. It is enough that a feeling of one kind or the other was produced or likely to be produced by the writing or speech complained of. But would it be enough if it is produced in one or two men and not among the public at large? As the section has been phrased, it is clear that what is intended is, that the matter to be seditious should have influenced or be likely to influence the public generally and not only particular members of it. It is only then that one can be said to have *brought* the Government into hatred or contempt. This, moreover, implies dissemination of one's thoughts with a view to bring about that result. For one may *feel* hatred and contempt of the Government, but it is not sedition : one may reduce one's thoughts to writing and so long as that writing remains unpublished there can be no offence, for it cannot influence the opinions of others.[1] The moment, however, that it is published, though not in the manner or to the extent contemplated by the author,[2] the offence is complete, for it may then arouse those feelings in others. So Batty, J., said : "With the *feeling* of hatred the law can do nothing, because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite the feelings in others."[3]

Publication, Not Authorship, Material.

1222. It is consequently immaterial that the words used were not the speaker's own. The gravamen of the offence consists in their publication and not their authorship. As in defamation so in sedition, it is no defence to say that the accused had only copied or circulated matter which had already been published, or that it has been published upon the responsibility of one who was its author.[4] The only defence in such a case is inadvertence or want of knowledge or intention. Such knowledge will, however, be presumed in one who is the declared printer or publisher under the Press and Registration of Books Act,[5] for a declaration signed under section 5 of that Act to the effect that the "declarant" is a printer or publisher of the periodical therein specified carries with it the presumption and that whatever is published thereafter is published by the declarant in accordance with his declaration.[6] But this is merely a presumption which may be reverted, by shewing that the declared publisher or printer was ill or absent at a given time, and had

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(1) Foster, Cr. L., 198.
(2) *Burdett*, 4 B, & A. 95 (126, *et seq.*).
(3) *Bhaskar*, 8 Bom. L. R., 421 (437).
(4) *Jogendra Chunder Bose*, 19 C. 35 (41) ; *Tilak (Bal Gangadhar)*, 22 B. 112; *Bhaskar*, 8 Bom. L. R. 421.
(5) Act. XXV of 1867, s. 7.
(6) *Tilak (Bal Gangadhar)*, 22 B. 112 (130) ; *Bhaskar*, 8 Bom. L. R. 421 (435) ; *Phanendra Nath*, 35 C. 945.

therefore no knowledge of the publication,[1] and it is, moreover, submitted that the knowledge of the publication of periodical does not necessarily imply knowledge of its contents, much less knowledge that its contents are seditious.

1223. In order to fasten the presumption of such a knowledge, it would have to be held that the publisher is also the censor of a periodical and that he is at liberty to reject what he does not wish to print. But surely this is the function of the editor and not of the printer. In any case the term "printer" does not include compositors and the like, nor the term "publisher" include news-vendors and news-agents. But in England the authorities are undoubtedly in favour of the view that even a news-agent selling seditious libel may be indicted on the bare fact of publication. So John Almon was indicted for selling through his servant at his shop a newspaper called the *London Museum*, in which was published a letter of Junius to the King, and at the trial, a juror put to Lord Mansfield this question : "Whether selling in the shop by a servant of a pamphlet without the knowledge or privity, or concurrence of the master in the sale, or even without a knowledge of the contents of the libel or pamphlet so sold, be sufficient evidence to convict the master," to which Lord Mansfield replied : "I have always understood and take it to be clearly settled, that evidence of a public sale or public exposure to sale, in the shop by the servant or anybody in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him unless he proves the contrary, or that there was some trick or collusion."[2] But before the jury returned their verdict the Judge qualified this statement by saying that instead of saying that it was sufficient evidence he should have said it was *prima facie* evidence to charge him, unless he could shew it was by trick or collusion, and without his knowledge or privity.[3] Almon was thereupon convicted and fined 10 marks though the real printers and publishers tried by another jury at Guildhall were acquitted. Almon moved for a new trial on the ground of the Judge's misdirection and then Lord Mansfield explained himself[4] by stating that what he had meant, to lay down was that publication of the print by the servant for the master was *prima facie* evidence of publication by the master himself, but that it was liable to be contradicted by contrary evidence tending to exculpate the master by shewing that he was not privy nor an assenting party to it. Then his Lordship added that thus stated, the point was as much established as that an eldest son is heir to his father. Aston, J., agreed and added : "He has the profits of the shop and is answerable for the consequences."[5]

1224. This case was decided in 1770 when the law of constructive treason was rampant, and the rule laid down by Lord Mansfield has been considerably modified in recent years. Baron Wood in a case sated that the publication must be "by one conscious of its contents."[6] Otherwise a postman or messenger carrying a sealed parcel enclosing a libel would be equally guilty.[7] even though he cannot read.[8] Lord Campbell's Act has somewhat altered the law in this respect[9] but it is submitted, not to the extent necessary. It lays down that whenever under the plea of not guilty "evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendent to prove that such publication was made without his authority, consent, or knowledge and that the said publication did not arise from want of due care or caution on his part."[10] This section applies to all cases of criminal libel, blasphemous, seditious or otherwise.[11] So it has been now held that the directors of a printing company are not criminally liable for a libel

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(1) *Phanendra Nath*, 35 C. 945 (953), followed in *Chuni Lal*. 12 L. 483.
(2) *Almon*, 23 St. Tr. 803 (838).
(3) *Ib.*, p. 838, last para.
(4) 20 St. Tr. 803 (805) ; citing *Harris*, St. Tr. 925.
(5) *Ib.*
(6) *Malony* v. *Bartley*, 3 Camp, 213.
(7) *Per* Lord Kenyon, C. J., in *Topham* 4 T. R. 129 ; *Day* v. *Bream*, 2 Moo. and Rob. 55.
(8) *Per* Lord Kenyon. C, J. in *Holt* ; 5 T. R. 444 ; *Emmens* v. *Pottle*, 16 Q B. D. 354.
(9) *Hari Sarvothama*, 32 M. 338.
(10) 6 & 7 Vict., c. 96, s. 7.
(11) *Bradlaugh*, 15 Cox. 218, *Holbrook*, 3 Q. B. D. 60 ; *Ramsay & Foote*, 15 Cox. 231.

contained in a paper printed by the servants of the Company, unless they knew of or saw the libel before its publication, or gave express instructions for its appearance.[1] It may be added that no criminal prosecution against any proprietor, publisher, editor or any person responsible for the publication of a newspaper can now be instituted for any libel published therein without the order of a Judge at Chambers being first had and obtained. Such application is to be made on notice to the person accused who shall have an opportunity of being heard against such application.[2] Even under the rule as so declared, the accused is not liable for sedition unless it was manifest and apparent, and this has been always the rule.[3] It may perhaps be added that even in this view of the law the practice of the Indian Courts[4] to sentence printers and publishers to long terms of imprisonment on the mere presumption of knowledge cannot be supported.

1225. No Sedition.—Lastly, the section exempts two classes of comments from the purview of sedition. In this respect the section has undergone some verbal changes, but they do not substantially affect the rule as previously enacted. It will be observed that second and third explanations do not necessarily exclude each other. Indeed, the third explanation is more general than the second explanation and sanctions comments generally without any view to obtaining a reform. But while second explanation speaks of the *measures* of the Government, third explanation speaks of the *administrative or other action* of the Government. It would seem that the second explanation deals with the criticism of a general policy, whilst the last explanation deals with particular acts not affecting its policy. The two explanations would then mean this, that it is not sedition to adversely criticise the acts and policy of the Government, so long as it is not calculated to excite hatred, contempt or disaffection against the Government. This much was conceded by Strachey, J., who said: "A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely, and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin, and character or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people, then he is guilty under the section, and the explanation will not save him."[5] A journalist is not expected to write with the accuracy of a lawyer or a man of science; he may do himself injustice by hasty expression out of keeping with the general character and tendency of the articles."[6] This is a very clear enunciation of the rule, and it lays down the utmost limit of fair criticism. So Lord Loughborough said in the debate upon Fox's Libel Bill in 1792: "Every man may publish at his discretion his opinions concerning forms and systems of Government,—if they be wise and enlightening, the world will gain by them, if they be weak and absurd, they will be laughed at and forgotten if they be *bona fide*, they cannot be criminal, however, erroneous."[7]

Liberty of the Press.

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(1) *Allison and others*, 16 Cox. 559.

(2) Libel Amendment Act, 1888 (51 and 52 Vict., c. 64, s. 8). See *Allison*, 16 Cox. 559. This provision was inserted on the motion of Lord Coleridge.

(3) *Topham*, 4 Tr. R. 129; *Lord Abingdon*, 1 Ex. 228; *Harvey*, 2 B. & C. 257 and in America the same rule is laid down in *Smith* v. *Ashley*, (1846) 52 Mass. 367; *Dexter* v. *Spear*, 4 Mason 115.

(4) *Surendra Prosad*, 38 C. 227.

(5) *Tilak* (*Bal Gangadhar*), 22 B. 112 (137); followed *per* Batty, J., in *Bhasker*, 8 Bom. L. R. 421.

(6) *Tilak* (*Bal Gangadhar*), 22 B. 112 (142); cited with approval in *Mon Mohan*, 38 C. 253.

(7) This section is according to Sir James Stephen drawn exactly as the law was settled by this Bill; 2 Steph. Cr. L. 357.

1226. Right of Criticism.—So, more recently Fitzgerald, J., summed up the right of the subject to criticise his Government as follows:—"When you come to consider what a journalist may do, I have to point out that a journalist may (and, indeed, it is his duty to), canvass and censure the acts of the Government of the State; he is free to discuss their acts and their public policy, and he may canvass, and if he thinks proper, censure the acts of Government and ministers, and above all, he is invited to consider what is of the greatest importance, the administration of the law. Justice demands that the errors of the Court of Justice shall be pointed out: and all that is within the province of a public journal. But this course should be carried out with calm and temperate language. The man who criticises the conduct of the Government, ought not to impute improper motives; and though he may point out that there is bad administration of justice, yet he should not use language that would indicate contempts of the laws of the land. When a public writer uses his privilege to create discontent and dissatisfaction, he becomes guilty of what the law calls sedition."[1] So in another case it was said: "It is the right of the British subject to exhibit the folly or imbecility of the members of the Government. But if in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation."[2] These extracts are sufficient to show that the view of the English Judges is in entire harmony with the exceptions, which do not encourage the creation of a servile press, but a press which possesses perfect freedom of speech so long as it does not deteriorate into a malignant abuse. And as regards the second explanation, it is not invariably necessary that the criticism of a Government measure should be accompanied by a suggestion for its alteration by lawful means. It may be a measure calling for censure, which may then be unreservedly passed thereon, but if its alteration is suggested, then it should be only by constitutional means. The comments may be relevant or irrelevant, wise or foolish, couched in a style of irony or satire, but the critic must not overstep the limit here prescribed. He must not take an individual act of the Government and moralize upon its total inadequacy. He must not fasten a political lampoon on a topic of passing interest.

1227. Punishment.—The punishment for sedition varies from transportation for life to a mere fine. The propriety of providing such severe maximum sentence was questioned at the time the original Bill was under discussion, and the force of the objection was conceded by the Law Commissioners who observed that the English Criminal Law Commissioners had in their digest fixed the term of imprisonment not exceeding three years.[3] A comparison of the sentences passed by the Indian Courts with those awarded to offenders convicted in England would seem to suggest a glaring disparity in the conception of the gravity of the offence in the two countries, at variance with the original intention of those who were responsible for the enactment of the Code, and who had condemned the sentence of transportation as an "unwarrantable severity" for the offence in question, proposing to limit it to five years, for which the sentence of simple imprisonment for three years was to be provided as an alternative.[4] As it is, the sentence admissible under this section may be transportation for life or for any period, imprisonment, or fine. The sentence of transportation for any term sanctioned by this section is a departure from the general law, and is only allowable, because it is so expressly authorized. It need scarcely be added that the object of the Crown in instituting prosecution of this nature is not vindictive,[5] and severe punishment would defeat its purpose by evoking public sympathy and arousing a greater hostility towards the Government. Such sentence is wholly unjustifiable if the accused is pressing for reforms without advocating violence,[6] or where the language used is not intemperate,[7] or where the usual mitigating circumstance, *e.g.*, old age or peaceful character of the accused, is present.[8]

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(1) *Sullivan* and *Piggott*, 11 Cox. 54.
(2) *Per* Lord Ellenborough, C. J., in *Cobbett*, 29 St. Tr. 153.
(3) Second Report, ss. 26, 27.
(4) *Ib.* s. 473.
(5) *Satya Ranjan Bakshi*, (1927) C. 678.
(6) *Ram Sharan Das*, (1930) Cr. C. 988, 129 I. C. (L.) 700; *Indra*, 127 I. C. (R.) 870.
(7) *Sham Das*, (1930) L. 874.
(8) *Anand Kishore*, (1930) L. 306.

125. Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Queen or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may de added, or with fine.

Waging war against any Asiatic Power in alliance with the Queen.

1228. Analogous Law.—This section was clause 114 of the original Bill and was passed at the time when there was no provision for punishing such an offence, which, however, is now punishable under the more exhaustive provisions of the Foreign Enlistment Act, 1870,[1] which extends "to all dominions of Her Majesty including adjacent territorial waters."[2] That Act not only prohibits the waging of war against the dominions of any friendly State,[3] but it prohibits the rendering of any assistance to any person for war-like purposes. It was under section 119 of this Act that Dr. Jameson was prosecuted for his raid into the territories of the late Boer Republic.[4] It was, however, held in that case that in order to bring a case within section 11 there must have been a preparation in the Queen's dominions, but "when you have got that fact established there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which, will amount to an offence against the Act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty."[5]

1229. Procedure and Proof.—A prosecution under this section requires complaint made "by order of or under authority from the Governor-General in Council, the local Government or some officer empowered by the Governor-General in Council in this behalf."[6] The offence is not cognizable but a warrant may issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session. The points requiring proof are :—

(1) That the accused—
  (*a*) Waged war, or
  (*b*) Abetted the waging of war, or
  (*c*) Attempted to wage war.
(2) With a friendly Asiatic power;
(3) That his prosecution was duly sanctioned by Government.

1230. Charge.—In framing the charge under this section the form given under section 121 should be followed, substituting for the "Emperor" the words "the Government of an Asiatic Power in alliance (or at peace) with the King."

1231. Principle.—This rule is sanctioned by international comity, and a desire of the State to remain friendly with its neighbours.[7]

1232. War against an Asiatic Power.—This section has been drawn to protect friendly Asiatic powers from the ravages of British subjects who may make excursions into their territory, and then run back to the comparative security of their own homes. It is not necessary that the Asiatic power should be outside India. The native Feudatory States in India are such Asiatic powers, and an invasion of their territory, will expose a person to the penalty of the rule. So where the accused accompanied an illegal expedition into Manipur, a Native State, he was held to have committed the offence under this section.[8]

1233. Commercial Contracts Exempted.—Where two friendly States are at war with each other it is not the abetting of such war to embark upon a merely commercial enterprise, so long as it is not directly conducive to the waging of war.

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(1) 33 and 34 Vict,, c. 90.
(2) 33 and 34 Vict., s. 2.
(3) *Ib*.. ss. 11, 12.
(4) *Jameson*, (1896) 2 Q. B., 425.
(5) *Per* Lord Russel, C. J., in *Jameson*, (1896) 2 Q. B. 425 (431).
(6) S. 196, Cr. P. C.
(7) *Jameson*, (1896) 2 Q. B. 425 (430).
(8) *Keifa Singh*, 3 W. R. 16. The facts of this case are, as usual in these reports, not given.

In 1870 France and Germany were at war. England was neutral. France contracted with an English Cable Company for the laying of a submarine cable connecting two points from which communication between Dunkerque and Verdon could be easily made, and which would have assisted France in her war against Germany. The Company's ship "*The Invincible*," employed to lay the cable was arrested, and the question was whether she was employed in aiding the military operations against a friendly State. It was held that the primary object of the contract being to offer commercial facilities by improved communications, the contract was of a commercial character, and it did not assume any other character because the cable was also to subserve military operations.[1] But where a ship was engaged for the express purpose of towing a prize of war or its crew to a safe harbour, she was held to have contravened the Act and she might then be captured in neutral waters.[2]

1234. The friendly foreign State under this Act may be a State *de facto*, though not *de jure* exercising the functions or assuming to exercise the functions of Government. So where the insurgents during the Cuban rebellion had formed themselves into a Government, the Privy Council held that it was a foreign friendly State within the meaning of the Foreign Enlistment Act.[3]

Committing depredation on territories of Powers at peace with the Queen.

126. Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

1235. Analogous Law.—This section deals with depredation as the last section deals with war. An illegal war is nothing more than a depredation. However, this section has a wider application than the last as it applies to a Power not necessarily Asiatic.

1236. Procedure.—An offence under this section requires sanction, and its procedure is in other respects the same as for an offence under the last section.

1237. Charge.—The charge under this section should run thus :—

"I (*name and office of Magistrate etc.*,) hereby charge *you* (*name of accused*), as follows.—

"That you——, on or about the——day of——at——committed (*or* made preparation to commit) depredation on the territories of——a power in alliance (*or* at peace) with the Emperor, and thereby committed an offence punishable under section (126) of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

1238. What is Depredation.—Depredation is briefly plunder.[4] It is pillaging by men or animals. A war illegally carried on is scarcely distinguishable from a depredation, except perhaps in the intention ; the object of the predatory band being plunder. A depredation to be punishable under this section must be a raid by a band of men into foreign territory for the purpose of general robbery, plunder or laying waste. An outrage by an individual against the property of an individual is not depredation, but theft or robbery as the case may be. The section rather refers to an organized raid planned to plunder generally without reference to any individual.

Receiving property taken by war or depredation mentioned in sections 125 and 126.

127. Whoever receives any property knowing the same to have been taken in commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

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(1) "*The International*," 3 A. & E. 321 (336, 337).

(2) "*The Gauntlet*," *Dyke* v. *Ellott*, L. R. 4 C. P. 184, reversing 3 A. & E. 381.

(3) "*The Salvadoo*," L. R. 3 P. C. 218.

(4) From L. *de praedari*, to plunder.

1239. Analogous Law.—This is the only section in this chapter under which no sanction is required for a prosecution.

1240. The receiver of property acquired in illegal war or depredation is in the nature of the receiver of stolen property, and the language of this section though narrow is not incomparable with that used to define that offence in section 411.

1241. Procedure and Proof.—An offence under this section requires no sanction. It is non-cognizable, but warrant may issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session. The points requiring proofs are :—

(1) That the property was acquired in war or depredation.
(2) That the war or depredation in which the property was acquired was punishable under section 125 or 126.
(3) That the accused received such property.
(4) That when he received it, he knew that the property had been acquired as mentioned in 1 and 2.

1242. Charge.—The charge should run thus :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——received (*specify the property*), knowing the same to have been taken in waging war against——an Asiatic power in alliance (*or* at peace) with the Emperor (*or* knowing the same to have been taken in the commission of depredation) on the territories of——a power in alliance (or at peace) with the Emperor and thereby committed an offence punishable under section 127 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

1243. Principle.—A receiver of property obtained in war or depredation becomes an accessory after the fact, or an abettor in the large sense in which that term has been used in English Law, if he receives the property "knowing the same to have been taken in the commission of the offences mentioned in sections 125 and 126." He is consequently similarly punishable.

1244. Meaning of Words.—"*Receives any property* : " Retention of property for another is not receiving it within the meaning of this section. "*Knowing the same to have been taken* : " The word knowledge is as much stronger than "believe," as the latter is stronger than the word "suspect."[1]

1245. Receipt of Booty.—The receiver of the spoils of war or depredation is in the nature of a *particeps criminis* when he knows of the origin of the property received by him. Such a person must be distinct from the actual warrior or depredator, whether a British subject or a foreigner taking refuge with his plunder within British territory. He is not liable to be dealt with not as a receiver but as a principal offender. The receiver is a person who acquires property from him usually by purchase at a nominal price. Raiders generally drive cattle across the frontier where they get rid of them for what they will fetch. Such receivers are liable to be punished under this section, though the principal offenders may escape scot-free. The object even in such a case of punishing the receivers is to discourage depredation in foreign territory by making it difficult for the depredators to relieve themselves of their spoil.

1246. But honest receivers are exempted ; only those who *knew* that the property had been so acquired are liable to be punished. Such knowledge must be founded upon facts known to or brought to the notice of the receiver.

1247. Where such depredations are common, intending purchasers may well suspect that the property offered to them may have been so obtained. But it is not enough to bring them within the penal visitation of this section for which something more is required. The law requires knowledge that the property was acquired in

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(1) *See* s. 26 ; *Per* Melville, J., in *Rango Timaji*, 6 B. 402 (403).

war or depredation, but such knowledge will be presumed where the sale is made by persons who are transfrontier thieves and known to be so, and who habitually live by such depredations. The disposal of the property at a very low price, or the hurry or secrecy attending its sale, its unusual character and its unaccountable possession with the seller are other facts from which such knowledge may be inferred. The offence is analogous to one punishable under section 411 under which the salient features of such an offence will be found more exhaustively set out.

Public servant voluntarily allowing prisoner of state or war to escape.

128. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[***Public servant***—s. 21. ***Voluntarily***—s. 39.]

1248. Analogous Law.—This section is only an aggravated form of an offence under s. 225-A which relates to a public servant intentionally aiding or suffering a prisoner to escape from his custody. The words used in the two sections are different, but the sense is the same.

1249. Procedure and Practice.—For the prosecution of an offence under this section a complaint of Government is necessary.[1] An offence under this section is non-cognizable, but warrant may be ordered in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Sessions.

1250. Proof.—The points requiring proof are :—

(1) Sanction ;
(2) That the accused was a public servant ;
(3) That he had the prisoner in custody ;
(4) That the prisoner escaped ;
(5) That the prisoner was a State prisoner, or a prisoner of war ;
(6) That he allowed him to escape from his place of confinement ;
(7) That he did so voluntarily.

1251. Charge.—The charge may be framed as follows :—

" I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*), as follows:—

" That you——being a public servant (*mention the office*), and as such having the custody of——a State prisoner (or a prisoner of war), on or about the——day of——at——, voluntarily allowed such prisoner to escape from——, the place in which such prisoner was confined, and thereby committed an offence punishable under section 128 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

" And I hereby direct that you be tried by the said Court on the said charge."

1252. Principle.—This and the next two sections deal with the rescue and escape of State prisoners. This section punishes a public servant who *voluntarily allows* a State prisoner to escape, while the next section deals with one who only negligently *suffers* one to escape. The last section in the chapter punishes any one rescuing or assisting in the escape of a State prisoner.

1253. Meaning of Words.—" *State prisoner* " is a prisoner confined under the provisions of the " Regulation for the Confinement of State Prisoners,[2] under the authority of the Governor-General in Council. Such a prisoner is arrested for " reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominion from foreign hostility and from internal commotion."[3] Not only

(1) S. 196, Cr. P. C.
(2) Beng. Reg. III of 1818 ; Bom. Reg. XXV of 1817 ; Mad. Reg. II of 1819 ; substantially reproduced in Act XXXIV of 1850 and Act III of 1858.
(3) Preamble, Beng. Reg. III of 1818.

foreigners but British subjects, may be arrested under the provisions of these Regulations, and all who are so arrested will be State prisoners,[1] and they may be detained in any fortress, jail, etc.,[2] "*Prisoner of war*" is an enemy taken in arms who is according to the laws of civilized war to be treated as prisoner till the termination of hostilities, and not slain. A prisoner of war is a State prisoner.[3]

Public servant negligently suffering such prisoner to escape.

129. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

[***Public servant***—s. 21. ***State prisoner or prisoner of war***—s. 128.]

1254. Analogous Law.—This section is the same as the last only with the mitigating circumstances that the escape was not allowed voluntarily but was suffered negligently.

1255. Procedure and Practice.—A prosecution under this section requires the complaint of Government.[4] The offence is non-cognizable, but warrant may issue in the first instance. It is bailable but not compoundable. It is triable by the Court of Sessions, Presidency Magistrate or a Magistrate of the first class.

1256. Proof.—The points calling for proof are the same as under the last section, only instead of proving that the accused allowed the prisoner to escape voluntarily, it is sufficient under this section to prove that the escape was due to the accused's negligence. For, though he may not be a consenting party to his escape and would have opposed it if he had known, still the prisoner's escape may be due to his negligence. A sentry falling asleep while on duty would be guilty under this section,[5] while one opening the jail gate to let out the prisoner will be guilty under the last.

1257. Charge.—The charge under this section should be similar to one under the last section, only substituting the words "negligently suffering" for "voluntarily allowed."

Aiding escape of, rescuing or harbouring, such prisoner.

130. Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—**A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.**

1258. Analogous Law.—The last two sections refer to public servants. This applies to all alike. In its general wording, it includes the two offences under the preceding sections, and while these latter only refer to escape from the prisoners place of confinement, this deals with escape, however, and from wheresoever effected. In one respect this section is narrower than the last, in that it requires that the rescue or assistance should be made or given "knowingly", the purpose of which is evident for while a public servant having the custody of his prisoner knows that his prisoner is a State prisoner or a prisoner of war, such knowledge cannot be presumed on the part of the public at large. It is, therefore, necessary to prove in his case

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(1) *Per* Phear. J., in *Ameer Khan*, 6 B. L. R. 459.
(2) S. 2, cl. 3, Beng. Reg. III of 1818.
(3) *Per* Phear, J., in *Ameer Khan*, 6 B. L. R. 459.
(4) S. 196, Cr. P. C.
(5) *Futteh Khan*, (1874) P. R. No. 4.

that he had such knowledge at the time he assisted him in his escape or rescue. This section is a special adaptation of the more general sections 223-225B of the Code.

1259. Procedure and Practice.—A prosecution under this section requires the complaint of Government. An offence under this section is non-cognizable, but warrant may issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

1260. Charge.—The charge under this section should run thus :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of accused*) as follows :—

"That you———on or about the ——day of——at——knowingly aided (*or* assisted *or* rescued, *or* attempted to rescue *or* knowingly harboured *or* concealed)———a State prisoner (or prisoner of war) in escaping from lawful custody (*or* who had escaped from lawful custody or offered or attempted to offer resistance to his recapture after he had escaped from lawful custody) and thereby committed an offence punishable under section 130 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

1261. Meaning of Words.—"*Knowingly aids or assists*": The knowledge must be that the person assisted is an escaped State prisoner or a prisoner of war. The word "aid" implies indirect assistance as for example by supplying food or drink; assistance means direct help in the escape. "*Harbours or conceals*": To harbour a person is to give him shelter and protection. "*To the recapture,*" which presumably means *legal* recapture. A prisoner of war cannot be *legally* recaptured after he has escaped from the territories of the State. "*Permitted to be at large on parole,*" *i.e.*, is given limited liberty to move about within a defined area on his verbal promise that he shall not escape.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY, [NAVY AND AIR FORCE.][1]

1262. Topical Introduction.—"A few words will explain the necessity of having some provisions of the nature of those which are contained in this chapter. It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person: nor framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not military, who has abetted a breach of military discipline, should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence; and this seems to us a sound principle when applied only to the punishments provided by this Code. But the military penal law is, and must necessarily be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher, or a kidnapper. We have attempted in this chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who not being military, abet military crimes."[2]

Abetting mutiny or attempting to seduce a soldier, sailor or airman from his duty.

131. Whoever abets the committing of mutiny by an officer, soldier, [sailor or airman][3] in the Army, [Navy or Air Force][4] of the Queen, or attempts to seduce any such officer, soldier, [sailor or airman][5] from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[6] *Explanation.*—**In this section the words "officer," ["soldier," "sailor"][7] and "airman"][8] include any person subject to the [Army Act, the Indian Army Act, 1911, or the Air Force Act, as the case may be.][9]**

1263. Analogous Law.—Similar provisions have been enacted under the English Army Act[10] and the Indian Army Act,[11] which, however, relate exclusively to military men who are punishable by Court-Martial. In England civilians who endeavour to seduce any person serving in Her Majesty's forces by sea or land from allegiance to Her Majesty, or to incite any such person to commit any traitorous practice whatsoever, are on conviction by a Civil Court, liable to penal servitude for life.[12] The section provides for India what these provisions do for England.

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(1) These Words were substituted for the words "and Navy" by s. 2 and first Schedule of the Repealing and Amending Act (X of 1927.)

(2) Note D.

(3) Added by the Repealing and Amending Act, 1927 (X of 1927).

(4) *Ib.*

(5) *Ib.*

(6) This explanation was added by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870) s. 6.

(7) Inserted by the Amending Act, 1934 (XXXV of 1934).

(8) Added by the Repeating and Amending Act, 1927 (X of 1927).

(9) The words in the crotchets were substituted for the words and figures "Articles of War for the better Government of Her Majesty's Army, or to the Articles of War contained in Act V of 1869" by the Amending and Repealing Act of 1927 (X of 1927).

(10) (1881) 44 and 45 Vict. c. 58, s. 7.

(11) Indian Army Act, (Act VIII of 1911), s. 27.

(12) 37 Geo. III, c. 70, amended by 7 Wm. IV and I Vict., c. 91; similar provision to punish a person on board is made under the Indian Navy (Discipline) Act (Act XXXIV of 1934).

1264. Procedure and Practice.—An offence under this section is cognizable and warrant may issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session. A prosecution under this section alone does not require sanction, though sanction would be, of course, necessary if it is intended also to prosecute under section 124-A.

1265. Proof.—The points to be proved to establish the offence are :

(1) That the person abetted was an officer, soldier or sailor in the King's Army, or Navy.
(2) That the accused abetted him to commit mutiny, or attempted to seduce him from his allegiance or his duty.

1266. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——abetted the commission of mutiny by——, an officer (*or* soldier *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the Emperor [*or* attempted to seduce——an officer (*or* soldier *or* sailor *or* Airman) in the Army (*or* Navy *or* Air Force) of the Emperor from his allegiance (*or* his duty) and thereby committed an offence punishable under section 131 of the Indian Penal Code.

"And I hereby direct that you be tried by the said Court on the said charge."

1267. Principle.—As stated in the Topical Introduction (§1262), this chapter supplements the provisions of the Army Act and extends to civilians its penal provisions regarding abetment of military offences. All are intended to 'prevent the tampering of the army by extraneous pressure, assistance or influence. And so far as the section is concerned it is enacted to punish the abetment of mutiny and sedition by a military man. The offence contemplated is an abetment of the offence whether such abetment is or is not successful,—only, if successful, the abettor is then liable to the enhanced penalty provided in the next section. This section then relates only to an abetment not followed up by actual mutiny, or which—supposing actual mutiny follows—is not in consequence of that abetment.

1268. Meaning of Words.—"*Abets the committing of mutiny*" : "Abets" as defined in s. 107 and "mutiny" as explained elsewhere. (§ 1269) "*Or attempts to seduce such officer*": This is exactly the language of section 7 (2) of the English Army Act applicable to India.[1] The seduction of a soldier from "his allegiance or his duty" has been there interpreted to mean only an act amounting to treason, such as sedition.[2] It does not extend to mere insubordination or disobedience howmuchsoever flagrant.[3] An act may fail to amount to abetment, but it may still be "an attempt to seduce," as where Pindi Das published an article in a vernacular weekly newspaper called "India" headed "The British Government's Native forces, *Bande Mataram*," which purported to be a letter from a sympathiser of native soldiers, in which the accused compared the lot of the native sepoy, to that of the British soldier, and of which he posted some 3000 copies to the sepoys, it was held that the accused was guilty both under section 124-A as well as under this section.[4]

1269. Abetting Mutiny.—The term "mutiny" has not been defined in the Code. It, however, implies collective insubordination, or a combination of two or more persons to resist or to induce others to resist lawful military authority. A man cannot be charged generally with mutiny, or with an act of mutiny, but only with some one or more of the specific crimes laid down in section 7 of the Army Act above summarized. If he has not brought himself within the terms of that section, his offence, however much it may tend towards mutiny, must be

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(1) (1881) 44 & 45 Vict., c. 58.
(2) The language here applid has also been used in a similar English enactment ; 7 Geo. III, c. 70, as amended by 7 Will IV and I Vict., 91.
(3) *Pindi Das*, (1907) P. W. R. (Cr.) 37.
(4) *Pindi Das*, (1907) P. W. R. (Cr.) 37.

dealt with as insubordination under section 10 hereafter quoted (§ 1308). Thus, where there is an actual mutiny or a conspiracy to mutiny, all concerned in the mutiny or conspiracy may be tried under section 7 for causing or conspiring to cause, or joining in the mutiny as the case may be. If no mutiny or conspiracy exists, a man can only be tried under section 7 on a charge of endeavouring to persuade some person in Her Majesty's forces or in the Navy to join mutiny, or of failing to inform his commanding officer of an intended mutiny. These remarks apply equally whether the person accused is "subject to military law," and therefore charged under the Army Act, or whether he is a civilian and therefore charged under this section. Since the insertion of section 138-A[1] in 1887, a sailor in the Navy of the Queen includes also a sailor in the Indian Marine service,[2] which is regulated by the Indian Marine Service Act.[3] The Explanation is new, and was added by the Indian Penal Code Amendment Act, 1870.[4]

1270. Persons subject to the Articles of War for the better government of Her Majesty's Army are non-combatants attached to and serving with the army, such as camp-followers and others who are classed as "soldiers" for the purpose of this section.

1271. Obviously, this section has no application to a friendly advice tendered by one person to another concerning his own individual betterment, as where a relation or friend advises a sepoy to give up soldiering for trade, or to secure his discharge. The section only applies to incitement, leading the soldier to mutiny *en masse*, or to the breach of his allegiance or his duty. Such a case may arise where one counsels the soldiers not to fire on a mob when commanded to do so, and which it is then his duty to do, for his is not to reason why, unless the order given be illegal. So where soldiers or sailors go on a strike, they and their abettors are both liable, the latter under this section, the former under the Military law.

132. Whoever abets the committing of mutiny by an officer, soldier, [sailor or airman][5] in the Army, [Navy or Air Force][6] of the Queen shall, if mutiny be committed in consequence of that abetment, be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of mutiny if mutiny is committed in consequence thereof.

1272. Analogous Law.—This is a companion section to the last and prescribes an enhanced penalty where the mutiny abetted is committed in consequence of the abetment. The phrase "committed in consequence of that abetment" is here used in the sense described in the explanation appended to section 109, under which its meaning has been set out (§ 1016).

1273. Procedure and Proof.—The offence under this section is cognizable and warrant may issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

1274. The points requiring proof are the same as under the last section, except that it must be further proved that the mutiny was committed in consequence of the abetment. The same fact should be specified in the charge which should otherwise follow the wording of the form set out under the last section. (§ 1266).

133. Whoever abets an assault by an officer, soldier, [sailor or airman][7] in the Army, [Navy or Air Force][8] of the Queen on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Abetment of assault by a soldier, sailor or airman on his superior officer when in execution of his office.

[***Abets***—s. 107. ***Assault***—s. 351.]

(1) Now repealed by Act XXV of 1934.
(2) Act XIV of 1887, s. 79.
(3) (1884) 47 and 48 Vict., c. 38; the Indian Marine Act (XIV of 1887).
(4) Act XXVII of 1870, s. 6.
(5) Added by the Repealing and Amending Act, 1927 (X of 1927).
(6) These words were substituted for "or Navy" by *Ib*.
(7) *See* footnote 5.
(8) *See* footnote 7.

1275. Analogous Law.—The substantive offence, the abetment of which is made here punishable, is that defined in section 8 of the Army Act.[1] The terms of that section are, however, wider, for it comprises not only striking or use of any violence to his superior officer being in the execution of his office but also assault and the use "of threatening or insubordinate language" to him when he is not on duty.

1276. Now this section does not apply to the abetment of assault by a soldier or an officer not being in the execution of his office; and since the mere use of threatening or insubordinate language does not constitute an assault within the meaning of the Code, it follows that the criminal responsibility of the abettor under this section is not co-extensive with that of the soldier.

1277. The word "Superior Officer" is not defined, but it has a well-defined sense in the Military law. A person of equal rank with another may be his superior officer if his duties place him in control of the other. A lance corporal while acting as orderly sergeant is the superior of all other lance corporals. So a private soldier while placed temporarily in command of a guard is, for the time being the superior officer of the other private soldiers over whom he is placed. Abetment of a soldier not on active service is within the rule.

1278. Procedure and Practice.—An offence under this section is cognizable and warrant may issue in the first instance. It is both non-bailable and non-compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

1279. Proof.—The points calling for proof under this section are :—

(1) That the accused abetted an assault by another who was then a soldier in the army or sailor in the navy or airman in the air force;
(2) That the assault was abetted on his superior officer who was then in the execution of his duty.

1280. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——abetted an assault by——an officer (*or* soldier *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the Emperor on——a superior officer being in the execution of his office and thereby committed an offence punishable under section 133 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

1281. Meaning of Words.—"*By an officer, etc.*," who must be subject to Military law, *i.e.*, who must be then on the active list, or be a reservist. An officer or soldier who has been discharged or retired on pension is not then liable under section 8 of the Army Act, and this section providing an enhanced penalty will not apply to an abetment of an assault by him. The word "*soldier*" in this section has the same meaning as in the explanation to s. 131[2] "*On any superior officer*": For the meaning of this term *see* before (§ 1277). "*Being in the execution of his office*": For the meaning of these words *see* below (§ 1283).

1282. Abetment of Assault by Soldier.—This section provides an enhanced penalty for abetting an assault by a soldier on his superior officer in the discharge of his office. A soldier is himself liable for not only an assault but also the use of threatening or insubordinate language,[3] and indeed for even disobedience of the lawful commands of his superior officer,[4] whether or not the superior officer be in the execution of his office, but the liability of an abettor is not co-extensive with that of the soldier, for, indeed, he is not under the same discipline, and the principle governing his criminal responsibility must, therefore, be necessarily different. According to the section he is only liable for (*i*) abetting an assault by an officer or soldier, on (*ii*) his superior officer, (*iii*) being in the execution of his duty. He is not

(1) (1881) 44 & 45 Vict., c. 58.
(2) *Sri Nawas*, 56 I. C. (L.) 671
(3) S. 8, Army Act, 1881.
(4) *Ib.*, s. 9.

liable for abetting, say, the use of threatening or insubordinate language except as provided in section 138, that is to say, if the use of the language is followed by an act of insubordination. The "assault" here contemplated is undoubtedly the same as is implied in the use of the phrase "strikes or offers any violence" in the English Statute. These words would include any defiant gesture or act, which, if completed, would result in actual violence, but do not extend to an insulting or impertinent gesture or act, from which violence could not result. For example, a soldier throwing down his arms or his accoutrements on parade, or throwing away his cap or belt in an impertinent manner, but in such a direction that they could not strike a superior could not be deemed to offer violence within the meaning of the term. So also a man shaking his fist, or even drawing a bayonet, or otherwise making a show of violence against a superior behind the bars of a cell, or at such a distance that striking him was at the moment impossible, is not guilty of an offer of violence. On the other hand, throwing a missile, or pointing a loaded fire-arm at a superior would come within it.

1283. Again, there can be no abetment of an assault where the assault itself was not an offence. Such would be the case if the violence be used in self-defence, or if it be shown that it was necessary, or that at the moment the soldier had reason to believe that it was necessary for his actual protection from injury, and that he used no more violence than was necessary for his purpose.[1] The abetment here made punishable is the abetment of an assault on a superior officer in the well defined sense in the Military Law.

1284. It will be presumably for the prosecution to show, that the abettor knew that the person assaulted was the assailant's superior officer at the time. This knowledge would be presumed where he was wearing his uniform and he held a rank superior to that of the assailant. But where he was a superior by virtue of his duty or temporary office, this knowledge cannot be presumed. Lastly, the assault must be on a superior "being in the execution of his office." It is difficult to define precisely the meaning of these words. The question whether the superior officer was or was not at the time in the execution of his duty depends upon the nature of his duties and the command of his own superior officer. So far as an outside abettor is concerned he may show that he did not know that the superior officer was then on duty. But a military officer may be presumed to be on duty, if he is in uniform, and if not he may be presumed not to be on duty, and in that case it will be necessary to prove some knowledge on the part of the abettor that he was on duty. Indeed, where the person assaulted was then in plain clothes, it must be shown not only that the abettor knew him to be on duty, but also that he knew him to be the assailant's superior officer. Of course a superior may be on duty not only when he is performing his prescribed duty, but also when he is discharging a duty arising out of the exigency of the moment. Such duty would be discharged where an officer finds a private drunk or disorderly or out of quarters after hours, or otherwise transgressing a rule of law, service or decorum, calling for his interference. An officer is generally responsible for the behaviour of his men, and his duties in relation to them are therefore as multifarious as they are varied. So far as the abettor is concerned, his responsibility does not rest upon that uncertain ground. So far as he is concerned, it lies on the prosecution to show not only that the officer was on duty, but that the abettor knew of it at the time. The aggravated character of his crime depends upon his knowledge without which neither the soldier nor the abettor is liable to the drastic penalties of disciplinary law.

1285. It may be added that this section only prescribes a punishment for assault abetted, but not committed. An assault so committed calls for the punishment prescribed by the next section.

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(1) Ss. 96-106.

134. Whoever abets an assault by an officer, soldier, [sailor or airman][1] in the Army, [Navy or Air Force][2] of the Queen, on any superior officer being in the execution of his office shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Abetment of such assault if the assault is committed.

1286. Analogous Law.—This section bears the same relation to the last as section 132 bore to its predecessor. The last section prescribes a punishment only for an assault abetted, but not committed. This section prescribes a penalty for an assault committed "in consequence of that abetment,"—a phrase, the meaning of which has been sufficiently explained elsewhere.[3]

1287. Procedure and Practice.—An offence under this section is cognizable and warrant may issue in the first instance. It is both non-bailable and non-compoundable and exclusively triable by the Court of Session.

1288. Proof and Charge.—The points to be proved are the same as under the last section, with the additional fact that the assault was committed in consequence of the abetment. The charge should follow the form given under the last section adding, "and which he committed in consequence of the abetment" "after being in the execution of his office."

135. Whoever abets the desertion of any officer, soldier, [sailor or airman][4] in the Army, [Navy or Air Force][5] of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Abetment of desertion of soldier, sailor or airman.

[***Abets***—s. 107. ***Soldier***—s. 131, Expl.]

1289. Analogous Law.—This and the next section refer to offences which are also offences under the Army Act,[6] and the Indian Navy (Discipline) Act.[7] This section extends to a sailor in the Navy, and to an airman in the Air Force, the same provisions as the Army Act provides for soldiers in the Army.

1290. Procedure and Practice.—An offence under this section is cognizable, and warrant may issue in the first instance. The offence is bailable, but not compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first or second class.

1291. Proof.—The points requiring proof are :—

(1) That the person abetted was an officer, soldier, sailor, or airman ;
(2) That the accused knew it ;
(3) That he abetted him to desert.

1292. Charge.—The charge should run thus :—

"I (*name and office of the Magistrate etc.*), hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——, at——abetted the desertion of——,an officer (*or* soldier *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the Empire, and thereby committed an offence punishable under section 135 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1293. Principle.—It is not necessary under this section that the desertion abetted should take place. It will suffice for the offence if it is abetted. As such, the abetment is both a military as well as a general offence when dealt with as a military offence, only a Court having a summary jurisdiction would appear to

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(1) Added by the Repealing and Amending Act, 1927 (X of 1927.)
(2) *Ib.*
(3) S. 109, Expl. and Comm.
(4) Added by the Repealing and Amending Act, 1927 (X of 1927.)
(5) *Ib.*
(6) S. 153, (1881) 44 & 45 Vict., c. 58. This Act extends to India, see *ib*, s. 191.
(7) Act XXXIV of 1934, s. 26.

possess the power of trying the accused, but the procedure on his trial need not be necessarily summary, for it is provided in the Army Act that the trial in India shall be in such Courts and in such manner as may be from time to time provided therein by law.[1]

1294. Abetment of Desertion.—The only question arising in a case under this section iswhether the accused had abetted desertion which raises the question what is desertion? Literally, desertion implies the forsaking or abandonment of duty.[2] But a person may abandon his duty by absenting himself without leave, but it is not desertion. In Military law the term is only applied when the soldier absenting himself without leave has no intention to return to his duty. It may be, that he did not intend to quit the service altogether, but if he had evaded the performance of some service of importance, his unaccountable absence will count as desertion.

1295. To establish desertion it is necessary to prove some circumstance justifying the inference that the prisoner intended not to return to military duty in any corps, or intended to avoid some important particular service, such as active service, embarkation for foreign service, or service in aid of the civil power.

1296. To establish an attempt to desert, some act which, if completed, would constitute desertion as above-mentioned, must be proved. It has been held in a case that a person may abet desertion of a soldier who is no soldier at all.[3] The view is, of course, erroneous in view of explanation to s. 131, and the meaning of abetment.

1297. Intention Distinguished from Attempt.—A mere intention to desert does not amount to an attempt to desert. As desertion depends upon the intention of the soldier, knowledge of that intention must be brought home to the abettor. For a person cannot be held guilty of abetment of desertion, unless it is shown that he knew that the act he was abetting was an offence, and that offence was desertion. If then the soldier leaving in consequence of the abetment had then the intention of returning to his regiment, his offence will be only absenting himself without leave,[4] which is only a minor delinquency as compared to desertion. But all desertion implies absence without leave with the intention superadded that the absentee does not intend to return to his duty. Such intention may be presumed on the part of one who is found leaving the country in plain clothes, or in disguise. A person may desert even though his absence was in the first instance legal, as where a soldier is allowed furlough, during or after which he deserts, but the criterion in each case is the same, namely, the intention of not returning. Now, as a soldier on furlough is still under orders, if he quits the place where he has permission to go, without asking leave, or if he disguises or conceals himself so that orders cannot reach him or if he goes on board a ship about to sail for a distant port, he is liable to be tried and convicted of desertion, though on furlough at the time. Intention to desert cannot be inferred merely from prolonged absence without leave, for a soldier who has been entrapped into bad company through drink, or other causes, may be absent some time without any thought of becoming a deserter. On the other hand, there may be circumstances, when desertion is apparent, as where a soldier is arrested on steamer sailing for America, though in such a case he might have been absent only a few hours.

136. Whoever except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, [sailor or airman][5] in the Army, [Navy or Air Force][6] of the Queen has deserted, harbours such officer, [soldier, sailor or airman][7] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Harbouring deserter.

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(1) Army Act 44 & 45 Vict.. c. (58), s. 168.
(2) Lat. *de*, privating and *sero*, to unite.
(3) *Saleh Mahomed*, 10 S. L. R. 159.
(4) Army Act, s. 15.
(5) Added by the Repealing & Amending Act, 1927 (X of 1927).
(6) *Ib*.
(7) *Ib*.

Exception.—**This provision does not extend to the case in which the harbour is given by a wife to her husband.**

1298. Analogous Law.—This section is also met by the provision of the Army Act[1] or of the Indian Navy (Discipline) Act.[2] Harbouring a deserter must be in the words of English Law concealing such deserter, or aiding or assisting him in concealing himself, or aiding or assisting in his rescue," knowing him to be a deserter. A person harbouring a deserter is in the language of English Law an accessory after the fact. The Code punishes not only one who harbours a deserter but other offenders as well.[3] But the essential ingredients of the offence are in each case the same, namely, concealment of the person to prevent his apprehension.

1299. Procedure and Practice.—An offence under this section is cognizable, but warrant may issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate, or a Magistrate of the first or second class.

1300. Proof.—The points requiring proof are :—

(1) That the accused harboured the person in question,

(2) Who was an officer, soldier, sailor or airman in the King's Army or Navy or Air Force;

(3) That he had deserted;

(4) That the accused knew or had reason to believe at the time that he was a deserter;

(5) That the accused is not the wife of the deserter.

1301. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——knowing or having reason to believe that——an officer (*or* soldier *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the Emperor had deserted, harboured such officer (*or* soldier *or* sailor *or* airman) and thereby committed an offence punishable under section 136 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1302. Harbouring Deserter.—The gist of an offence under this section lies in the fact that the deserter obtaining the help of another to conceal himself eludes the search and his apprehension. The case excepted is that of the wife, and for obvious reasons. In any other case, it will suffice to show that the accused had harboured the deserter, "knowing or having reason to believe" that he was a deserter. Such knowledge or belief must depend upon the circumstances of each case, but if the accused had known the deserter to be in the Army and he afterwards finds him in plain clothes, he cannot but believe that he must have deserted unless he has procured his discharge. So if a person appears in disguise, or solicits shelter and privacy, the accused may well believe that he is a deserter. But in order to convict the accused of harbouring it will not be sufficient to show that there was something in the deserter's dress or demeanour from which the accused might have suspected him to be a deserter. The section requires that he must at least have *reason to believe* that he was a deserter, and such reason must be shown and proved by the prosecution, and it must be sufficient to carry conviction to any reasonable mind that with that reason before him the accused must have felt convinced that the person he was harbouring was a deserter. Then again there must be evidence to show that the accused did *harbour* the deserter. The term "harbour" has been defined in the Code[4] but that definition is limited to the use of that term in sections 212, 216, and 216-A. In other sections the word is evidently used in the narrower sense explained in the English Statute (§ 1289). The harbouring here must then be shown to have satisfied that meaning.

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(1) S. 153 (3), Army Act, 1881.
(2) S. 25. Act XXXIV of 1934
(3) *E.g.*, ss. 130, 157, 212, 216, 216-A, 126-B.
(4) S. 216-B.

137. The master or person in charge of a merchant vessel on board of which any deserter from the Army, [Navy or Air Force][1] of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Deserter concealed on board merchant vessel through negligence of master.

1303. Analogous Law.—This section punishes the master of a merchantman for criminal negligence in harbouring a deserter without knowledge. The facility which such vessels afford to deserters calls for the penalty here prescribed.

1304. Procedure and Proof.—An offence under this section is non-cognizable, and summons may issue in the first instance. The offence is bailable but not compoundable. It is triable by the Presidency Magistrate, or a Magistrate of the first or second class, and may be tried summarily.

1305. Two things are required to be proved against the accused : (*i*) neglect of duty, or want of discipline, (*ii*) that, but for it, the presence of the deserter would have been detected. If more is proved, the accused may be convicted under the last section.

1306. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That——, a deserter from the Army (*or* Navy *or* Air Force) of the Emperor, had concealed himself on or about the——day of——at——on board——a merchant vessel of which you——are the master (*or* person in charge) through your neglect of duty as such master (*or* person in charge, *or* through your want of discipline on board the said vessel) and that you have thereby committed an offence punishable under section 137 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1307. Liability of Ship's Master.—This section does not deal with the men of war. It only deals with merchant-vessels, or ships engaged in commerce. It is the duty of all masters of such ships to search the vessels thoroughly for stoways before disembarkation. A master, who does not order such search, or which, if ordered, is not made with the necessary diligence, is guilty of an offence under this section. But if the search was duly made, but the deserter could not be found the master is not criminally responsible, nor is he responsible if the deserter had taken his passage in disguise which the master was unable to see through.

138. Whoever abets what he knows to be an act of insubordination by an officer, soldier, [sailor or airman][2] in the Army [Navy or Air Force][3] of the Queen, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Abetment of act of insubordination by soldier, sailor or airman.

1308. Analogous Law.—This section prescribes a punishment for abetment of insubordination by a soldier or sailor or airman.

1308-A. "Insubordination" in Military law may consist of any wilful breach of discipline or disobedience of lawful command. The term has been thus defined in the Army Act[4] :—

Insubordination.

"10. Every person subject to Military law who commits any of the following offences, that is to say—

"(1) Being concerned in any quarrel, affray, or disorder, refuses to obey any officer (though of inferior rank), who orders him into arrest, or strives or uses or offers violence to any such officer, or

"(2) Strives or uses or offers violence to any person, whether subject to Military law or not, in whose custody he is placed, and whether he is or is not his superior officer, or

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(1) Added by the Repealing & Amending Act, 1927 (X of 1927).
(2) Added by the Repealing & Amending Act, 1927 (X of 1927).
(3) *Ib.*
(4) Army Act, 1881, s. 10.

" (3) Resists an escort whose duty it is to apprehend him or leave him in charge, or
" (4) Being a soldier breaks out of barracks, camp, or quarters,
" shall on conviction by Court-martial be liable, if an officer, to be cashiered, or to suffer such less punishment as in this Act mentioned, and if a soldier, to suffer imprisonment or such less punishment as in this Act mentioned."

1309. Procedure and Practice.—An offence under this section is cognizable, and warrant may issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first or second class.

1310. Proof.—The points requiring proof are :—

(1) That the act was one of insubordination ;
(2) That it was committed by an officer, etc., as mentioned in the section ;
(3) That the accused abetted the act ;
(4) That it was committed in consequence of the abetment ;
(5) That the accused then knew that the act was one of insubordination.

1311. Charge.—The charge may run thus :—

" *I* (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*), as follows :—

" That you——on or about the——day of——at——abetted what you knew to be an act of insubordination by——an officer (*or* soldier *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the Emperor, and such act of insubordination was committed in consequence of the said abetment, and thereby committed an offence punishable under section 138 of the Indian Penal Code, and within my cognizance.

" And I hereby direct that you be tried on the said charge."

1312. Abetment of Insubordination.—It is the first essential ingredient of an offence under this section that the accused should have known that the act he was abetting was an act of insubordination. Such knowledge implies knowledge of the act as well as its quality. If, for instance,an inferior officer orders the arrest of a superior officer *prima facie* it will not be insubordination if the former disobeyed the latter, and it will be no offence if a by-stander counselled him to resist. But if the latter knew that the superior had been concerned in a quarrel affray or disorder then as the order of the inferior is legal, so is its disobedience by the superior and its abetment by the by-stander equally illegal.

138-A (*Application of foregoing sections to the Indian Marine Service*) ***Repealad.***[1]

1313. Analogous Law.—This section, which is merely explanatory of the term " Navy of the Queen " as used in the preceding sections, was added by the Indian Marine Act, 1884.[2] It ran thus:

Application of foregoing sections to the Indian Marine Service.

S. 138-A. The foregoing sections of this chapter shall apply as if Her Majesty's Indian Marine Service were comprised in the Navy of the Queen.

1313-A. The Indian Marine is not necessarily a part of the Navy of the Queen, because it is regulated by the English Statute not applicable to India. This section consequently has been repealed by Repealing and Amending Act of 1934.[3]

139. No person subject to [the Army Act, the Indian Army Act, 1911, the Naval Discipline Act, (or that Act as modified by the Indian Navy Discipline Act, 1934),[4] or the Air Force Act],[5] is subject to punishment under this Code for any of the offences defined in this chapter.

Persons subject to articles of war.

1314. Analogous Law.—This section is also explanatory, and provides against persons subject to Military law being dealt with under this chapter. This is because, being subject to Military law, they can be punished under it. This is

(1) Repealed by Act XXV of 1934.
(2) Act XIV of 1884, s. 79.
(3) Act XXV of 1934.
(4) Substituted by the Repeating and Amending Act, 1927 (X of 1917.)
(5) These words excepting the words in brackets (see footnote 4) were inserted by the Amending Act of 1934 (XXXV of 1934).

in accordance with the rule *speciali generalibus derogant*—which has been considered elsewhere (§ 79).

Wearing garb or carrying token used by soldier, sailor or airman.

140. Whoever, not being a soldier, [sailor or airman][1] in the Military, [Naval, or Air][2] service of the Queen, wears any garb or carries any token resembling any garb or any token used by such a soldier, [sailor or airman][3] with the intention that it may be believed that he is such a soldier, [sailor or airman][4] shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

1315. Analogous Law.—This section applied first only to the personation of a soldier, but since its amendment in 1927, it applies equally to the personation of a sailor or airman.

1316. Procedure and Practice.—An offence under this section is cognizable, but summons may issue in the first instance. The offence is bailable but not compoundable. It is triable by any Magistrate and may be tried summarily.

1317. Proof.—The points requiring proof are :—

(1) That the accused wore the garb, or carried the token in question ;
(2) That such garb or token resembled that used by soldiers ;
(3) That the accused was not a soldier ;
(4) That he wore the garb or carried the token with the intention of passing off as a soldier.

1318. Charge.—The charge should run thus :—

"*I* (*name and office of Magistrate, etc.*), thereby charge you (*name of accused*), as follows :—

"That you——not being a soldier in the Military service of the Emperor on or about the——day of——, at——wore——(*specify the garb*) *or* carried——, a token resembling (*specify it*) (*or* used by such soldier) with the intention that it might be believed that you were such a soldier, and thereby committed an offence punishable under section 140 of the Indian Penal Code.

"And I hereby direct that you be tried on the said charge."

1319. Wearing a Soldier's Garb.—This section punishes what is a false personation of a soldier. His garb and token being his distinctive uniform by which he is readily distinguishable from all others, a person who wears them with the intention of passing himself off as such a soldier is guilty of an offence under this section. But he may be guilty of much more. If, for instance, he had donned that garb to act as a spy, in which case he subjects himself to the military law, and may be shot.[5] This section, however, deals only with the wearing of the garb, and the tokens of a soldier. The garb means his uniform, and the tokens would include such things as buttons, stripes, badges or medals, and the like. Merely wearing the soldier's garb is not a crime, for it is a daily spectacle in the cantonments where sweepers, bearers, and cooks may be seen masquerading in soldier's cast-off coats. So an actor upon the stage wears the varying costumes of military men. The crux of the offence is the intention to deceive, and such intention may be inferred from the nature of the disguise, and the purpose for which it was used.

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(1) Added by the Repealing and Amending Act, 1927 (X of 1927.)
(2) *Ib.*
(3) *Ib.*
(4) *Ib.*
(5) 2 Vattel, 210-214; Customs of war, s. 41.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

1320. Topical Introduction.—This Chapter consisting of 21 sections deals with a class of offences intermediate between offences against the State, and those against the persons. Its general underlying object may be gathered from its heading which is to preserve public tranquillity.[1] The arrangement of the sections here as elsewhere in the Code, is again haphazard and unscientific. But such offences in their most elementary form consist of an affray.[2] Where, however, there is a meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, the assembly is designated an unlawful assembly.[3]

1321. Sections 142-145, 150, 151, 157, 158 deal with the liability of persons who are members of an unlawful assembly. The use of force converts an unlawful assembly into a riot. In English Law there is a distinction made between a riot and a rout. a rout being a disturbance of the peace by persons assembled together, with an intention to do a thing which, if executed, would make them rioters, and actually making a motion towards the execution thereof, but not executing it.[4] The Code recognizes no such distinction, and the facts constituting a rout in England fall within the definition of a riot under the Code. A new section[5] was added to this chapter in 1898, and its object is to prevent internecine, racial or sectarian quarrels resulting in the disturbance of public peace. It is, however, more akin to the offence of sedition as defined by Sir James Stephen,[6] and its proper place would appear to be after s. 124-A.

1322. It is provided by the Code of Criminal Procedure that every village headman, village accountant, village watchman, village police-officer, owner or occupier of land, and the agent of any such owner or occupier and every officer employed in the collection of revenue or rent of land, on the part of the Government of Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may obtain respecting the commission of, or intention to commit in or near such village, any non-bailable offence or any offence punishable under sections 143-145, 147 or 148 of the Code.[7] And the same duty is generally laid on the public without any restriction as to the locality.[8]

Unlawful assembly.

141. An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is—

First.—**To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency or any Lieutenant Governor, or any public servant in the exercise of the lawful power of such public servant; or**

Second.—**To resist the execution of any law, or of any legal process; or**

Third.—**To commit any mischief or criminal trespass, or other offence; or**

Fourth.—**By means of criminal force, or show of criminal force to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment or to enforce any right or supposed right; or**

Fifth.—**By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.**

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(1) *Per* Best, J., in *Tirakadu*, 14 M. 126.
(2) Ss. 159, 160.
(3) 1 Hawk, P. C. C. 65, s. 9.
(4) 1 Hawk P. C. C. 65, s. 1.
(5) S. 153-A.
(6) See S. 124 A. com.
(7) S. 45, Cr. P. C.
(8) S, 44, Cr. P. C.

Explanation.—**An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.**

[***Government of India***—s. 16. ***Government***—s. 17. ***Presidency***—s. 18. ***Public Servant***—s. 21. ***Criminal Force***—s. 350. ***Mischief***—s. 425.]

1323. Analogous Law.—This section defines an "unlawful assembly" by declaring an assemblage of more than five persons for any purpose indicated in the section, illegal. In fixing the number at five the section departs from the rule of English Common Law, under which an assemblage of only three persons for the purpose specified in the section is sufficient to constitute an unlawful assembly. In other respects the section generally accords with the English rule.

1324. The procedure for breaking up unlawful assemblies is laid down in the Code of Criminal Procedure, Chapter IX (ss. 127-132) to which reference may be made.

1325. Principle.—It is a principle well recognized that law should discourage the tumultuous assemblage of men. In early times, therefore, the mere assemblage of men was regarded as a menace to peace and therefore unlawful. But with the growth of democratic power the assemblage of men became a public necessity though law still continues to look askance at the concourse of men but it could not punish men assembled for a lawful purpose, and therefore, it had to lay down that though an assemblage of men, however large, is not *per se* illegal, it may become illegal, if more than five persons meet for an unlawful purpose. The illegality was thus transferred from the assembly to the object of the assembly, and these are enumerated in the five clauses which form a part of the section.

1326. Meaning of Words.—"*If the common object of the persons*": This is a most important proviso. In order to constitute an unlawful assembly there must be a community of intention. For the meaning of other words and clauses see below. "*To enforce any right or supposed right,*" *i. e.*, to enforce the right of which the party was out of possession. A party in possession resisting its infringement would be *maintaining* and not enforcing his right.[1] "*Supposed right,*" as distinguished from "*any right,*" must mean a non-existent right.

1327. Essentials of "Unlawful Assembly."—The first and the foremost essential element of an unlawful assembly is that it should consist of at least five persons, who should meet for a common object.[2] The five persons so meeting may not all have had the same object before meeting, some may be won over to the common cause by persuasion and influence, but so long as there are not five men to say "we agree to execute our common purpose" there is not an unlawful assembly. So in England where the number fixed is three, it has been held that two persons only cannot be guilty of a riot.[3] But where six persons being indicted for a riot, two of them died before trial and two were acquitted, the remaining two being found guilty, the Court refused to arrest judgment holding that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had died without a trial.[4] Such, of course, is the law here, for though there must be five persons possessed of the same intention, it is not necessary that they should be all jointly brought to trial, for some of them may abscond and evade justice, but that would not affect the liability of those remaining.

1328. The section speaks of the five persons having a common object. Now the word "object" means the purpose, intention or design, and the clause requires that it must be "common," that is, it must be possessed by all. But there may be five persons possessing a common wish, and they meet together, but that alone does not make their assemblage unlawful. For they may meet together in a theatre, and their object then may be to amuse themselves. In such a case they meet, but do not "assemble" within the meaning of the clause. That word implies the meeting

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(1) *Bam Nandan*, 20 I. C. (C.) 623.
(2) *Vyapuri Chetty*; 4 I. C. (M.) 1142.
(3) *Sadbury and others*, 1 Lord Rayne, 484.
(4) *Scott and another*, 3 Burr. 1262.

of persons animated by the same purpose with the intention of furthering it. It is the combination of men for a common purpose that law discourages, for it regards such combinations as conducive to rioting and disorder. But the mere conbination or assemblage of five men does not render their meeting unlawful, unless the meeting was in pursuance of a common unlawful object ;[1] but such object need not be present in the minds of all before they meet, for it may occur to them afterwards[2] but as soon as five persons concur, the assembly becomes from that moment unlawful whatever may have been its character before.[3] Indeed, members of an assembly may have a community of object only up to a certain point beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object.[4]

1329. Sometimes an assembly may be perfectly lawful in its inception, but it may become suddenly unlawful without previous concert among its members.[5] But it must be part of the plan of the meeting that the common object should be forthwith carried into effect : for if men meet only to arrange plans for future action, it cannot be said that there was any fear of the breach of the peace without which there can be no unlawful assembly.[6] Moreover, the objects illegal which the members have in common must be one of those specified in the section. If the object does not fall under either of those clauses it is not illegal and if the object is not illegal there can be no "unlawful assembly," whatever may have been the number of men meeting or the fear of disorder and tumult.[7] So, where five persons assemble for the purpose of gambling, their assembling does not constitute an "unlawful assembly" because gambling, though illegal, is not one of the illegal objects enumerated in the section.[8]

1330. This section does not declare the mere assemblage of men, however large, illegal. It requires that, in order to be illegal, it must be inspired by an illegal object as specified in the section, which must be proved by the prosecution. So, where there was a large concourse of men armed with sticks and bill-hooks, it could not be presumed that their object was illegal, though the fact that they were in a large crowd and were armed may raise some suspicion, but such suspicion is not proof upon which the accused could be convicted.[9] As the specification of the illegal common object is the essential ingredient of an offence under this section, it cannot be varied in appeal, for the trial proceeds upon proof of the common object which is specified, and not upon any common object which the facts of the case may disclose.[10] Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one lawful assembly, and to try them together, in as much as they do not have "one common object" within the meaning of this section.[11]

1331. An assembly lawful in itself does not become unlawful merely by reason of its lawful acts.[12] It is not unlawful to carry sticks and if it provokes an assault the assailants are guilty and not those who use their sticks in self-defence.[13]

1332. The section declares the following five objects as illegal, which may now be examined.

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(1) *In re Vyapuri Chetty*, 4 I. C. (M.) 1142 ; *Jhakri*, 17 I. C. (C.) 1001.

(2) *Khemee Singh*, 1 W. R. 18 ; *Koura Khan*, (1868) P. R. No. 34.

(3) *See* Expl..; *Khemee Singh*. 1 W. R. 18 ; *Periapiam*, 1 Weir 66.

(4) *Jahiruddin*, 22 C. 306.

(5) *Ragho Singh*, 6 C. W. N. 507 ; *Shettyast* 2 Bom. L. R. 1129. See (1832) C. J., Tindal's charge to the Grand Jury of Bristol, 5 C. & P. 261, quoted in 1 Penal Law (4th. Edn.) (§ 1368.)

(6) *Clarkson*, 17 Cox. 483.

(7) *Beatty* v. *Gillbanks*, 9 Q. B. D 308.

(8) 1 Weir, 66.

(9) *Peelimuthu*, 24 M. 124; *Umacharan Singh*, 29 C. 244 ; *Rahimuddi* v. *Asgar Ali*, 27 C. 990.

(10) *Rahimuddi* v. *Asgar Ali*, 27 C. 990.

(11) *Suroop Chander Paul*, 12 W. R. 75.

(12) *Beatty* v. *Gillbanks*, 9 O. B. D. 308 ; *Mukka Muttrain*, 31 I. C. (M.) 343 ; *Dhunmun*, 75 I. C. (Pat) 176.

(13) *Mukka Muttrain*, 31 I. C. (M.) 343.

1333. Overawing Government.—The first illegal object stated is the overawing of Government or a public servant by the show of criminal force. The terms there employed are the same, meaning of which will be best understood by referring to the commentary on s. 124-A (§§ 1196-1208). Here, however, the same subject may be again briefly recapitulated. The gist of an offence under this clause consists in (*i*) overawing, (*ii*) by the show of criminal force, (*iii*) the Government, or (*iv*) a public servant in the lawful discharge of his duty. A person is said to overawe another when he restrains him by awe, fear or superior influence. Overawing merely by superior influence is not criminal, nor is overawing by fear illegal unless it is attended by show of criminal force. But where a person is terrified into doing what he had otherwise no mind to do, and refraining from doing what he had otherwise a mind to do, he is said to be overawed, and where that fear is brought on by the show of force, he is said to be overawed by show of criminal force.

"First."

1334. It will be seen that overawing by show of criminal force of the Government is by itself illegal, but in the case of a public servant the use of criminal force is only illegal if it was used to obstruct him in the exercise of his *lawful* power. This is perfectly in keeping with the other provisions of the Code.[1] While, therefore, this clause confers an absolute protection on the Government, the protection conferred on its public servants is only qualified and circumscribed by the legality of their action (§ 871).

1335. Resistance to Legal Process.—Similarly it is illegal for five or more men to join in resisting "the execution of any law, or of any legal process." The execution of any law means the carrying out of the provisions of law or the enforcement of any act warranted by law. The arrest of one or the attachment of one's property is in pursuance of the execution of law authorizing such arrest or attachment. The measures adopted under the Epidemic Diseases Act, for the prevention of plague, would, for instance, be in execution of the law, namely, the Epidemic Diseases Act.[2] Process means a measure, and a "legal process" would similarly mean a measure in accordance with law. A notification issued in accordance with s. 30 of the Police Act prohibiting processions without license is one such process.[3] In either case the act or process must necessarily be legal, and the illegality of resistance would thus be judged by its legality.

"Second."

1336. Commission of any Offence.—This clause is not free from avoidable ambiguity. It says that an assembly is unlawful, if its common object is "to commit any mischief or criminal trespass, or other offence." Now, strictly speaking, the other offences must be *ejusdem generis*; otherwise the preceding enumeration was unnecessary. But the clause is intended to include all offences both against person and property, and not only mischief, criminal trespass and *ejusdem generis*. Where in a partition case a *kutcheri* house was allotted to one party but a formal deed of exchange had remained to be executed it was held that the mob who invaded and destroyed the house were guilty of mischief and therefore of rioting under this clause.[4] So where the mob had looted a crop which was their common object, but there was nothing to fix individual responsibility for the theft, a conviction for rioting was held to be appropriate.[5]

"Third."

1337. Forcible Possession and Dispossession.—Similar ambiguity pervades the language used in this clause, which by the way, was not a part of the original Bill. As it stands, it would seem to prevent the use of force for (*i*) taking or obtaining possession of any property

"Fourth."

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(1) Ss. 95-100.
(2) Act. III of 1897.
(3) *Abdul Hamid*, 2 Pat. 134 F. B.; *Vadlamudi*, 54 M. 1025; *Ramchandra*, 55 B. 725; *Ramendra Chandra*, 58 C. 1303.
(4) *Tanak Chaudhury*, (1923) Pat. 351,
(5) *Chandra Mohan Singh*, 56 I.C. (Pat.) 512.

moveable or immoveable, corporeal or incorporeal, (*ii*) to enforce *any* right, and (*iii*) to enforce any *supposed* right. The first clause relating to possession and dispossession is particularly ambiguous, if it is taken in conjunction with the second clause. For was it intended to enact that a person having a perfect right to property is under *no* circumstance entitled to vindicate that right by the use of force? If so, the clause is in sharp conflict with the general principles of English Law, and the right of private defence as described in the Code (§ 936.) Suppose, for example, that a person is surrounded by dacoits who rob him of his property. He has undoubtedly the right of defending himself against his assailants and for this purpose, he may enlist the co-operation of others. Suppose now five persons so assist him in beating off the dacoits; are they not entitled to use criminal force to take (*i.e.*, recover) possession of their property? To deny them that right would be absurd and yet this is what the clause leads up to. Then, again, suppose that a person is entitled to a land, and has been in undisputed possession of it. If another commits a trespass, has he no right of turning out the trespasser and to use force for that purpose?

Right of Procession.

1338. Curiously the Indian cases decided on the subject do not appreciate the difficulty presented by the literal reading of this section. They have been commented on before (§§ 855-863), and it is perhaps not necessary to advert to them once more. It will suffice here to state that it is undoubtedly the right of every person to use force within the limits prescribed by law, in defence of his or another's person and property. If, therefore, the use of such force is justifiable under one section, it cannot be held unjustifiable under this or any other section. And the fact that such an act may cause the breach of peace, is no reason for denying him his right, for to hold otherwise would, to use the words of Field, J., "amount to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act."[1] This observation was made in the case of the Salvation Army, who, in defiance of the Police order to desist from marching out in a procession led a procession in the exercise of their right of way, though they knew that they would be attacked by a counter organization, of "The Skeleton Army" formed to oppose them. The Salvation Army were prosecuted for rioting but were acquitted on the ground that they were exercising their legal right of way.[2] This view was followed in India in a case where the accused had carried their idol in a procession.[3]

1339. Now if this view is right, the view taken in some of the Indian cases must be necessarily erroneous, unless, of course, there is anything to shew that the Indian Code had deliberately laid down a rule at variance with itself and the English Law. Indeed, in a case of the Punjab Chief Court, the difference in view was held to be due to the difference between the two systems[4] but that alone would not reconcile the Code with itself. However, whichever view may be right the conflict of views on so important a subject is regrettable. For, as before noticed, the Courts in this country are not agreed as to the legality of the use of force to vindicate one's right or possession of property. There are cases in which such a right is admitted.[5] On the other hand there are those in which it is unequivocally denied.[6] There are

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(1) *Beatty* v. *Gillbanks*, 9. Q. B. D. 308.

(2) *Beauty* v. *Gillbanks*, 9 Q. B. D. 308 (314); 5 M. H. C. R. (App.) 6. To the same effect, *Kandasamy* v. *Subraya*, 32 M. 478; *Mannada* v. *Nallaya*, *ib.*, 527; *Sengodan*, 15 I. C. (M.) 806; *Deebakar*, (1927) C. 520.

(3) *Mukka Muthrian*, 31 I. C. (M.) 343.

(4) *Per* Plowden, J., in *Rasul*, (1889) P. R. No. 4; contra *Habib*, (1877) P. R. No. 5; *Kuttan*, (1870) P. R. No. 13.

(5) *Birjoo Singh* v. *Khub Lal*, 19 W. R. 66; *Shunker Singh* v. *Burmah Mahto*, 23 W. R. 25 (Right to restore the *status quo ante* admitted); *Denonath* v. *Rajcoomar*, 3 C. 573; *Bikku Koer* v. *Marshman*, 5 C. W. N. 368; *Panch Kouri*, 24 C. 686; *Ram Khelawan Singh*, 36 C. 827; *Chanduka Sheikh*, 22 I. C. (C.) 993, *Ahmad* 11 Pat. 523, *Baij Nath*, 36 C. 296; *Deputy Legal Remembrancer* v. *Matukudhari*, 32 I. C. (C.) 137; *Narsang Pathabhai*, 14 B. 441*a*; *Sarabdawan Singh*, 23 I. C. (O.) 134; *Suba Singh*, 37 I. C. (L.) 318; *Gita Prasad Singh*, (1924) Pat. H. C. C. 29; *Jageshwar*, 40 I. C. (A.) 311 *Lila*, (1922) O. 228; *Indrajit* 10 O. L. J. 40;, *Ram Krishna*, 66 I C. (Pat.) 817; *Lashkari*, 3 S. L. R. 343.

(6) *Jairam*, 35 C. 103; *Kabiruddin*, 35 C. 368; *Maniruddin*, 35 C. 384; *Ambica Lal*, 35 C. 443; *Baijnath Dhanuk*, 36 C. 296; *Rasul*, (1889) P. R. 4, *Ganouri Lal*, 16 C. 206 (219) followed in *Gayasuddin Anant Pandit* v. *Madhusudan*, 26 C. 574.

again cases in which the use of force is held justifiable only for the purpose of *maintaining* a right or possession, though not enforcing a right or obtaining or even regaining possession.[1]

1340. But these cases do not exhaust all the contingencies arising under the clause. For a person may have a right to a thing as well as possession, or merely one without the other which another person may claim or possess. What are then the rights of the two against each other, and how far is one entitled to enforce them against the other by application of force. Suppose, for instance, *A* has both the right to as well as possession of his land, which is threatened by *B*. Is *A* entitled to protect himself against the aggression of *B* by the use of force? If so, what force? In the exercise of his right of private defence he may employ force, but under this section he may not employ more than five persons for that purpose; but if he is at all entitled to use force, surely its adequacy must be determined by the nature of emergency and not by any rule of law. The solution of the question must, therefore, depend not upon the reconciliation of the rules, not upon any adventitious grounds, but upon the true principle dictating their enactment. And the questions that call the two rules into play are of daily occurrence and may arise under varying circumstances and conditions. For instance :—

(1) *A* may have both the right to as well as possession of his land, but *B* may threaten *A's* possession of it.[2]

(2) *A* may have only the right and *B* the possession, and A may like to recover possession from *B*, or conversely.[3]

(3) *A* may be in peaceful possession of land of which the title is in *B*, and *A* may resist *B's* forcible entry upon land in his possession.[4]

(4) *A's* peaceful but wrongful possession may be of a short duration in which case *B* may use force to eject *A*,[5] unless *A* had acquiesced in the latter's possession.[6]

(5) *A* and *B* may both be entitled to join possession.[7]

(6) In the last case *A* or *B* may, however, be in separate peaceful possession.

(7) *A* and *B* may be both jointly entitled to the land.

(8) There is a *bona fide* claim of right on both sides.[8]

1341. In short, the question is how far is a man justified in resorting to force for defensive purposes both for the purpose of retaining what he has got, and recovering what he has a right to. It would seem that the decided cases recognize the legality of the use of force in the former case ;[9] but this can only be because this section offers no impediment to the exercise of that right, but if so, one fails to see why a different rule should prevail in the latter case, though the Courts undoubtedly emphasize the difference[10] (§§ 935-941). There are however cases, where this divergence of view cannot influence the decision. No person can have a right to prevent by force another person dealing with his own land merely because he may have some right of easement or customary right over a portion of that land, of which right

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(1) *Moher Sheik*, 21 C. 392; *Silajit*, 36 C. 865; *Nandan Prasad*, 20 I. C. (C.) 623; *Lashkari*, 8 S. L. R. 343; *Sarabdhawan Singh*, 23 I. C. (O.) 184; *Samba Pillay*, 35 I. C. (M.) 823; *Mihan Singh*, (1914) P. R. 26; *Jageshar*, 40 I. C. (A.) 311.

(2) *Ram Nandan*, 20 I. C. (C.) 623.

(3) *Gayaprasad*, (1924) Pat. H. C. C. 29.

(4) *Ram Krishna*, (1922) Pat. 197.

(5) *Sarabdawan Singh*, 23 I. C. (O.) 184; *Ram Nandan*, 20 I. C. (C). 623.

(6) *Chandulla*, 22 I. C. (C.) 993.

(7) *Ib.*

(8) *Reajaddin*, 26 I. C. (C.) 173 in which, according to the Calcutta High Court, the use of force is presumably justified. *Deputy Legal Remembrancer* v. *Matukdhari*, 32 I. C. (C.) 137; contra *Gulam Hoosein*, 11 Bom. L. R. 849; *Sarabdhawan Singh*, 23 I. C. (O.) 184.

(9) *Punni Basara*, 2 I. C. (M.) 613; *Ayya Annasamy*, 25 M. 624, *Shunker* v. *Burmah*, 23 W. R. 25; *Pachkauri*, 24 C. 686; *Poresh Nath Sircar*, 33 C. 295 (305); *Jhalku*, 21 I. C. (C.) 382; *Baij Nath*, 36 C. 296; *Ram Nandan*, 20 I. C. (C.) 623; *Ram Khelawan*, 36 C. 827; *Ranga Gownden*, 30 I. C. (M.) 700; *Silajit*, 36 C. 865; *Fatesh Singh*, 41 C. 43; *Sarabdhawan Singh*, 23 I. C. (O.) 184.

(10) *Bepin Behari* v. *Pranakul*, 11 C. W. N. 176. *See* the subject further discussed in the Introduction. 1 Penal Law (4th Ed.)

he is not at the time in actual enjoyment. It is not unlawful for the owner to defend his right to deal with his land.[1] The accused were playing music in celebration of their festival. A gentleman feeling annoyed by the noise seized their drum whereupon they assaulted him. It was held that the assailants, though guilty under s. 352, could not be convicted of this offence.[2] A person is entitled to defend not only his private and personal rights, but also his public right, *e.g.*, his right of way. For instance, where the Municipality had leased out the right to collect tolls from persons exposing goods for sale on the road way, persons who obstructed such an attempt could not be denounced as forming an unlawful assembly.[3] An assembly lawful in itself does not become unlawful merely by reason of its lawful acts provcking others to do unlawful acts or by reason of their repelling an attack made by such persons upon them.[4]

1342. Bona Fide Claim Protected.—Not only a right but a *bona fide* claim is protected by reason of s. 79. Where two rival Zemindars were at law, and the Magistrate acting under s. 146 of the Criminal Procedure Code attached the disputed property and placed it in the management of a Receiver but omitted to give him any direction regarding its management. There was a dispute regarding the tenants, grazing rights thereon. The accused, who were tenants of one of contesting Zemindar obtained a lease of grazing rights. As such they objected to the tenants of the rival Zemindar ploughing up the land over which they claimed to have obtained a lease from the Receiver. It was held that their *bona fides* protected them.[5]

1343. Illegal Command to Disperse.—An assembly lawful in its inception does not become unlawful by the mere fact of its refusal to disperse in obedience to a command. To render it unlawful, the command to disperse must be lawful, that is to say it must not be a command given to a lawful assembly but to one which was or had become unlawful,[6] which it does not become merely because its presence is likely to provoke a breach of the peace.[7]

1344. Symbolical Possession.—Where a person has the right to defend his possession he has equally the right to defend his symbolical possession. Where therefore the judgment-debtor was ousted in the eye of the law, the decree-holder could not be convicted of rioting for using force to turn him out.[8] So upon determination of the tenancy the landlord is clothed with possession in the eye of the law, and he can use force to evict the tenant.[9]

Proof of Possession.

1345. It is of course, an elementary principle of criminal law that all the essential ingredients of an offence must be affirmatively proved by the prosecution, and that the measure of proof is not, as in a civil case, the balance of the evidence.[10] In some cases, *e.g.*, the case of rioting, trespass, and offences against property generally there might be some difficulty in attaining this standard of proof, but it is no reason for adopting any other standard. For instance, where the land upon which a riot was alleged to have taken place, was found to lie fallow on the day of occurrence, it was held that regard being had to the condition of land and the nature of the acts of possession on which the parties relied, the question of possession may have to be decided on the further question of title.[11] The accused attempted to rescue stolen cattle from the possession of the complainant and the Police who accompanied him, and in rescuing, caused grievous hurt to them. It appeared that the Police had not only recovered the stolen cattle but also seized some herds to which they had no right. They also carried off the herdsman who tended the cattle. The accused caused grievous hurt to the Police and some of the complainant's men and one of them (*B*) was severely injured by an accused who was his enemy. It was held that

(1) *Bhandhu Singh*, 6 Pat. 794 : (1922) (O.) 228; *Inderjit*, (1923) O. 167
(2) *Ram Prasad*, 30 I. C. (A.) 687.
(3) *Dhunmun*, 75 I. C. (Pat.) 176.
(4) *Mukka Muthrian*, 31 I. C. (M.) 343.
(5) *Beajaddin*, 26 I. C. (C.) 173; *Veerabhadra Pillai*, (1927) M. 986; *Dubakar* v. *Saktidhar Kabiraj*, 54 C. 476.
(6) *Girdhar Singh*, 64 I. C. (C.) 373.
(7) *Mukka Muthrian*, 31 I. C. (M.) 343; following *Beatty* v. *Gillbanks*, 9 Q. B. D. 308.
(8) *Ram Krishna*, 66 I. C. (Pat.) 817, (1922) Pat. 197.
(9) *Gayaprasad*, (1924) Pat. H. C. C. 29.
(10) *Panchanon*, 52 I. C. 881.
(11) *Panchanon* 52 I. C. 881.

though the accused were technically guilty of dacoity, the proper course was to convict the two assailants of the Police under s. 332 and the rest of rioting but that all the accused could not be constructively held liable for the specific act of *B*.[1]

1346. "Supposed" Right.—One thing is, however, clear. No one has the right to vindicate his "*supposed* right" by use of criminal force.[2] Such a right is in fact no right at all. It is a mere pretension to a right which does not exist. If people were to set up their own notions of what is right or wrong in vindication of armed force, it will be a plea available to every one who cared to raise it. Such a plea would be totally subversive of all security and order. So where a number of men assembled and forcibly interrupted a procession on the ground that they had a right to do so because it caused them annoyance and was a nuisance, they were rightly convicted of rioting as their action was held to be one clearly falling within this clause.[3] So where the disciples of Pussyfoot who pulled down a toddy shop and cut down the spathes of toddy trees.[4] Such also was the fate of those who joined to humiliate their adversaries.[5] It may also be conceded that the clause appears to be equally against the *deprivation* of any person of the possession or enjoyment of any property corporeal or incorporeal; but here again the word "deprive" must be understood to imply the possession of at least some right in the actual possessor. If this view is right then it is not difficult to reconcile the first clause to the general law. For the words "take" or "obtain" must then be understood in a sense antithetical to the word "deprive," that is, as excluding the right of recapture or retaking possession of property from which a person has been illegally dispossessed (§ 936). There may be again cases where both parties come determined to fight, the claim of a right being reduced to a mere pretext for fighting.[6] In such a case the assembly is unlawful not because the claim of right is immaterial, but because it was not the real object of the fight.

1347. Illegal Compulsion.—This clause is generally indeed, too generally worded. All it means, however, is that no one can use criminal force to illegally compel another to do or forbear from doing any act connected or unconnected with property. It is not sufficient to bring a case under this clause that the accused should have merely used criminal force or show of criminal force to take possession of property, unless the use of force was accompanied by some criminal intent. So where a number of men turned out to remove the pipes laid by the District Board Sircar to replace a bridge, on the ground that they would obstruct the flow of water, it was held that the object of the accused was not unlawful within the meaning of this clause.[7]

"Fifth."

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Being member of unlawful assembly.

1348. Principle.—The last section defines an "unlawful assembly." This section defines who is a member of such an assembly. All persons present at a meeting are not members, nor for that purpose is it necessary that all present should assent to its purpose. If a person attends a meeting innocently but he continues therein after he is made aware of its illegal purpose, he is so far as his legal responsibility is concerned, in the same predicament as if he had attended the meeting with previous knowledge and approval of its object. Such knowledge may be communicated to him at any time in any manner, directly or indirectly. If he is once apprised of it, it is then his duty to withdraw, failing which his presence will be construed as of one who had willingly joined the assembly with the purpose of furthering its

(1) *Ujagar Singh*, (1912) P. L. R. 223; *Ram Prasad*, 1 Pat. 753.

(2) 5 M. H. C. (App.) 6.

(3) Though in English Law the use of force even in the assertion of a supposed right is protected; *Phillips*, 2 M. C. C. 252, *s.c.* Langford Cr. N. 602.

(4) *Marimuthu*, (1923) M. 606.

(5) *Ram Sahay*, 57 I. C. (C.) 278.

(6) *Prag Dat*, 20 A. 459; *Mober Sheikh*, 21 C. 392.

(7) *Addaita Bhula* v. *Kali Das De*, 12 C. W. N. 96.

common object.[1] This rule is however made subject to the exception that his joining or continuance in the assembly should have been "intentionally." This excludes a case of one inveigled into an assembly by deception or misrepresentation. It is not, of course, necessary that a person should be aware of *all* the proceedings or purposes of the assembly. It is enough if he continued in it after being made aware of only so much as was sufficient to make it unlawful.

143. Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.[2]

Punishment.

1349. Analogous Law.—This section constitutes being member of an unlawful assembly an offence. It is not, therefore, necessary that the purpose of the unlawful assembly should have been achieved or that even an attempt should have been made in that direction. Law suppresses unlawful assemblies because, if not suppressed, they lead to more serious crimes.

1350. Procedure and Practice.—An offence under this section is cognizable, but summons may issue in the first instance. It is bailable but not compoundable. It is triable by any Magistrate and may be tried summarily. But in order that the accused may be so tried the offence must be strictly one under this section, and not one of graver kind, as for instance, rioting. Where therefore on the facts disclosed by the evidence the offence committed was one of rioting, but the Magistrate convicted them summarily under this section, it was held that the offence should not have been mitigated merely for the purpose of introducing a different jurisdiction, or a lower scale of punishment or of applying the summary mode of procedure and that if the accused so desired, they were entitled to a re-trial on the more serious charge.[3] This offence does not involve the use of force, so that a conviction under this section does not justify an order for security under section 106 of the Procedure Code.[4]

1351. Proof.—The points requiring proof are :—

(1) That there was an assemblage of at least five persons ; (§ 1327).
(2) That the object of the meeting was any of the five objects mentioned in s. 141;
(3) That the accused shared that object with at least four others of the meeting ;
(4) That the accused intentionally joined the meeting—
  (*a*) having knowledge of its object, or
  (*b*) continued therein after having had that knowledge.

1352. It lies on the prosecution to prove all the ingredients constituting the offence[5] which cannot be done merely by the opinion of witnesses, since the offence can only be proved by such facts as the cries of the rioters and the like.[6]

1353. Charge.—The charge should specify the unlawful common object of the assembly.[7] Where it is criminal trespass and it is compoundable, the members would still be liable to punishment under this section.[8] The charge may run thus :—

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(1) *Gendo*, 6 Pat. 828 (831); *Loganathaiyar* 4 I.C. (M.) 700 ; *Sheo Dayal*, 55 A. 689 (continues means physically present)

(2) As to duty to give information of offences punishable under ss. 143, 144, 145, 147, or 128, *see* the Code of Criminal Procedure.

As to the application of s. 141 to offences under special or local laws, *see* s. 40 *supra*.

As to punishment for an offence under s. 148, enquired into by a Council of Elders in a Punjab Frontier District, in the North West Frontier Province or in Baluchistan, *see* the Punjab Crimes Regulation, 1901 (III of 1901) s. 12.

As to dispersion of the assemblies, *see* the Code of Criminal Procedure, 1898 (Act V of 1898) Chapter IX.

(3) *Sardar Khan*, (1887) P. R. No. 5.
(4) *Rai Narain Bhagabat*, 35 C. 315.
(5) *Mahomed Ibrahim*, 112 I. C. (N). 902.
(6) *Joti Raot*, 105 I. C. (Pat). 234.
(7) 4 W. R. Cr. 9, (10) ; *Behari Mahton*, 11 C. 106 ; *Sabir*, 22 C. 276 ; *Tafazzul Ahmed*, 26 C. 633; *Poresh Nath Sircar*, 33 C. 296 ; *Kudrutullah*, 39 C. 781 ; *Soshi Bhushan* v. *Gobind Chandra*, 8 C. W. N. 663 ; *Budhu* v. *Mt. Lachmina*, 4 C. W. N. 599 ; *Gowardhan Das*, (1907) P. W. R. No. 38 ; *Ramasamy*, 31 I. C. (M.) 825 ; omission not fatal to conviction if evidence sufficient to support it ; *Kudrutullah*, 39 C. 781 ; provided the accused had the chance of meeting ; *Banga Hadua*, 5 I. C. (C.) 771.
(8) *Matti Venkanna*, 46 M. 257.

"I (*name and office of* (*Magistrate, etc.*), hereby charge you (*name of accused*), as follows:—

"That you——on or about the——day of——at——were a member of an unlawful assembly, the common object of which was (*here specify the object*) and thereby committed an offence punishable under section 143 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1354. Principle.—This section read with the last makes it penal to intentionally join an assembly, the object of which is illegal, or to continue, therein after the illegality of its object is known. The mere participation in a meeting is, therefore, not punishable under this section unless it is accompanied by knowledge and intention at least evidencing acquiescence in its object.

1355. Member of an Unlawful Assembly.— A person cannot be punished under this section, unless the prosecution are able to establish that (*i*) there was an assembly of five or more persons; (*ii*) that it was "unlawful" within the meaning ascribed to that term in section 141; (*iii*) that the accused was a member of that assembly; and (*iv*) that he was aware of its unlawfulness. The fact that there was an assemblage of men does not render the assembly unlawful within the meaning of section 141. It may by its number portend a breach of peace, but even that fact does not render an assembly illegal, though in that case it may justify an executive action, for the Code of Criminal Procedure empowers all Magistrates and officers in charge of police-stations to command the dispersal of not only unlawful assemblies but also of "any assembly of five or more persons likely to cause a disturbance of the public peace."[1] Even in such a case the assembly does not become unlawful merely because it continues without dispersing in defiance of the lawful order to disperse, for there is no clause under section 141 to say that an assembly refusing to disperse in obedience to a lawful command becomes an unlawful assembly. But it is conceivable that such an assembly may easily contravene the conditions of its legality, as if it overawes the public servants charged with the duty of dispersing it; or it may otherwise bring itself within the terms of section 141. In this connection, however, it may be stated that no one has the power to disperse an assembly on the ground that it was likely to cause a disturbance of the public peace, unless there were facts sufficient to satisfy the Court that the assembly was likely to cause such disturbance. A mere opinion of the Magistrate who ordered the particular assembly to disperse is not sufficient.[2] It is needless to add that no person can be convicted, as they were in the Punjab, for passing close to the village of their enemies.[3]

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[4]

Joining unlawful assembly, armed with deadly weapon.

1356. Analogous Law.—This section is an aggravated form of the last section, the aggravation consisting in the carrying of *lethal* arms which is itself a menace to peace, and which shows preparation and an intention to use force, and which has further the effect of overawing those against whom it is directed. The punishment in such cases, therefore, varies with the amount and nature of the danger threatened. The term "deadly weapon" does not occur in the original draft, in which the corresponding words used were "weapon for shooting, stabbing, or cutting." The term is now more general and would include not only those weapons but others having a deadly effect.

1357. Procedure.—An offence under this section is cognizable and warrant may issue in the first instance. It is bailable but not compoundable. It is triable by any Magistrate. A person armed with a deadly weapon may be tried

(1) S. 127, Cr. P. C.
(2) *Murlidhar*, (1887) P. R. No. 22.
(3) *Radhakrishan*, 15 I. C. (L.) 316.
(4) *Vide* footnote 2 on p. 504.

jointly with those not so armed, if they both were members of an unlawful assembly, though they may be separately charged with and convicted under this or the last section, as the case may be. When one person instigates another to join an unlawful assembly armed with a deadly weapon and afterwards joins the unlawful assembly himself, he may be punished under this section read with section 114, even though he was not himself armed with a deadly weapon.[1]

1358. Proof.—The points to be proved are the same as under the last section (§ 1351) in addition to which it must be proved that the accused was armed with deadly weapon, or with anything which used as a weapon of offence is likely to cause death.

1359. Charge.—The charge may run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——, being armed with a deadly weapon, to wit——(*or* armed with——which, used as a weapon of offence, is likely to cause death) were a member of an unlawful assembly, and thereby committed an offence punishable under section 144 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1360. Principle.—The gravity of an offence depends upon the gravity of consequences threatened or possible. A number of men armed with deadly or dangerous weapons are obviously a menace to public peace, and as they are capable of greater mischief so must be the punishment comparatively more deterrent.

1361. Meaning of Words.—"*Armed with deadly weapons*": A deadly weapon is a weapon which when used will probably cause death, *e. g.*, a gun, a sword or a spear. It means "anything which, used as a weapon of offence, is likely to cause death."

1362. Armed with Deadly Weapon.—The only distinguishing feature of an offence under this section is that a member of an unlawful assembly is armed with a deadly weapon. As such, he is liable to an enhanced punishment under this section, but only a person armed with a deadly weapon would be so punishable, others being punished under the last section.

1363. In order to render a person liable to the enhanced penalty provided by this section, it must be shown that besides being a member of an unlawful assembly he was armed with a "deadly weapon." The section does not define this term, but it obviously describes it by its effect, "anything which, used as a weapon of offence, is likely to cause death." The question whether a particular instrument is or is not *lethal* then depends upon whether it is or is not likely to cause death. It may not be designed as a weapon of offence, but if when so used it is likely to cause death, it is a deadly weapon whatever may have been its nature and character. A hatchet or a crowbar[2] would thus be a deadly weapon, for when used as weapons of offence, they are likely to cause death.

1364. So while an ordinary stick cannot be so described, still it may by its length and weight assume that character.[3] But it has been observed by the Calcutta High Court that "a *lathi* is not in itself a deadly weapon. It performs precisely the same function in ordinary life in this country as a walking stick does in other countries ; it is universally used by everybody in the *mofussil*, and it certainly cannot be regarded as in any way a dealdy weapon, unless and until it is used on the head or on some vital part of a person."[4] As to this it may be remarked that a weapon may be deadly, though it may be commonly carried by the people, and the true test of whether a *lathi* is a deadly weapon or not depends upon its size and weight. For instance, it cannot be doubted that the ferruled sticks usually carried by professional *lathials* are weapons of this description[5] and stout male bamboos cannot

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(1) *Shrihari* v. *Lal Khan*, 5 C. W. N. 250.
(2) *Mir Bayankhan*, (1935) Pesh. 65.
(3) *Nathu*, 15 A. 19.
(4) *Per* Holmwood and Sharfuddin, JJ., in *Parma Sing*, 9 I. C. (C.) 586.
(5) *Ib.*

be otherwise described.[1] The question is thus a question of fact solely dependent upon the effect which a given weapon is likely to produce upon a human being.[2]

1365. The section speaks of "whoever being armed" and which would seem to suggest that only persons actually so armed are liable to the enhanced penalty here prescribed. But it has been held that this is by no means necessary and a person may be convicted under this section, though he was not himself armed with a deadly weapon. Such a case has been held to arise when one person instigates another to join an unlawful assembly armed with a deadly weapon, and afterwards joins that assembly himself, in which case he may be punished under this section, read with section 114 of the Code, though he was not himself armed with a deadly weapon.[3] But this view has been controverted by another Bench of the same Court who held that the "whoever" could not mean any person other than the person actually armed with a deadly weapon. In their view no one can be subjected to the aggravated penalty provided by this section 148, on the ground of being constructively armed with a deadly weapon.[4]

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining or continuing in unlawful assembly knowing it has been commanded to disperse.

1366. Analogous Law.—This section is closely allied to section 151 and these two sections must be read with section 127 of the Code of Criminal Procedure. That section refers to the dispersal of an assembly of more than five persons if it is unlawful, or is likely to cause a disturbance of the public peace. This section prescribes the penalty applicable to the former as section 151 prescribes a similar penalty applicabale to the latter. As however the penalty for refusing to disperse an assembly likely to cause a disturbance of the public peace is less than that prescribed in this section, and as such an assembly may as well as be unlawful, the explanation appended to section 151 provides that such a case should be dealt with under this section. The provisions of both the sections are generally similar to the provisions of section 188 which is enacted to meet a general case of disobedience to an order duly promulgated by a public servant.

1367. Procedure and Proof.—An offence under this section is cognizable and warrant may issue in the first instance. It is bailable but not compoundable, and may be tried by any Magistrate.

1368. In order to establish a charge under this section all the four points necessary to establish a case under section 143 must be proved, in addition to which the following additional points must be further established :—

(5) That such unlawful assembly had been commanded to disperse.
(6) That such command to disperse was in the manner prescribed by law.
(7) The accused joined or continued in such unlawful assembly after it had been commanded to disperse.[5] A mere refusal to obey an order is not sufficient, since joining at consequence implies an overt act.[6]
(8) That he did so, knowing that it had been commanded to disperse.

1369. It is found that at the time of the order of dispersal the assembly did not consist of five persons but less, the Court may still proceed to deal with disobedience under section 188.[7]

1370. Charge.—The charge may run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows:—
"That you——on or about the——day of——at——, joined (*or* continued in) an unlawful assembly, knowing that such assembly had been commanded in the manner prescribed by

(1) *Krishtna Chetty*, (1882) 1 Weir 70.
(2) *Nathu*, 15 A. 19.
(3) *Shrihari* v. *Lal Khan*, 5 C. W. N. 250 (251, 252).
(4) *Sabir* 22 C. 276; *Ramcharan Rai*, (1899) A. W. N. 77.
(5) *Ramachandra*, 55 B. 725.
(6) *Satyanarayana*, 54 M. 1025.
(7) *Ambika Charan De*, (1933) C. 361.

law to disperse, and thereby committed an offence punishable under section 145 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1371. Though the common object must be placed in the charge, its omission to do so does not vitiate a conviction if there was sufficient evidence on record to bring home to the accused what the common object was.[1]

1372. Principle.—A person who joins or continues in an unlawful assembly after it has been legally ordered to disperse is guilty of contempt of the lawful authority of a public servant.[2] But this section, and section 151 deal specially with cases arising under this chapter. They are, however, cases of the same kind and are subject to the same rules. The provisions of this section are, however much stricter, and a case falling under this section could not be appropriately punished under section 188.

1373. Meaning of Words.—"*Knowing that such unlawful assembly*": The knowledge must be both of the unlawful assembly as well as of the fact that it had been commanded to disperse, and that command must have been "*in the manner prescribed by law to disperse.*" This evidently contemplates the adoption of a procedure similar to that prescribed by the English Riot Act,[3] under which the command to disperse must be in the form of a proclamation to be made in the King's name, and in a form there set out. Such a procedure does not obtain in this country, and there is therefore no "manner" prescribed by law for dispersing unlawful assemblies.[4]

Rioting.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

[***Unlawful assembly***—s. 141. ***Force***—s. 349.]

1374. Analogous Law.—Hawkins defines riot thus: "A riot is a tumultuous disturbance of the peace by three or more persons assembling together of their own authority with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."[5] In England this definition has been held to be good in cases arising under the Riot Act, which contains no definition of rioting.[6] And the definition here given is a mere adaptation of it.

1375. Principle.—The basis of the law as to rioting is the definition of an unlawful assembly, a riot being simply an unlawful assembly in a particular state of activity, that activity being accompanied by the use of force or violence. It is only the use of force that distinguishes rioting from an unlawful assembly.[7]

1376. Meaning of Words.—"*Force or violence*": "Force" is defined in section 349, and it has been used here in that sense.[8] Violence is force used to any object other than a human being *e. g.*, to a building or other property.[9] "*Or by any member thereof*": That member must, however, use force in prosecution of the common object of the unlawful assembly. If he uses force for a purpose of his own, he alone is liable.

1377. What constitutes Rioting.—A general analysis of the offence of rioting has been before set out (§ 1375). The offence involves (*i*) the use of force or violence; (*ii*) by an unlawful assembly, or by any member thereof; (*iii*) in

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(1) *Ramachandra*, 55 B. 725, following *Basiraddi*, 21 C. 827, *Kudrutulla*, 39 C. 781.
(2) S. 188.
(3) 1 Geo. I. st. 2, c. 5, s. 1.
(4) *Cf.* s. 127, Cr. P. C.
(5) Per *Hawkins*, 1 Hawk., P.C., c. 65, s. 1.
(6) 7 & 8 Geo. IV, c. 30, s. 8.
(7) *Per* Plowden, J., in *Rasul*, (1889) P. R. No. 4.
(8) *Ghani Khan*, 46 I. C. (O). 844.
(9) *Ib.*; *Venkata Subbier*, (1923) M. 603.

prosecution of the common object of such assembly. To beign with , then, there can be no riot without an unlawful assembly.

1378. All rioters must then be necessarily members of an unlawful assembly and therefore, even as such, they are liable to punishment under section 143. They are, however, guilty of something more, if they or any of them uses force in prosecution of the common object of that assembly. Now since the force causes motion, rioting is complete as soon as such motion is produced by a member in the manner described in section 349. Force, however slight and producing motion, however inconsiderable, is sufficient to complete rioting.[1] But there must be the actual use of force, and not merely a show of force, and the force used must be in prosecution of the common object. The words " force or violence " *vi et armis* are taken from the English Law.[2] and while the word " force " implies the use of personal violence, the word " violence " would seem to suggest the use of force to objects or things in *terrorem populi* ; as for example, the show of armour, turbulent gestures or the like. It is not necessary to constitute rioting that personal violence should have been committed.[3] Nor is it necessary that it should have been directed against a number of men. For if sufficient force be used to terrify a single person, the offence is complete, though no other persons were near enough to be within reach of the alarm.[4] The difference between a riot and an unlawful assembly is this : if the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot ; but if they merely meet upon a purpose which, if executed, would make them rioters and having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly.[5] It is only the use of force that distinguishes rioting from an unlawful assembly.[6] Passive resistance cannot be construed into the use of force or violence. Nor is the mere obstruction to carts and bullocks passing by a particular road, without interfering with the free passage of persons by the same, amounts to the use of criminal force within the meaning of this section.[7]

1379. Sudden Quarrel.—The mere use of force by a number of men assembled does not render all of them liable for rioting. The essence of the offence lies in the use of force to achieve a common purpose. This implies some degree of previous concert and deliberation. For if a number of persons having met together at a fair market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but only of a sudden affray of which none are guilty, but those who actually took part in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention.[8] So where in the midst of a marriage-procession in a mango-tope a person Tonnerre intruded and asked one of the party by name Noorul Hossein to supply him with coolies and on his stating that the coolies had run away, he began to use forcible language, whereupon Noorul became insolent and put his finger in his mouth, laughing at Tonnerre as he did so. Thereupon Tonnerre knocked his hand out of his mouth which was a signal for the 50 or 60 men assembled to assault him and to drive him out of the place. The men were prosecuted for rioting but it was held that they could not be convicted of that offence. The attack on him was sudden and unpremeditated and was caused no doubt by his striking the head-man of the party Noorul Hossein. None of the assailants knew of Mr. Tonnerre's intention to come to the tope, nor was there any intimation of any movement on their part until Mr. Tonnerre excited their indignation by his conduct to Noorul Hossein. The assembling of these men together in their own marriage-procession was perfectly lawful, and there is not the

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(1) *Ramadeen Doobay*, 26 W. R. 6 ; *Kura Khan*, (1868) P. R. No. 34.
(2) 1 Hawk, P. C. C. 65, s. 5.
(3) *Per* Lord Mansfield, C. J., in *Clifford* v. *Brandon*, 2 Camp. 369.
(4) *Phillips* 2 M. C. C. 252, s. c. *subnom ; Langford*, C. & M. 602 ; *Kanta Neya*, 2 C. (C.) 455 ; *Ghani Khan*, 46 I. C. (O.) 844.
(5) *Per* Patteson, J., in *Birt.*, 5 C. & P. 154
(6) *Per* Plowden, J. in *Rasul*, (1889) P. R. No. 4.
(7) *Kombola*, 27 I. C. (M.) 560.
(8) 1 Hawk, P. C. C. 65, s. 3 ; *Khajah Noorul Hossein* v. *Fabre-Tonnerre*, 24 W. R. 26.

slightest evidence that they had any evil intention towards any one. And, if this be so, then the disturbance which ensued was not a riot, and there could be no abetment of a riot on the part of the accused.[1]

1380. But it is no riot for a member of the audience in a public theatre to applaud or hiss a performance, but if a number of men come prepared to interrupt the performance by causing a disturbance, it may be rioting, though they may not use any personal violence or cause any injury to the house.[2] So where two parties meet without any intention to quarrel, but all of a sudden a fight ensues, in which both sides use force, it cannot be said to be a case of rioting in the absence of any evidence to prove previous concert,[3] which cannot be inferred from the mere fact of joint action, for such action may have been spontaneous and not necessarily the result of a previous design. Of course, such preconcert and design may be as much the result of mutual understanding as of a previous deliberation, but in such a case there must be facts from which such inference may be drawn. For this purpose the declarations of the parties assembling their badges and banners are all relevant for the purpose of showing their common object.[4]

1381. The common object of the assembly must " of course " be illegal. For there can be no riot where force is employed to vindicate a lawful right. The use of force on such an occasion is not only lawful but commendable.[5] The occasion on which force may be so used is, when one is entitled to the right of private defence. It is then not only lawful for one to use force, but also to use it sufficiently to preserve and protect one's right (§§ 890-899).

1382. The question whether the unlawful act was committed in prosecution of the common object of the unlawful assembly is a question of fact to be decided upon the circumstances of each case. As has been already pointed out, a person may participate in the common object only up to a certain time and extent ; he cannot then be held responsible for any act of the others done after he had definitely withdrawn from the assembly or had withdrawn his support. This question will have to be presently considered (§§ 1422-1425).

Punishment for rioting.

147. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

1383. Analogous Law.—This section prescribes a punishment for rioting as section 143 prescribes a punishment for being a member of an unlawful assembly. The next section deals with an aggravated form of the same offence, and it thus corresponds with section 144.

1384. Procedure and Practice.—An offence under this section is cognizable and warrant may issue in the first instance. It is bailable but not compoundable It is triable by any Magistrate but not summarily.

1385. Proof.—The Court has, of course, to find on the evidence given by the prosecution whether the charge alleged has been made out. It cannot construct a theory of its own and find it upon the alleged ground of its probability.[6] The petitioners were convicted of ss.148, 323 and 326-149, some under one, some under all the sections. The riot related to a dispute about possession of land upon which the Sessions Judge found that the riot had not taken place. He also found that the petitioners were in possession of it. The District Magistrate in his explanation combated the view of the Sessions Judge but the High Court refused to go behind the findings of the Sessions Judge, and set aside the convictions under ss. 148 and 326-149 and as regards s. 323 it found that the petitioners had not exceeded the

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(1) *Per* Glover, J., in *Khajah Noorul Hossein* v. *Fabre-Tonnerre*, 24 W. R. 26 ; *Doolubh*, 2 N. L. R. 883.

(2) *Clifford* v. *Brandon*. 2 Camp. 358.

(3) *Mozhur Hossein*, 5 N. W. P. H. C. R. 208.

(4) *Per* Holroyd, J., in *Redford* v. *Birley*, 3 Stark, N. P. C. 79 ; *per* Mansfield, C. J. in *Clifford* v. *Brandon*, 2 Camp. 370.

(5) 1 Hawk. P. C. C. 65, s. 2.

(6) *Fateh Sher*, (1913) P. W. R. 35, 21 I. C. 593 ; *Kalu Khalashi*, 19 I. C. (C.) 1002 ; *Sheobans Singh*, 42 I. C. (A.) 997.

right of private defence.[1] The question whether there is a right of private defence is a matter which can be dealt with by the High Court as a pure point of law.[2] It is competent to the Court to charge the accused with two or more common objects in the alternative and to convict them if at least one of them is proved.[3]

1386. The points requiring proof under this section are :—

(1) That five or more persons were assembled.[4]
(2) That they constituted an unlawful assembly, within the meaning of section 141.[5]
(3) That the accused was a member of that assembly.
(4) That force or violence was used by any member of that assembly.
(5) That it was used in prosecution of its common object.

1387. Since the participation of five persons is an essential ingredient of the offence it follows that the acquittal of one or more of them is fatal to the prosecution.[6]

1388. Charge.—The charge under this section must specify the common object of the unlawful assembly (§§ 1327-1347). But the omission to set it out has been held to amount to a mere irregularity and one which does not necessarily vitiate the conviction unless it appears that the omission had prejudiced the accused.[7] Where, therefore, the rioting was in respect of property claimed by the opposing factions, the omission to specify it in the charge would be taken to have prejudiced the accused.[8] But where the accused is charged under this section with the common object of causing grievous hurt to *B*,[9] where the charge specified one common object and there was no evidence to support an omission by the Magistrate to state that it had been proved, it was held to be a mere irregularity not prejudicing the conviction.[10] But generally speaking, the proof of the common object stated in the charge is a *sine qua non* to a legal conviction under this section.[11]

1389. Where the common object stated in the charge against the petitioners was to take possession of some property by criminal force, or to enforce a right or supposed right to it, and the Appellate Court found that the opposite party had been trying to encroach upon the land decreed to the petitioners, and that the occurrence was the result of the complication, which the opposite party was trying to introduce by stealthy wrongful acts, it was held that the common object alleged in the charge had not been made out, and that the accused were therefore entitled to be acquitted.[12] Where a charge, as drawn up by the Magistrate, alleges several alternative common objects of the unlawful assembly, and the Magistrate omits to specify any common object as proved, the Appellate Court cannot on that ground alone reverse the conviction ; for it is then its duty to see if it is not sustainable by proof of any of the common objects stated.[13] But such common object must be apparent from the evidence.[14] It is a matter of evidence and not of inference and it must be found,[15] though the finding may be an inference deducible from evidence.[16] But the case is manifestly different where there were two possible common objects and it was not apparent which of them had been accepted by the Court.[17] Where the object was assault, there can be no conviction upon proof of arson.[18]

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(1) *Jhalku*, 21 I. C. (C.) 382 ; *Laxmanrao*, 150 I. C. (N.) 1028.
(2) *Baburam*, 19 I. C. (C.) 951.
(3) *Harinder Singh*, 42 I. C. (Pat.) 142.
(4) *Sadho*, 152 I. C. (A.) 108.
(5) *Mahesh Dutt Singh*, (1920) Pat. 127.
(6) *Ata Muhammad*, (1923) L. 692 ; distinguished incontra *Rahman*, (1926) L. 521 ; to the same effect, *Feroze Din*, 111 I. C. (L.) 443, *Venkadu*, (1930) M. 532 ; *Sadho*, 152 I. C. (A.) 108.
(7) *Budhu* v. *Mt. Lachminia*, 7 C. W. N. 599 ; *Poresh Nath Sircar*, 33 C. 295 ; *Gowardhan Das*, (1907) P. W. R. No. 38 ; *Kadrutulla*, 39 C. 781, followed in *Ramchandra*, 55 B. 725. *See* also 9 C. W. N. 599 ; *Babu Hasanali*, 30 Bom. L.R. 653, contra. It vitiates the conviction, *Allah Dad*, 75 I. C. (L.) 731.
(8) *Poresh Nath Sircar*, 33 C. 295 (304).
(9) *Sita Ahir*, 4 O. C. 168.
(10) *Dasarathi*, 36 C. 158, *Maharaj Singh*, 53 I. C. (N.) 488.
(11) *Gorripati*, 12 I. C. (M.) 216 ; *Allah Dad*, 75 I. C. (L.) 731.
(12) *Poresh Nath Sircar*, 33 C. 295 (304); *Sita Ahir*, 40 C. 168 ; *Ranga*, 9 I. C. (M.) 727.
(13) *Manaruddi*, 35 C. 718.
(14) *Dasarathi*, 36 C. 158.
(15) *Gorripati*, 12 I. C. (M.) 216 ; *Jadubar Singh*, 52 I. C. (Pat.) 494.
(16) *Birjubhukan*, (1923) N. 100.
(17) *Sabir*, 22 C. 276 ; *Poresh Nath Sircar*, 33 C. 295.
(18) *Aklumian*, (1928) Pat. 405.

1390. Where the common object of an unlawful assembly was stated to be the causing of obstruction to measurement and demarcation of khas mahal land and the prosecution failed to establish that the land on which the riot was alleged to have taken place was in actual possession of Government, the Court held the charge as laid not proved.[1]

1391. The opposing factions, though each forming an unlawful assembly cannot be both charged and tried jointly as they have not both the same common object.[2] They may have each the object of fighting but the object of an assembly *A* to fight with *B*, is not the same as of the assembly *B* to rout *A*. The proper procedure in a case of opposing factions is to hold two separate trials, the members of each faction being made witnesses against the others. A conviction for rioting cannot be supported where the common object of the six accused was stated to be to assault the complainant, but the Court found that the object of three of the accused was to seize the complainant's cattle.[3] It is, of course, not open to the Appellate Court to invent a common object not specified in the charge.[4] A smaller number than five might be convicted if there is evidence that five or more persons had taken part in the riot.[5] But unless at least five are shown to have the same common object they cannot be convicted of rioting.[6] Where a person was charged and convicted under this and section 323 his conviction cannot be altered in appeal to one under s. 160.[7] A person cannot be convicted of rioting and the causing of hurt where he has not been charged for it.[8] But it is not illegal to charge a rioter both for rioting and the causing of hurt or grievous hurt and the rest of his confederates for only rioting.[9] But a man charged under this section cannot be convicted under s. 352.[10]

1392. The charge should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows:—

"That you——on or about the——day of——at——were a member of an unlawful assembly, and in prosecution of the common object of such assembly, *viz.*, committed the offence of rioting, punishable under section 147 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1393. Essentials of Unlawful Assembly.—For a general commentary on the essential ingredients of rioting, reference should be made to s. 141 (§§ 1327-1331). In order to justify a conviction under this section all the five points noted before should be proved.

1394. In the first place there must be proof of the assemblage of five or more rioters. The mere presence of five or more persons does not constitute their assembly unlawful; since some of them might be *Spectator haud particeps*.[11] It is on the prosecution to show that the assembly was unlawful in the sense that term is used in this section. And there must be a finding to that effect in the absence of which the High Court would set aside the conviction.[12] The *nexus* which binds the assembly is the presence of a common object. It must also be found.[13] That object must, of course, be unlawful. In order to be lawful it must fall under one or more of the five sub-clauses of s. 141. It is not necessary that the object of the assembly should be initially

Assemblage of Five.

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(1) *Panchanan*, 52 I. C. (C.) 881.

(2) *Sheikh Bazu*, 8 W. R. 47; *Durzoola*, 9 W. R. 33; *Surroop Chunder Paul*, 12 W. R. 75; *Hossain Baksh*, 6 C. 96; *Bachu Mullah* v. *Sita Ram Singh*, 14 C. 358; *Chandra Bhuiya*, 20 C. 537; *Haibat*, (1881) P.R.No. 22; *Nawab*, (1881) P. R. No. 26; *Saifulla*, (1882) P. R. No. 15; *Nga Shwe Ya*, (1884) 1 Bur. 275; *Nga Shwe Zan*, (1885) 1 Bur. 331.

(3) *Aminulla*, (1922) C. 191.

(4) *Akbar*, (1924) C. 449.

(5) *Ramadhin*, (1924) A. 230; *Ramaswamy*, 14 M. L. W. 588.

(6) *Sinnaswami*, 16 M. L. W. 326.

(7) *Mahankali*, (1924) M. 375, contra; *Sabir Hussain*, 63 I. C. (A). 157.

(8) *Genu*, 26 I. C. (C.) 152.

(9) *Katwary Rai*, 39 A. 623, *Daulat*, 2 Luck. 264.

(10) *Strinivasalu Naicken*, 39 M. L. T. 409; But held that a person charged under this section might be convicted of affray under S. 160.—*Gulabchand*, (1927) N. 163.

(11) *Ramaswamy*, 69 I. C. (M.) 380.

(12) *Mahesh Dutt Singh*, (1920) Pat. 27.

(13) *Sabier Husain*, 63 I. C. (A.) 157.

unlawful, what is however, necessary is that no assembly is unlawful, unless its object is shown to be unlawful. But this is not all. Besides being unlawful, the assembly must use force, the use of the least amount of which would suffice to satisfy its requirement.[1] The general principles governing the offence have been set out under section 141. It is proposed here to supplement that commentary.

1395. Cumulative Sentence.—It should also be noted that rioting is a general offence, and other offences of a more specific kind may be committed therein. In that case the question arises whether the rioters cannot be punished both for rioting and the other offence. It has been held in some cases that since rioting involves the use of force, the rioters should not be convicted twice over for committing a single act, such as for example, rioting and trespass,[2] rioting and hurt,[3] and even grievous hurt,[4] but this view is explained in other cases to be confined only to cases in which it is not possible to identify the actual assailants, that is to say, where they are only constructively guilty of that offence under s. 149.[5] But other cases do not recognize this distinction holding that, since the use of force is a necessary ingredient of the offence of rioting, its use could not be treated as a distinct act and separately punished.[6] But of course this would not justify the use of unlimited force, and it is obvious that if in the course of rioting any member commits a specific offence, he is liable to be separately tried therefor. For example, where the common object of an unlawful assembly was to assault the police-officers in the discharge of their duty, and hurt was actually caused to some of them, the accused could not be convicted both under this as well as section 332. In such a case, the proper course is to convict the accused for the specific offence committed by them.[7] But should evidence as to who committed the specific offence be lacking, it is not necessary to frame a separate charge under section 332.[8] So where the common object of the assembly was to overawe the police in the lawful discharge of their duties, the use of criminal force for that purpose being a necessary ingredient to constitute rioting, the accused could not be punished twice over for the same act once for rioting, and then again for assaulting a public servant under section 353 of the Code.[9] Such was also the view taken in a case where in order to execute a sentence of the Panchayat the accused seized the complainant, blackened his face, placed him on a donkey and took him round the village whereupon they were convicted both of this offence as also of s. 355, but their conviction for the latter offence was set aside.[10]

1396. The same rule applies whatever may have been the offence which constitutes the unlawful object of the assembly. It may be mischief theft or abduction. So where several persons were charged with rioting and theft, and the common object of the assembly by which the rioting was caused was theft, it was held that they could not be convicted, both for theft as well as rioting, when the latter was but an element of the former.[11] So where an accused person was found with several others to have entered upon another's land with the common object of cutting the standing crops, and in prosecution of that common object hurt was caused, it was held that the accused could not be convicted and sentenced for criminal trespass as well as for rioting, inasmuch as the common object of the riot and the intention in the criminal trespass were substantially the same.[12] It has, however, been held in some cases that a person may be legally convicted both for

(1) *Nemdhari Singh*, 61 I. C. (Pat.) 833; *Kanta Neya*, 9 I. C. (C.) 455.
(2) *Kesireddi*, 8 I. C. (M.) 880.
(3) *Nilmony Poddar*, 16 C. 442, F. B. followed in *Ponniah Lopes*, 57 M. 643. *Fakira*, 114 I. C. (L.) 331.
(4) *Mangal Singh* (1916) P. R. No. 31.
(5) *Mohur Mir*, 16 C. 725; *Ferasat*, 19 C. 105; *Ram Angutha Singh*, 40 C. 511; *Mehpal Singh*, 41 C. 836.
(6) *Hardit Singh*, 10. I. C. (L.) 278; *Mangal Singh*, (1916) P. R. (Cr.) 31 (no separate sentences for riot and grievous hurt).
(7) *Gowardhan Das*, (1907), P. W. R. No. 38.
(8) *Sundar Singh*, 15 I. C. (L.) 92.
(9) *Ramdihal*, 3 C. W. N. 174; *see* s. 71 and Comm.
(10) *Koram Singh*, 67 I. C. (C.) 729.
(11) *Mithoo Singh* v. *Gopal Lal*, 3 C. W. N, 761; following *Nilmony Poddar*, 16 C. 442. F. B.; *Chandra Mohan Singh*, 56 I. C. (Pat.) 512.
(12) *Bhup Singh*, 8 C. W. N. 305; *Ariff Munshi*, 22 I. C. (C.) 764.

rioting as well as for causing hurt,[1] or grievous hurt ;[2] but a Full Bench of the Calcutta High Court has held otherwise.[3] But this was a case in which the person was accused of grievous hurt by application of section 149, on which ground it was distinguished in two cases of the Punjab Chief Court,[4] who held that there the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, the causing of the hurt was itself the form of force or violence which constituted the offence of rioting. In any case, it is not open to the Appellate Court to alter a conviction of rioting under this section with the common object of ejecting the complainants from their homestead land to one under section 323 in the absence of a specific charge thereunder.[5]

1397. As observed before, where any of the rioters is identified as causing hurt and grievous hurt, he alone is convicted of the specific offence found proved against him, the rest being convicted of rioting, unless of course the case falls within the terms of s. 34 or s. 149.[6] Where the infliction of such injury cannot be traced to any offender the courts rest content by recording a conviction under this or the next section.[7] Where the unlawful assembly composed of the accused became a riot by the causing of hurt and grievous hurt, it is not legal to pass separate sentences for the two offences of rioting and hurt or grievous hurt.[8] So where the accused had been convicted of rioting in that they were alleged to have attacked the police and obstructed them in the discharge of their duties as also of s. 332 upon the same facts the Court upheld the conviction under s. 332 and quashed it for rioting.[9] On a charge for rioting it is not legal to convict a person of assault or abetment of assault.[10] It has been held that where the common object charged was criminal trespass, the accused might be convicted of trespass though not specifically charged for that offence.[11]

1398. No Rioting.—It is possible to enumerate several cases in which there was no rioting. For example, where a number of persons went up to rescue another who was assaulted, and in doing so, some of them inflicted hurt and one of them who could not be identified, dealt a fatal blow, it was held that all the members could not be convicted of rioting as there was no unlawful common object, but that those who had caused hurt should be convicted of that offence.[12] A person who exceeds the right of private defence may be guilty of the offence proved against him but he can be only convicted of that offence and the sentence passed on him lenient.[13] It was held to be no riot where the accused went armed to turn out a party of men who had taken possession of, and ploughed up their land, upon which the accused had sown and harvested the crop. As observed before, mere disturbance of possession is not dispossession.[14]

1399. In one case three parties were involved. Party *A* had grown the crops. Party *B* cut and carried them away and stacked them in the field of party *C*. *A* went armed to recover their crops. *C* used force to resist *A*. The latter hit back. They were held justified in using such force as sufficed to repel the attack and recover their crops.[15]

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(1) *Ramadhin*, 2 A. 139; *Dungar Singh* 7 A. 29; *Mohur Mir*, 16 C. 725.

(2) *Pershad*, 7 A. 414 F B.; *Bisheshar*, 9 A. 645; *Jafir Khan*, (1885) P. R. No. 32; *Tokha*, (1895) P. R. No. 8; *Bhagwan Singh*, (1901) P. R. No. 4, (F. B.) ; contra *Mangal Singh*, (1916) P. R. No. 31; *Chhida*, (1926) A. 225.

(3) *Nilmony Poddar*, 16 C. 442, F. B.

(4) *Nur Khan*, (1894) P. R. No. 31; *Bhagwan Singh*, (1901) P. R. No. 4, F. B.

(5) *Lal Mohan*, 28 C. 293.

(6) *Ranga Koravan*, 9 I. C. (M.) 727.

(7) *Fateh Sher*, (1913) P. W. R. 35, 21 I. C. 593; *SundarSingh*, (1912) P. W. R. 14, 15 I. C. 92.

(8) *Bishna*, (1922) L. 405.

(9) *Kallu*, 67 I. C. (L.) 721.

(10) *Muthukanakku*, 65 I. C. (M.) 862.

(11) *Ariff Munshi*, 22 I. C. (C.) 764.

(12) *Ambika Singh*, 1 Pat. 212.

(13) *Bagri*, 36 I. C. (L.) 450 ; *Mihan Singh*, (1914) P. R. No. 28, 26 I. C. 652.

(14) *Sambu Pillai*, 35 I. C. (M.) 823.

(15) *Baburam*, 19 I. C. (C.) 951.

148. Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Rioting armed with deadly weapon.

[*Deadly weapon*—s. 144]

1400. Analogous Law.—This section bears the same relation to the last section as section 144 does to its predecessor. The offence for which the enhanced penalty is here provided is aggravated by the presence of deadly weapon (§ 1346).

1401. Procedure and Practice.—The offence under this section is cognizable, and warrant may issue in the first instance. It is bailable but not compoundable, and triable only by the Court of Session, a Presidency Magistrate or a Magistrate of the first class.

1402. Proof.—The points requiring proof are all those required to establish an offence under the last section (§ 1385), in addition to which must be proved the following :—

(6) That the accused was armed with a deadly weapon, or with something which used as a weapon of offence was likely to cause death.[1]

1403. Charge.—The charge should specify that the accused was armed with a deadly weapon, and it should then run thus :—

"*I* (*name and office of Magistrate etc.*,) hereby charge you (*name of accused*), as follows.—

"That you——on or about the——day of——at——, were a member of an unlawful assembly and did, in prosecution of the common object of that assembly, namely, commit the offence of rioting with a deadly weapon (*or* which used as a weapon of offence was likely to cause death) to wit——and thereby committed an offence punishable under section 148 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

1404. Meaning of Words.—"*Whoever.....being armed*," *i.e.*, only the person so armed can be convicted under this section.[2] For the meaning of the other words used in this section reference should be made to the commentary under section 144, where the terms here used have been explained.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

[*Offence*—s. 40. *Unlawful assembly*—S. 141.]

1405. Analogous Law.—A person may be constructively liable for an offence which he has not actually committed by reason of his being a member of a conspiracy to commit such offence, or because he was a member of an unlawful assembly, the members whereof knew that an offence committed by one of them was likely to be committed, or that it was the common intention of all to commit such offence. The first case is covered by s. 120-A, the second by this section and the third by s. 34. The distinction between these three cases of constructive liability has been dealt with under s. 34.[3]

1406. Procedure and Practice.—The procedure on trial for an offence under this section depends upon the nature of the offence committed. The offence is, however, in any case non-compoundable. Where riot was committed by two opposing factions, they must each be separately tried.[4] Since this section mixes

(1) But in *Mudurupavalagadu*, 96 I. C. (M.) 158—*held* accused need not be so armed.
(2) *Ratan Lal*, 8 Luck. 570.
(3) Cf. s. 34 Comm. §§. 270-275
(4) *Hossein Buksh*, 6 C. 96 ; *Chandra Bhuiya*, 20 C. 537 ; *Haibat*, (1881) P. R. No. 16 ; *Lal Triloknath*, 1 Oudh 75 ; *Nga Shwe Zan*, 1 Bur. 331 ; *Nga Shwe Ya*, 1 Bur. 275.

a person constructively liable for an offence committed by another, it is conceivable that he might be convicted both of being a rioter and for committing the offence ; *e. g.*, offences under s. 147 and s. 452.[1]

1407. Proof.—The points calling for proof to establish an offence under this section are :—

(1) That there was an unlawful assembly ; (S. 141 & com.)
(2) That the accused was a member thereof ; (S. 142.)
(3) That he intentionally joined or continued in that assembly ;
(4) That he knew of the common object of the assembly ;
(5) That an offence was committed by a member of such assembly ;
(6) That it was committed—
  (*a*) either in prosecution of the common object of the assembly, or
  (*b*) such as the members of the assembly knew to be likely to be committed in prosecution of their common unlawful object.[2]

1408. In order to render a person liable for his constructive criminality, the terms of the section must be strictly fulfilled. It must, for instance, be proved by the prosecution that the accused was a member of the unlawful assembly at the time the offence, for which he is held liable, was committed. It must, moreover, be shewn that the offence was committed by a member, known or unknown, of the unlawful assembly of which the accused is shown to have been a member.[3] Again, the section has no application where there is no unlawful assembly. So if the accused persons are acquitted of rioting they cannot be properly convicted of grievous hurt under s. 325 by the application of this section, which creates constructive liability, whereas s. 325 punishes the actual offender.[4]

1409. Charge.—The charge framed under this section should state with certainty, and accuracy, the exact nature of the charge brought against the accused. This is, of course, generally true in all cases, but it is especially true in a case where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.[5] So in a case tried by a jury, it is the duty of the judge not only to specify the common object in the charge, but in commenting upon this section expressly draw their attention to the common object.[6] A person charged for a constructive offence, *e. g.*, s. 325 read with this section, cannot be convicted of the substantive offence under s. 325.[7] On the other hand, it is said that a person charged under s. 353 alone might be convicted of that offence read with this section, though he was not so charged. But this case was really decided with reference to the prejudice caused to the accused and should not be taken as a decision for omitting a specific charge under this section.[8]

1410. The charge under this section should run thus :—

"*I* (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——,were a member of an unlawful assembly, and in prosecution of the common object of which, namely,——(*specify the object*) one of the members of the said assembly caused (*specify the offence*) to——,and you are thereby under section 149 of the Indian Penal Code, guilty of causing the said offence which is punishable under section——of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (*in case of committal by the said Court*) on the said charge."

1411. Principle.—The Court prescribes three cases of constructive liability, some of which would overlap in practice. The widest liability is where two or more persons agree to commit an illegal act, in which case they become members of a conspiracy, but not of a criminal conspiracy punishable under s. 120-B for which one of them must do some overt act in pursuance of the agreement. This

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(1) *Sheo Nath*, 97 I. C. (L.) 804.
(2) *Suba Ahir*. (1927) Pat. 27.
(3) *Rasul*, (1889) P. R. No. 4.
(4) *Abhi Misser* v. *Lachmi Narayan*, 27 C. 566.
(5) *Behari Mahton*, 11 C. 106 ; *Dasrath Mandal*, 34 C. 325.
(6) *Mangan Das*, 29 C. 379.
(7) *Pertap Rai*, 56 I. C. (Pat.) 231 ; *Qadir Baksh*, (1925) L. 539 ; *Abhi Missar* v. *Lachmi Narain*, 27 C. 566 ; *Kudrutullah*, 39 C. 781 ; contra, *Dhian Singh*, (1915) P. R. (Cr.) 16.
(8) *Ramasray Ahir*, 7 Pat. 484.

section requires the consensus of five persons to do an unlawful act prohibited by s. 141, in addition to which, in order to create a liability under this section, there must be proof that the accused knew that the offence committed by one member of the assembly was likely to be committed by any of them. As such, the rule here enacted is, as regards the *mens rea*, somewhat wider than that enacted in s. 34, Though both deal with constructive liability, that is to say, liability for an act not actually done by the accused.

1412. Meaning of Words.—"*Offence*" in this section means an offence punishable by this Code, and not by a special or local law, *e. g.*, the Railway's Act.[1] "*In prosecution of the common object*": "In prosecution" here means in furtherance of the common object.[2] "Object" is distinct from "intention" mentioned in s. 34. *A* and *B* both start to kill *C*. *A* intends to do so because he is *C's* enemy; *B* because he wishes to rob him. Here the object of both *A* and *B* is to kill *C*, but their intentions differ.[3] The prosecution must be both in fact as well as in intention, "or such as the members of that assembly *knew to be likely*," in which case the offence need not be in prosecution of the common object. The word "or" is disjunctive and divides the two provisos. The knowledge of likelihood must come home to *all* the members, and not only to some of them. Indeed, if the knowledge of some only were sufficient, the test would be easy to satisfy, and the rule as good as neutralized, for, the actual offender would be presumed to possess such knowledge and that alone would be sufficient to fasten liability upon all. The word "knew" is not the same as "might have known" and implies the existence of facts from which a certain inference is so irresistible as to amount to a certainty.[4] This knowledge must be shown to exist at the time of the commission of the offence, and not knowledge acquired in the light of subsequent events.[5] "*Every person who is—a member*": The words "at the time of the commission of the offence" are important and imply that only persons who continue to be members of the unlawful assembly up to the time the offence is committed, are liable for it.

1413. Conditions of Constructive Liability.—This section bears a close analogy to other sections of the Code, *e. g.*, sections 34 and 111. The former section is more general, and it makes co-responsibility depend upon common intention. Section 111 defines the liability of the abettor for a different act done, if it is *inter alia* done in pursuance of the conspiracy, or if it was the probable consequence of the abetment. These provisions are closely analogous to the provisions of this section under which the liability of a rioter for the act of his confederate is made to depend upon similar contingencies. It is, indeed, evident that were it not for this section the accused's case would have been met by either of those sections, but this section has been enacted to declare him liable as a principal, and not merely as an abettor. But in so enhancing his liability the section takes care to restrict it by three exacting conditions which must be all strictly fulfilled and the non-fulfilment of any one is sufficient to absolve him. The section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by any one of its members during the time they are engaged in the prosecution of the common object.[6] Assuming that the accused was a member of an unlawful assembly, three other conditions must be fulfilled before he can be held responsible: (*a*) the offence must have been committed in prosecution of the common object (§ 1328)' or (*b*) the offence must be such as the members knew to be likely, and (*c*) the accused must have been a member of the assembly at the time the offence was committed (§ 1355). The first condition would cover an offence committed.

1414. Prosecution of the Object.—Now, by a member of an unlawful assembly engaged in prosecuting the common object, and acting with the purpose of executing such object, the commission of which executed or extended to execute

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(1) S. 40; *Aydrooss*, (1922) M. W. N. 800; followed in *Wasudeva Mudali*, 52 M. 882. *Thaikkottathil*, (1924) M. 338.
(2) *Ramaraja*, 53 M. 937 (942.)
(3) *Barendra Kumar Ghose*, 52 C. 197 (212) P. C.
(4) *Dhian Singh*, (1915) P. R. No. 15, 30 I. C. 737; *Dial Singh*, (1926) L. 419.
(5) *Khamiso*, 6 S. L. R. 101.
(6) *Mehapal Singh*, (1914) P. R. (Cr.) 26.

the common object. The second condition refers to an offence committed by such member, acting with such purpose, the commission of which did not execute or tend to execute the common object, but which offence was likely, to the knowledge of the members of the assembly, to be committed by a person so engaged, acting with such purpose.[1] The third condition is obviously necessary, for a person cannot be held responsible for an offence committed by an assembly from which he had withdrawn, and the object of which he may no longer have approved. This gives even a rioter a *locus pœnitentiæ*.

1415. Prosecution of the Common Object.—The test whether an offence is committed in prosecution of the common object is, whether the common object is prosecuted in fact as well as in the intention of the doer.[2] No offence can be held to execute the common object, unless the commission of that offence was involved in the common object. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. In one sense the prosecution of the common object is conterminous with the existence of the unlawful assembly.[3] In other words, there is an unlawful assembly only so long as there is prosecution of the common object of the assembly. In this sense the insertion of the condition in the present section would be as misleading as it would be meaningless. In order, then, that an offence be held to have been committed *in the prosecution* of the common object what would appear to be necessary is, that it must be *immediately* connected with that common object by virtue of the nature of the object.[4] For instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents, and in that case death resulting from the injury so caused would be homicide committed in prosecution of the common object. Take for instance, the common case presented by a number of men trying to take forcible possession of land in the occupation of another. Here the aggressors had a "common object" in view, that object being the ejectment of the person in possession, if necessary, by the use of force. All members of the unlawful assembly would then be so far liable whatever may be their individual share in the crime. But suppose, one of the members of the assembly commits murder, will all the members be equally liable for his act? It is certain that if there was evidence that the members of the assembly were prepared and intended to attain the common object at all hazards of life, if necessary by murder, then the murder would be regarded as committed in prosecution of the common object. On the other hand, if the members of the assembly did not intend to go to extremes, it cannot be said that the murder was committed in prosecution of the common object.

1416. But in such cases, the first condition can seldom be dissociated from the second. For suppose that in the case assumed, one of the members goes armed with a loaded gun, should the members then have presumed that there may be bloodshed and even murder? It is evident that such a presumption cannot be made from the mere possession of a gun by a member of an unlawful assembly.[5] For they may be perfectly aware that their opponents being unarmed would offer no resistance. The question is, therefore, a question of fact to be determined upon all the circumstances of each case. If suppose, in the example given, the party in possession were unarmed and numerically inferior, the aggressors could not be deemed to know that dispossession was only possible with loss of life. In such a case if the persons in possession offer unexpected resistance, and one of the aggressors thereupon fires his gun, killing one of his adversaries, the other members could not be held liable for his act which was not done in prosecution of the common object.[6] But if in

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(1) *Madat Khan*, (1887) P. R. No. 61.
(2) *Din Bundo*, 9 W. R. 19.
(3) S. 141.
(4) *Sabid Ali*, 20 W. R. 5 (8, 9), (F. B.,) followed in *Hari Singh*, 3 C. L. R. 49; *Raghunandan*, (1935) O. 52; *Jahiruddin*, 22 C. 306; *Krishnaro*, 5 B. L. R. 1023. *Ahmed*, (1927) S. 108.
(5) *Sabid Ali*, 20 W. R. 5 at pp. 9 & 10. But *see* where dacoits started out armed; *Dhian Singh*, (1915) P. R. No. 15, 30 I. C. 737.
(6) *Sabid Ali*, 20 W. R. 5 (F. B.) To the same effect *Lekha Singh*, (1933) O. 53.

such a case the unlawful assembly had been formed to commit an assault upon another person, the liability of the members might have varied, for the Court might then have assumed that the loaded gun was taken for that purpose.

1417. The case would, of course, be worse where the rioters shout "*Maro*" and thereupon some of them draw swords,[1] or where all take part in the beating which ends in death.[2] In such case the criminality of persons other than the actual offenders, depends upon the nature of the common object, the necessity of using force, the preparation made, and the resistance expected. A party of men proceeding to abduct a woman from the custody of her guardian, may well expect to encounter resistance. If, therefore, they all go out armed, it cannot but be presumed that they intended to use any force that the circumstances may require. In such case, the joint liability of all the members, for the death caused by one in the fight is unquestionable.[3] In another case the facts were these : About twenty-five men armed with *lathies* and *soorkhis*, and one with a gun, went to dispossess one Azim and to cut and carry off his paddy crop. Azim made a stand against his aggressor, *dao* in hand, threatening to attack any one who came upon his land. Upon this several of the accused got into the land and an altercation ensued. It led to abuse and one of the accused snatched the gun from another who was carrying it, and with it he shot Azim dead. The accused were all prosecuted for murder, but the Judges having differed as to the applicability of the Full Bench case,[4] the matter was referred to a third Judge who found that the deceased had undoubted title to the land, that the act of the accused was a "deliberate attempt to obtain by violence that which the law had declared to belong to the party assailed. They therefore knew that the use of violence was inevitable. The gun was carried by Tureebollah, who was the leader; and all could see and know that he carried it. They could, therefore, perfectly understand that the deadly use of the fire-arm was among the probabilities of which they took the risk; in other words, that the commission of murder was likely to follow." All the accused were, therefore, found guilty of murder.[5] Here it will be observed that the accused's invasion on Azim's land was destitute of any claim or title. The accused, moreover, knew that Azim would resent their aggression, and they had prepared themselves for the worst.

1418. The case is covered by the rule that where persons prepare themselves to resist all opposition, they are then all jointly responsible for the result, whatever may have been their individual expectations (§§ 262-291). So where persons encourage their confederates to strike, and thereupon an assault is committed, all have been held to be jointly liable for the result,[6] if they knew that it was likely. But where a party had started to give a severe beating to their opponents and in the course of the fight death was caused, but it was not possible to ascertain the various persons who struck each of the persons who were killed, though one of them was found to have been the first to knock down one of the deceased, it was held that he was guilty not of murder but of culpable homicide and that the rest of the assembly were all guilty of grievous hurt since it could be safely presumed that it was what they had all intended.[7]

1419. Liability Determined by Knowledge.—This raises the second question : Did the accused know that the offence committed was likely to be committed in prosecution of the common object of the assembly? The expression "*knew* to be likely to be committed" imports at least an expectation founded upon facts known to all the members of the assembly, that an offence of the particular kind committed would be committed. It means something more than a speculation that such an offence might happen to be committed.[8] As Pontifex, J., remarked

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(1) *Dushruth Roy*, 7 W. R. 58.
(2) *Gour Chunder Das*, 24 W. R. 5.
(3) *Golam Arfin*, 13 W. R. 33.
(4) *Sabid Ali*, 20 W. R. 5 (F. B.)
(5) *Hari Singh*, 3 C. L. R. 49. To the same effect, *Nazoo Fakir*, 4 W. R. 26. *Tiruvu Tewan*, 1929 M. W. N. 899.
(6) *Dushruth Roy*, 7 W. R. 58.
(7) *Baukan Singh*, 60 I. C. (O.) 679; *Imam Din*, 3 L. L. J. 245.
(8) *Madat Khan*, (1887) P. R. No. 61; *Dhian Singh*, (1915) P R. (Cr.) 16; *Hardeo Singh*, 60 I. C. (Pat.) 567.

in the Full Bench case already referred to "the word 'knew' used in the second branch of the section, is, I think, advisedly used, and cannot be made to bear the sense of 'might have been known'."[1]

1420. But as Couch, C.J., observed in the same case: "There does not seem to be much distinction between the two parts of the section, and.....the cases which would be within the first offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object."[2] A case of this kind may occur in a case like this. Persons assemble with a view to attacking and plundering the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking or the other offences which would be included in such acts, as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object; and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part of the section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object but which was not committed in the prosecution of it.[3]

1421. In order to make a man liable under this clause two things are essential: (*a*) that the offence should have been committed in prosecution of the common object; and (*b*) that all the members of the unlawful assembly must have known that such an offence was likely to be committed. In this, as in the previous case, the question is again one of fact, dependent upon the proved circumstances of each case. Of course, the knowledge here spoken of is not, and indeed, cannot be, sensual perception of a fact, for that fact is still to be. Knowledge must then necessarily mean consciousness of such facts from which an inference as to the happening of a certain result is probable. Thus, if five men go out armed with heavy *lathies* to attack another party of men, and one of them alone inflicts grievous hurt, all the five may be convicted of causing grievous hurt, for the grievous hurt was an incident, which each and all of them must, as reasonable men, have known was likely to occur in the prosecution of such common object.[4] But if in such a case one of the accused armed himself with a gun, should the others have known that death was likely to be caused? The carrying of a gun was undoubtedly a fact from which the accused may infer that death *may* be caused, but its *livelihood* cannot be necessarily inferred, for it depends upon other circumstances (§§ 1422-1425).

1422. Limits of Constructive Liability.—Now a person may join an unlawful assembly with an unlawful object, but it does not necessarily follow, that he indorses all that the other members say or do. Nor is he therefore responsible for their acts of which he was not clearly cognizant. For example, two persons may be induced by another to assist him in thrashing his enemy with whom he had had a quarrel. They may consent to lend him their assistance so far, but if he had secretly planned to kill him and does so, they cannot be held responsible for his act.[5] This shows that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence the effect of this section may be different on different members of the same unlawful assembly.[6] In dealing with such cases, it is on the one hand, necessary for the protection of accused persons, that they should not, merely by reason

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(1) *Sabid Ali*, 20 W. R. 5 (12), (F. B.)
(2) *Sabid Ali*, 20 W. R. 5 (10), (F. B.)
(3) *Sabid Ali*, 20 W. R. 5 (10, 11), (F. B.)
(4) *Ram Pertab*, 6 A. 121; *Krishnarao*, 5 Bom. L. R. 1023; *Chundersunngjee*, (1869) P. M. J. 14; 2 P. R. 1887.
(5) *Duma Baidya*, 19 M. 483; *Bhola Singh*, 29 A. 282; *Krishnarao*, 5 Bom. L. R. 1023.
(6) *Jahiruddin*, 22 C. 306.

of their association with others as members of the unlawful assembly, be held criminally liable for offences committed by their associates, which they themselves neither intended nor knew to be likely to be committed; on the other hand, it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties of offences for which, though committed by others, the law has made them liable by reason of their association with the actual offenders with one common object.[1]

1423. The first requisite of the rule is, that the person sought to be held liable for the act of another should have been at the time of the commission of the offence, a member of the unlawful assembly. If therefore being as such, he took part in the fight, but being wounded he had to retire to attend to his own injuries, he could not then be convicted under this section for murder, if subsequently committed in the fight if continued.[2] In such a case he may still cherish a desire to rejoin his comrades, but being unable to encourage or assist them, he could be said to belong to an assembly which he was powerless to help. So if after the object of an unlawful assembly had been accomplished, one of the rioters entered into an altercation with another, causing him injury, the other members of his party could not be held liable for his act, for the community of purpose had then ceased. So where *A* was legally entitled to fish, and *B* illegally attempted to catch fish in *A's* waterhole, whereupon *A's* party came armed with sticks and drove off *B* and his men, who were in full fight when *C*, one of *B's* party entered into an altercation with *D*, who was *A's* partisan and whom he struck with a fish-spear, it was held that *C* alone was liable for the specific injury caused under the circumstances.[3] So if a number of men composing two parties *A* and *D*, go out to demand rent, and in doing so, they both abuse *C*, whereupon one *D* ordered *E* to seize *A*, and he thought that the best means of securing him was to knock him down first, for which he dealt him a blow and killed him. Here *B's* party could not be said to be members of the unlawful assembly, of which *A* and his men were members. And as regards *C*, though he had taken part in abusing *A*, and though he was a spectator of the scene enacted between *E* and *A*, he could not be held liable with *E* for the homicide of *A*, because he did not share with him in that object, nor did he do anything to abet *E*.[4] In another case, the accused had started armed with spears to forcibly bring away a woman from the custody of persons, who then knew, would resist her removal. In the struggle which ensued the accused speared the woman and her defenders with the result that the woman died of injuries and the others were seriously wounded. It was held that, since they did not start with the preconcert of bringing the woman dead or alive, the only offence of which they could be convicted were those punishable under ss. 147 and 326.[5]

1424. Of course, a person who joins an assembly after an offence has been committed, cannot be held guilty of that offence by reason of his association with the assembly, for the words of the section require that he must have been a member of that assembly at the time of the commission of the offence. If, therefore, offences are committed by a fluctuating body of men, it is upon the prosecution to show that at least five persons of whom the accused was one constituted an unlawful assembly, and that the offence in question was committed by any one of them under the circumstances stated in the section. During the plague riots in Patna in 1900, the District Magistrate appointed three prominent citizens, one of whom was Nowrangi, as special constables, to carry out which order, one Baker, Inspector of Police, had been deputed. He ordered the three men to accompany him to the police station which they refused, upon which he ordered a constable to arrest Nowrangi, whereupon the villagers assembled in large numbers, abused and threatened the police. Nowrangi shook himself free of the constables and two other men ran up and seized

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(1) *Jahiruddin*, 22 C. 306.
(2) *Per* Norman, J., in *Kabil Cazee*, 3 B. L. R. (A. C.) 1; *Raghunandan*, 15 I. C. (O.) 972.
(3) *Binod*, 24 W. R. 66.
(4) *Foiz Ali*, 1 W. R. 20.
(5) *Bhari*, (1924) P. C. 126.

the constable's carbine. The police then hastily retreated from the village. Some of the villagers and the three constables-elect were then prosecuted under section 353 coupled with this section. But the Court held that the accused could not be convicted under section 353 of the Code, as the Inspector had no power to arrest Nowrangi, but that inasmuch as all the villagers had combined to assault the police, they were held guilty of rioting, though under extenuating circumstances.[1]

1425. Again, before other persons could be convicted under this section, it is essential that an offence must have been *committed* by any member of the unlawful assembly. This evidently means that there cannot be a constructive offender under this section, unless there is proof not merely that an offence was committed but also that it was committed by a person who was a member of the unlawful assembly. If, therefore, death was not the result of the injury caused by a member of the assembly, who was charged as being only liable for it by reason of the provisions of section 34, which provides for another case of constructive liability, he could not be said to have committed the murder so as to make the other members liable for it by a double construction.[2]

Hiring or conniving at hiring of persons to join unlawful assembly.

150. Whoever hires or engages, or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly ; and for any offence which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

[*Offence*—s. 40. *Unlawful assembly*—s. 141.]

1426. Analogous Law.—This section was not in the original draft and was added to approach those who could not be reached by the law of abetment. As such, it is probably too loosely worded, for whoever "hires, engages or employs" another, is clearly an abettor. But this section has not been enacted to punish an abettor, but one who though not an abettor still "promotes or connives" at the formation of an unlawful assembly. A master may, for instance, "connive" at his servant forming a riotous assembly in his interest. He may even put him in funds for that purpose. In the former case he merely encourages by his acquiescence, in the latter case he promotes the scheme by his active assistance. But in both cases his liability is the same, and it is in every case co-extensive with that of his mercenaries.

1427. The provisions of this section should be compared with those of s. 157 which are of even wider application. For while this section deals with a particular unlawful assembly, section 157 refers to the harbouring, etc., of persons who are likely to be engaged in any unlawful assembly,[3] while section 158 punishes the person so hiring himself out.

1428. Procedure and Practice.—The offence under this section is cognizable and not compoundable. In other respects it follows the procedure for the offence committed.

1429. Proof.—The points calling for proof are :—

(1) That some person was hired, engaged or employed to join an unlawful assembly ;
(2) That this was done by the accused or that he 'promoted or connived" at his hiring, etc.;
(3) In the latter case, that he was aware of the fact that the person was engaged to join an unlawful assembly ;
(4) That the accused was legally bound to prevent the hiring, etc.;
(5) That he was physically able to prevent it ;
(6) That he did not prevent it, or do all in his power towards preventing it.

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(1) *Raman Singh*, 28 C. 411 ; following *Dalip*, 18 A. 246.
(2) *Jhuboo*, 8 C. 739 (751).
(3) *Ram Lochan Sircar*, 29 C. 214.

1430. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——hired one——(*or* engaged *or* employed *or* promoted *or* connived at the hiring *or* engagement *or* employment of——) to join as (*or* become) a member of an unlawful assembly [(*if necessary add*), and that the said——as a member of such unlawful assembly in pursuance of such hiring (*or* engagement *or* employment) committed an offence under section——of the Indian Penal Code] and you have thereby committed an offence under section 150 and are punishable under section—— *add the substantive* offence) of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (*in case of committal*, by the said Court on the said charge."

1431. Principle.—The principle of this section has been already stated (§ 1426). It has been designed to meet a case of persons who are neither abettors nor participators of the crime committed by unlawful assemblies, but who, nevertheless, assist to bring unlawful assemblies into existence, and to whose co-operation and support they may owe their vitality of existence. Such a person is an "aider "though not an "abettor" in the terminology of English Law, and his liability is here set out.

1432. Meaning of Words.—"*Hires, engages or employs*": The last word is general enough to cover all that is intended to be conveyed by the three words. Hiring is engaging for a stipulated reward, and engaging is employing one for a definite purpose, while employing one is to make use of one generally. "*Promotes or connives at*": These words are important. The "promotion" of hiring engagement or employment is the rendering of active support and assistance; while "conniving" is closing the eyes upon a fault. It is allowing it without encouraging or even approving of it. It implies a state of mind in which disapproval of the act is joined to a desire not to oppose it. "*And for any offence.....in pursuance of such hiring*," that is, the employer is responsible for the act of his employee, done within the scope of his employment.

1433. Liability for Criminal Connivance.—Though this section is perhaps too generally worded, still the class of persons it is intended to reach is clear (§§ 1426, 1431). Persons who are neither co-conspirators nor abettors, but who nevertheless, hire or employ men and thus call conspiracies and unlawful assemblies into being are no less guilty than those who counsel and take part in them. In one sense such persons are abettors, but the law of abetment requires proof which may be lacking in their case. If they keep aloof and leave the work of hiring to their agent or manager, the latter may be tried as abettors, but the former may probably succeed in evading the ordinary law. The section, therefore, extends not only to acts of instigation by masters, but also to acts of instigation when done by others under their direction or connivance. Three sections refer to offences of this nature. This section, it will be observed, deals only with the hiring of a person to join a particular unlawful assembly. In other words, there can be no offence under this section, unless there was an unlawful assembly with or without the new recruit hired by the accused. If, therefore, a person in possession of property engaged a number of *lathials* to prevent entry thereupon of his nephew, who was jointly interested therein, and the finding of the Magistrate was that he was collecting and harbouring men for the purpose of committing a riot, should he find it his interest to do so, it was held that the accused could not be convicted under this section, because there was no finding (*a*) that there had been any unlawful assembly of the men hired by the accused, and (*b*) that in the course of the assembly any offence had been committed for which the accused would be liable equally with those who were members of that assembly.[1] But the second condition is not a necessary ingredient of an offence under this section, and the first condition had probably reference only to the particular facts of the case.

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(1) *Ram Lochan Sircar*, 29 C. 214.

1434. S. 157 Distinguished. The section speaks of hiring a person "*to join or become a member* of any unlawful assembly," which, strictly speaking, postulates the existence of an unlawful assembly apart from and independently of the hired recruit, for no one can be said to join an unlawful assembly, unless such an assembly was already complete as an unlawful assembly. If, therefore, there were four men united in an unlawful purpose within the meaning of section 141, and the accused hired a person to join them, thus completing an unlawful assembly, properly speaking he could not be convicted of an offence under this section. But this was probably not the intention of the Legislature, who have used the words "join and continue in an assembly" to include joining not only an assembly already formed, but also an assembly which becomes unlawful after they have joined. In this sense, all that is necessary to complete an offence under this section is, that either with or without the person hired there should be an unlawful assembly, and the accused should have either hired that person or connived at his hiring for the assembly. In this respect section 157 is rather wider as it provides for an occurrence that *may* happen, and makes the harbouring, receiving or assembling of persons who are likely to be engaged in any unlawful assembly an offence.[1] But the two sections provide for different contingencies. Under section 150 the accused may hire or connive at the hiring of a man to join or form an unlawful assembly. He may not harbour him. Under section 157 the accused may harbour such a person, though he did not hire him. The one section contemplates the existence of an unlawful assembly and the other contemplates its imminence. Neither of them, however, warrants the conviction of a person without proof of the particular facts therein set out, and on the sole ground of preventing an apprehended breach of the peace. So the mere assembling of a number of *lathials* in one's house is not an offence falling under either section. It may be a fit subject for an executive action; but it is not an offence.

1435. The section requires that in hiring the men, the accused should not only have some ulterior object in view, but his object must have been to constitute or strengthen an unlawful assembly formed or forming. It is thus on the prosecution to establish that the accused had this object in view, and that he had either hired or had "promoted" or "connived at" the hiring of men for that purpose. A person who encourages one to join an unlawful assembly would probably be as much an abettor as the real promoter of that assembly. Even promotion may be both by active co-operation as well as by indirect assistance, as where a zemindar finances his lessee to maintain an army of men as his own retainers. If he offers them any facilities, he may be proceeded against either under this section or section 157. It is not so difficult to establish "promotion" as to prove one's connivance at the hiring of men to form an unlawful assembly. The word connivance implies possession of the power or control over a thing connived at. It is not the duty of every person to prevent the formation of unlawful assemblies, wherever and for whatever purpose formed. Consequently, it is not connivance at the employment of men, where one has neither the right nor the power to prevent it. The section can, therefore, only apply to a case where the accused was under some legal obligation to prevent the hiring of men for the purpose. There can be no connivance at an act without such legal obligation. He must be legally bound to prevent the assemblage. He must have knowledge of its formation, and he must need physical ability to prevent it. If he does not interfere through sheer helplessness, he could not be convicted for criminal connivance.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

(1) *Ram Lochan Sircar*, 29 C. 214.

Explanation.—**If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.**

1436. Analogous Law.—Reference to this section has already been made while discussing the analogous provisions of section 145. It should be read subject to the provisions of that section, and of section 127 of the Code of Criminal Procedure which confers on a Magistrate and an officer in charge of a police-station, the power to disperse an unlawful or any assembly of five or more persons likely to cause a disturbance of the public peace. Refusal to disperse in obedience to lawful command thus made, is punishable either under section 145 or this section, according to the character of the assembly (§ 1366). If the number falls short of five persons, the case may be one for disposal under section 188 of the Code.

1437. Procedure and Practice.—The offence under this section is cognizable, but summons should issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and may be tried summarily.[1]

1438. Proof.—The points requiring proof are :—

(1) That there was an assembly of five or more persons ;
(2) That it was likely to cause a disturbance of the public peace ;
(3) That it had been commanded to disperse ;
(4) That such command was lawful ;
(5) That the accused joined or continued in the assembly, after it had been so commanded to disperse ;
(6) That he did so knowingly.

1439. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——at——joined (*or* continued in) an assembly of five or more persons likely to cause a disturbance of the public peace, after knowing that such assembly had been lawfully commanded to disperse, and thereby committed an offence punishable under section 151 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1440. Principle.—Section 145 punishes continuance in an *unlawful* assembly after it has been lawfully ordered to disperse. This section punishes the same act, where the assembly was not unlawful, but was "likely to cause a disturbance of the public peace." Such an assembly may have been perfectly lawful, and it does not become unlawful after it has been commanded to disperse ; but inasmuch as its continuance is likely to endanger public peace, law has armed the Magistrates and the police with power to disperse it by force if necessary, and it penalizes those who refuse to disperse after receiving a lawful mandate to that effect. (§ 1366).

1441. Meaning of Words.—"*Knowingly joins or continues*" : The joining or the continuance must have been after "knowing" the command to disperse. The word "knowingly" here then means "wilfully." "*Lawfully commanded to disperse*" : The lawfulenss of the command is its most essential element. If the command was unlawful, there is no offence in refusing to obey it. Its lawfulness then must have been made obvious to the accused. In Bombay the command to disperse must be as prescribed by s. 40 (1) of the City of Bombay Police Act, 1902. A command by a Magistrate is insufficient.[2]

1442. Disorderly Assemblies.—This and the section 145 provide penalties for an offence which, in both cases, consists of the disobedience to the legal mandate of the law, the difference in punishment in the two cases being due to the fact that while the assembly ordered to disperse was in the one case unlawful, it was not so in the other case ; and its dispersal was only ordered because it was menacing public peace ; in short, because it was turbulent. In such a case the act, though lawful in itself, is prohibited on account of the danger which it may cause to the public tranquillity.[3]

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(1) S. 200 (*a*), Cr. P. C.
(2) *Keshav*, 60 I. C. (B.) 1008.
(3) *Mhd. Abdullah*, 15 L. 610.

1443. But in order to make a person liable, it must be shown that the command was lawfully given. This implies that the person commanding had both the jurisdiction as well as reason to order dispersal of the meeting. And they are both questions of fact, dependent upon the powers possessed by the officer ordering the dispersal as well as the grounds upon which it was ordered. The first question depends upon the construction of section 127 of the Procedure Code. That section empowers "any Magistrate or officer in charge of a police-station" to command the dispersal of a turbulent assembly. It is then sufficient to show that the officer ordering the dispersal was either a Magistrate, stipendiary or honorary, or an officer in charge of a police-station—a term which necessarily includes his superior supervising officers, that is to say, those who, though not actually in charge of a police-station, are still in superior executive control of it, or of the officer in charge of it.[1]

1444. The next question presents some difficulties. For it requires for its validity that the order should not be passed unless there is an assembly of five or more persons likely to cause a disturbance of the public peace. Here in the first place there must be an "assembly." Now strictly speaking an assembly is "a company of persons gathered together in one place for some common purpose."[2] But this is not the sense in which the term has been used here, for it is immaterial for the purpose of this section, whether the assembly was stationary or moving, compact or scattered.[3] It is sufficient if there was a concourse of five or more men for a common purpose. If such an assembly existed, it is next necessary to see whether it was likely to cause a disturbance of the public peace. The question is, of course, one of fact, but it is one which it is for the prosecution to establish to the satisfaction of the Court. It is not sufficient to establish a charge under this section that in the opinion of the Magistrate or the police-officer who gave the command the assembly was likely to cause a disturbance of the public peace,[4] to admit the opinions of such persons in cases in which the legality of their very act is in question, would be to make them judges in their own cases.

1445. Of course, evidence on the question of a future contingency must necessarily consist more or less of opinions, but they must be opinions based upon facts and not be merely arbitrary. If suppose a religious body of men march out in a procession, the likelihood of their causing a disturbance will depend upon their popularity in the neighbourhood, the temper and attitude of the people towards them and the existence of opposing factions interested in opposing them. So where the Salvation Army insisted upon their right to march out in procession through the streets of Bombay, in spite of an order prohibiting them from so proceeding, the Court considered the opinions of the policemen who knew the people of Bombay as obviously valuable, though "the Magistrate himself must look to the surrounding circumstances, and from his own conclusions, whether the acts committed were reasonably likely to lead to a breach of the peace."[5] But the *legality* of the order does not solely depend upon the imminence of danger to public peace. That is no doubt one conduct which renders the assembly liable to dispersal. But the lawfulness of the command does not depend solely upon that consideration. If it did, it would place a man's liberty at the mercy of the mob. Suppose a number of Hindoos in accordance with their ancient rites have been in the habit of marching out in procession with their gods through the streets of a town. Are they to be prevented from doing so, merely because a number of ruffians belonging to another creed take upon themselves to oppose their procession? Would it be a legal command to order dispersal of the procession from the fear of persons riotously inclined? Would it not rather be more legal to strengthen the processions by the assistance of the police and to vindicate its right undeterred by the threats of the opposing faction?

1446. Such was the case of the Salvation Army already referred to (§ 1445) in which the right of way was upheld inspite of a prohibition of the two Justices of the

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(1) *Tucker*, 7 B. 42.
(2) Webster.
(3) *Tucker*, 7 B. 42.
(4) *Murlidhar*, (1887) P. R. No. 22 ; *Tucker*, 7 B. 42 ; *Girdhar Singh*, (1922) L. 135.
(5) *Per* Kemball, J., in *Tucker*, 7 B. 42.

Peace. It may be added that an exactly similar case arose about the same time and in connection with the same organization in Bombay, but in that case the rule laid down was very different.[1] In both cases the Salvation Army asserted their right to march out in procession, in both cases they led processions in spite of legal prohibitions. They were prosecuted in both cases, but while in England their right to proceed in procession was upheld, that right was denied in Bombay. This difference could scarcely be casual, for if the two cases were rightly decided there must be a difference in the laws of the two countries. But this is not the case, for in both laws, the right to proceed in procession is conceded, and in both it is made subservient to public peace. Why should then the Salvation Army have the right to march in procession in England, though they have no such right in Bombay? The heterogenous creeds and population of the latter place may dictate a different rule of law, but it cannot change its construction.

1447. It is submitted that the true rule applicable to such cases is this. The Magistrate cannot prohibit a lawful gathering merely because it may endanger public tranquillity. To hold otherwise would be to place one section of the community at the mercy of another, who may from bigotry or other cause choose to oppose them. In such a case it is not only lawful but right that the persons exercising their lawful right should be assisted and those opposing them should be punished. The question then is one of justice and not one of political or public expediency, and the civil authorities would well be within their rights, if they vindicated the liberties of the people, by the use of force, rather than suffer one sect to be overawed by the show of force by another.

1448. But this is a rule which applies only when some substantial right or custom is endangered. It could not obviously be extended to every function, however remotely connected with the main right. For example, it would be right for persons to march out in procession in accordance with their ancient usage; but it would be no denial of their right if they are restrained from marching with noisy bands and carrying the symbols of their faith, offensive to another community.

152. Whoever assaults, or threatens to assault, or obstructs or attempts to obstruct, any public servant, in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly or to suppress a riot or affray, or uses, or threatens or attempt to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assaulting or obstructing public servant when suppressing riot, etc.

[***Public servant***—s. 21. ***Unlawful assembly***—s. 141. ***Riot***—s. 146. ***Affray***—s. 159. ***Criminal force***—s. 350. ***Assault***—s. 351.]

1449. Analogous Law.—The last section dealt with passive resistance to the lawful command of a public servant. This section deals with active opposition offered to him. Consequently the enhanced sentence.

1450. Procedure and Practice.—The offence under this section is cognizable, and warrant may issue in the first instance. It is bailable and not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

1451. Proof.—The points requiring proof are :—

(1) That an unlawful assembly was held ;
(2) That an endeavour was made to disperse it;
(3) That the person so endeavouring was a public servant ;
(4) That the said public servant was then acting in the discharge of his duty as such public servant ;
(5) That the accused knew of it ;
(6) That he assaulted, or obstructed, or threatened to assault or obstruct him or to use criminal force or attempted to use criminal force.

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(1) *Tucker*, 7 B., 42, decided on 28th September 1882, in which no reference was made to the English rule ; probably its report had not then reached Bombay.

1452. Charge.—The charge must specify the person assaulted. It is not sufficient to say that the accused "obstructed members of the police force."[1] A person who commits the offence of rioting, grievous hurt, and assaulting a public servant in the execution of his duty, may be charged with and convicted of offences under sections 147, 352, and this section.[2]

1453. The charge may run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——assaulted (*or* threatened to assault *or* used *or* threatened to use criminal force to)——a public servant, in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (*or* to suppress a riot or affray), and thereby committed an offence punishable under section 152 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (*in case of committal*, by the said Court) on the said charge."

1454. Active Resistance to Suppression of Riots.—This section punishes an active opposition made to a public servant in the discharge of his duty, as such public servant. In the first place, as the section is worded, it is not necessary that the public servant concerned should be then employed in the lawful discharge of his duties. He is protected, because he acts in a moment of imminent danger, and he is protected if he acts in good faith under colour of his office, though his act may not be strictly justifiable by law.[3] It is, of course otherwise, if his act causes the apprehension of death or grievous hurt in which case there is the right of private defence.

1455. The gist of the offence described in the section consists of the use of force on a public servant with a view to deterring him, or which has the effect of deterring him from the discharge of his duty. It must therefore be shown not only that the public servant was then on duty, but also that he was then as a part of his duty *endeavouring* to disperse an unlawful assembly. If therefore he was not actually so engaged, an assault on him may be an offence, but it is not the offence described in this section. Again, the section speaks only of an unlawful assembly, a riot and an affray. It does not refer to a lawful assembly likely to cause a disturbance of the public peace, spoken of in the last section. The special provisions of this section, therefore, would not apply to an assault committed on a public servant while dispersing such an assembly. Persons found guilty under this section cannot be also separately sentenced under sections 332 and 333 of the Code, inasmuch as the infliction of hurt constitutes the essence of the offence under this setion.[4]

Wantonly giving provocation, with intent to cause riot. if rioting be committed. if not committed.

153. Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both ; and, if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

1456. Analogous Law.—This section deals with a person who does an illegal act which incites one to commit rioting, and when it does not amount to an instigation of rioting, for in such a case he will be dealt with as an abettor. The section rather contemplates mischievous provocation of a person to commit the offence. But it is nevertheless merely a provocation, and falls short of instigation. Again, that provocation is not benevolent but malignant, not solicited but wanton. It may be an appeal to a man's vanity or his sense of honour.

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(1) *Ferasat*, 19 C. 105.
(2) S. 235, ill. (*g*), Cr. P. C.
(3) S. 99.
(4) *Ferasat*, 19 C. 105; *Bana Punja*, 17 B. 260.

1457. The words "malignantly" and "wantonly" have been nowhere defined. They have only been used in this section, the word "malignantly" occurring once again in section 270.

1458. Procedure and Practice.—The offence under this section is divided into two parts according as the provocaton given results, or does not result, in rioting. In the former case the offence is one in which a warrant may issue in the first instance, otherwise a summons should issue. In both cases the offence is cognizable and bailable. In either case it is not compoundable. But in both cases it is triable by any Magistrate. And if the rioting provoked has not been committed it may be tried summarily.[1]

1459. Proof.—The points requiring proof are :—

(1) That the accused did something illegal ;
(2) That it was done either malignantly or wantonly ;
(3) That his act gave the provocation ;
(4) That he knew that his act was likely to give the provocation ;
(5) And that the provocation so given was likely to cause a riot ;
(6) That a riot was committed in consequence of such provocation.

1460. The last element is, however, not necessary to prove the offence. If proved, it aggravates the offence and exposes the offender to the enhanced penalty provided in the first clause. A conviction of this offence is not a conviction of an offence "involving a breach of peace" within the meaning of s. 106 of the Code of Criminal Procedure, justifying the taking of security under that section.[2]

1461. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——malignantly (*or* wantonly) by doing an illegal act, namely,——gave provocation to——intending (*or* knowing it to be likely) that such provocation would cause the offence of rioting to be committed, and thereby committed an offence punishable under section 153 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1462. Principle.—Law has always looked upon with disfavour officious inter-meddlers whether they provoked one to maintain a civil suit for the enforcement of his rights, or whether it provokes him to take the law into his own hands, and thus commit a breach of the peace. In the one case the offence is one of maintenance, and in the other the offence is punishable under this section. But the leading featuresof the two offences are thesame—officious interference with another person.

1463. Meaning of Words.—"*Malignantly or wantonly*" : Malignantly means maliciously.[3] The word "malignity" means virulent enmity and "malignantly" therefore means in a manner virulently inimical.[4] It implies a disposition bent on evil. The word "wantonly" means recklessly,[5] thoughtlessly, without regard for right or consequences. It implies a disposition not evil, but reckless or mischievous. A man may do a thing wantonly, when he has no reason to do it, but he does it because he takes pleasure in doing it, though he knows that its consequences to others may be serious. "*Gives provocation to any person*" means rouses that person to anger, creates hot blood. "*That such provocation will cause.....rioting,*" that is, it will cause a man to get angry so as to commit rioting, which he would not have otherwise committed, but such provocation must fall short of instigation constituting abetment.[6]

1464. Criminal Provocation of Rioting.—This section deals with a somewhat diffuse offence, which is neither abetment nor promotion of, or connivance for, rioting.[7] It is the provocation of a person rioting by the malignant or wanton

(1) S. 260 (*a*), Cr. P. C.
(2) *Rahimatalli*, 62 I. C. (B.) 401.
(3) *Per* Ranade, J., in *Kahanji*, 18 B. 758 (775).
(4) Webster.
(5) *Husain Baksh*, 29 A. 569 (571).
(6) *Ahmad Hasham*, 57 B. 329.
(7) S. 150,

doing of an illegal act. A person who appeals to another's sense of honour or wounded pride may or may not be guilty of an offence under this section. Suppose a man writhes under the sense of dishonour caused by the abduction of his wife, but he is afraid to avenge himself for want of assistance. His friend meets him and harps on the disgrace that had befallen him, and the retribution that it calls for. The man is provoked into hiring other men with whose assistance he commits a riot. Is his friend guilty of an offence under this section? It is evident that he is not. For though he had given him provocation, he had not done anything which is illegal and what he did was not done malignantly or wantonly.

1465. So during the excitement of the Hindu-Mahomedan riots which broke out in Bombay in 1893, the accused published a poem giving an account of the outbreak, and incidentally exalting certain classes of the Hindu community for the brave resistance which they had offered to the Mohamedan rioters. It wound up with an exhortation to the Hindus to fight again, and not be afraid of death. The accused was prosecuted and convicted under this section and s. 117 of the Code, but on appeal he was acquitted on the ground *inter alia* that his composition could not be regarded as an "illegal act" nor was its publication "malignant" or "wanton" within the meaning of this section.[1] But in another case, the accused were convicted for giving wanton provocation on the following facts. Two factions of Mahomedans started with *tazias* for the local Karabala. On the way they both quarrelled for precedence, and it was with the greatest difficulty that they were ultimately got to move on. They were prosecuted under this section and their conviction was upheld on revision, the Court holding that the word "wantonly" as used in the section merely meant "recklessly" and that the petitioners had acted recklessly in refusing to move on when ordered to do so, and in wrangling and abusing each other when they were all in an extreme excited condition and armed with *lathies*.[2]

1466. In order to sustain a conviction under this section, there must be (*a*) provocation given, (*b*) malignantly or wantonly, (*c*) by doing an illegal act, (*d*) intending or knowing it likely that such provocation will cause rioting. In the case last cited, the accused fulfilled all these conditions. For in abusing and refusing to move on, they had done an illegal act. Their abuses gave provocation. It was done wantonly, and it was known by them to be likely to cause rioting, because both parties were in an excited state of mind and were well armed. But the element of illegality was wanting in another case in which the accused, a Hindu, had erected a shed without any permission, inside which he had installed the image of the goddess Bhawani. A Mahomedan procession passed by his doorway outside which the goddess stood exposed to view, to which the Mahomedans objected. He was then ordered to put up a screen to hide his deity from their view, but this he refused to do, whereupon he was convicted under this section, but on revision his conviction was set aisde by Oldfield, J.,who held that none of the elements required to establish a case under this section was present to support the conviction.[3]

1467. The section requires that the accused must have done an act, and that act must have been an illegal one. It must have been, moreover, done malignantly or wantonly and with the intention or knowledge that it will probably provoke a breach of the peace. Now an act may be done wantonly, but it may not be done illegally and *vice versa*. Khusal Singh's act in erecting a shed and exhibiting his goddess therein, may or may not have been an illegal act. But it could not be in any sense considered a wanton act unless the Mahomedans had previously warned him of their susceptibilities in the matter, and even then there would remain the question of intention and knowledge. If five persons choose to cause provocation they cannot hold another responsible for their misbehaviour. The provocation given must be such as would be *likely* to cause the offence of rioting to be committed. This may depend upon the temper and feeling of the person subjected to provocation

(1) *Kahanji*, 18 B. 758.
(2) *Husain Baksh*, 27 A. 569.
(3) *Khushal Singh*, (1886) A. W. N. 23 *Gaya Prasad*, (1928) A. 745.

and its knowledge by the accused. The illegality of the act must be judged by the general law governing the rights of person and property. The question of malignity or wantonness is a question of fact dependent upon the circumstances of the case, and so is the question of intention or knowledge and the sufficiency of provocation to cause rioting. The accused, a Mahomedan, had killed a cow before sunrise, unobserved by the Hindus. It was held that, since the killing was neither malignantly or wantonly done, the mere fact that it might have hurt the religious susceptibilities of the Hindus, did not make the accused guilty of this offence.[1]

Promoting enmity between Classes.

153-A. Whoever by words, either spoken or written or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Explanation.—**It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majesty's subjects.**

1468. Analogous Law.—This section is new and was added by the Indian Penal Code Amendment Act of 1898.[2] Its language is similar to that used in the definition of defamation in section 499 of the Code. This section has been held to be no more ancillary to the last section than section 124-A is to section 124.[3] The explanation appended to this section and section 124-A, affording some measure of protection to honest criticism, was contrasted with the sweeping provisions of section 4 (1) of the Press Act (since repealed),[4] which prescribed the penalty of forfeiture for words published "which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise" to do any of the things detailed in the six following clauses of that section.

1469. The provisions of this section may at times overlap those of s. 295-A added by the Criminal Law (Amendment) Act, 1927.[5]

1470. Procedure and Practice.—No prosecution can be instituted under this section without the previous order or sanction of Government.[6] The offence is non-cognizable, but warrant may issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Presidency or First Class Magistrate.

1471. Proof.—The points requiring proof are :—

(1) That the accused wrote or spoke words or used signs or visible representation or employed other means—

(2) To promote, or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects ;

(3) That he did so maliciously.[7]

1472. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——at——, by speaking (*or* writing) the words——(*or* by signs *or* visible representations) promoted (*or* attempted to promote) feelings of enmity (*or* hatred between (*specify the classes*) of His Majesty's subjects, and thereby committed an offence punishable under section 153-A of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

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(1) *Abdullah*, 49 I. C. (A). 776.
(2) Act IV of 1898, s. 5. For the Report of the Select Committee, *see* Gazette of India, 1896, Part V, p. 13.
(3) *Jaswant Rai*, (1907) P. R. No. 10.
(4) Act I of 1910.
(5) Act XXV of 1927.
(6) S. 196, Cr. P. C.
(7) Which is the gist of the crime ; *Hemendra Prosad*, (1927) C. 215 ; *Chakravarthi*, 54 C. 59.

1473. Principle.—This section was enacted to supplement the law of sedition, which was found to be insufficient to prevent the conflict of classes, for which it was obviously inadequate. This section may, however, be said to deal with the defamation of a class as distinguished from the defamation of a person punishable under section 500 of the Code, or s. 295-A which deals with the defamation of religion. The object of the section is to prevent the various classes from coming into conflict by mutual abuse and recrimination. It has been held to involve moral turpitude entitling the High Court to take disciplinary measure against a pleader convicted of it.[1]

1474. Meaning of Words.—"*Promotes feelings of enmity*": The word "promotion" implies knowledge and intention to foster racial ill-feeling; the intention being an express and not merely a constructive intention.[2] It is not enough that one uses words *calculated* to produce such a feeling. What is required is that one should actively encourage such feelings by the use of words chosen for that purpose. "*Hatred between classes*": Imperialism is a system and not a class, and therefore, denunciation of British Imperialism would not be punished under this section[3] any more than the denunciation of Capitalism, Socialism, Communism, or Communalism would be so punishable. "*Feelings of enmity or hatred*": They may be unilateral or mutual; and the classes may have been already inimical. The offence consists of "promoting" or intensifying hatred, not begetting it.

1475. Promotion of Class-hatred.—The chief ingredient of an offence under this section is the intention to promote hatred or ill-will between the several classes. Such an intention must, of course, be inferred from the nature of the words used and their effect upon the class referred to as also from the state of feeling between the two communities at the time of the act complained of.[4] It is not necessary that the class, as a class, should be held up to hatred or contempt. The means employed is immaterial, so long as that was the intention and it is likely to produce that effect. So an attack upon the private life of a Saint or a Prophet of a community, with the object of producing it, would be punishable under this section.[5] Such was the case of the *Punjabee* newspaper, the editor of which was convicted under this section under the following circumstances. On the 8th December 1899, one Rafat Ali, a police constable, died from laceration of the brain and hæmorrhage caused by a violent blow on the back of the head, which was due to a fall from a horse. The issue of the *Punjabee* newspaper, dated 11th April 1906, contained two paragraphs in which it was suggested that the man died from a kick given by a European Police Superintendent and it was said not to be a solitary instance of a deliberate murder given out to be an accidental death. "How many poor Indians," it went on to say, "have been mercilessly launched into eternity in the past, for being mistaken for bears and monkeys, or for having so-called enlarged spleens." It was held that both the editor as well as the publisher consciously intended to promote enmity and hatred on the part of the Indians towards Europeans, by publishing the above articles, and they were, therefore, held to have come within the scope of the offence, and their case was in no way saved by the explanation appended to the section. It was also held that for the purposes of the section Englishmen and Indians constituted two separate classes.[6] It was also held in the same case that whether the feelings which existed between the two classes were of indifference, or of friendship, or of enmity of hatred, anything which tended to convert the two former into enmity or hatred, or to increase the enmity or hatred, promoted feelings of emnity or hatred.[7] The question in each case is one of fact and intention.

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(1) *Sharwani*, 55 I. C. (A.) 560.

(2) *Chakravarty*, 54 C. 59; *Satya Ranjan*, (1929) C. 309.

(3) *Zaman, A. M. A.*, (1933) C. 139.

(4) *Satya Ranjan Bakshi*, (1929) C. 309; *Chamupati*, 13 L. 152, (S. B.).

(5) *Devi Saran*, (1927) L. 594; *Kali Charan*, 49 A. 856, F. B. *Rel.* in *Chida Nand*, (1930) L. 350 *contra* in *Rajpal*, (1927) L. 590.

(6) *Jaswant Rai*, (1907) P. R. No. 10; *Kanchanlal*, 32 Bom. L. R. 585; *Chida Nand*, (1930) L. 350.

(7) *Jaswant Rai*, (1907) P. R. No. 107.

Where, for instance, the editor of another newspaper inveigled against both "*Babus* and *Mehas*" as robbing the poor and against the Christian Missionaries whose treatment of their converts before and after their conversion was contrasted, adding that they too were not free from the colour prejudice, the Court held the article foolish but not intended to arouse class animosity.[1] Similarly, a publication by the accused of a pamphlet which ridiculed the high priest of the Bohra Community exposed him to the penalty of this section.[2]

1476. This section is closely analogous to section 124-A, and has an intermediate place between that section and section 500 of the Code. For while section 124-A deals with what may be called defamation of the State, this section deals with defamation of a class, while section 500 refers to the defamation of a person. The defamation of a class, may, however, be made by defaming a person as an example of that class, as in the case last cited. Again, the defamation of a person may even amount to sedition, as where a person, as a representative of the ruling race is held up to ridicule or contempt, the object being to ridicule the Government through him. The question then whether a certain writing of speech amounts to sedition of an offence under this section, or is merely a personal libel, depends upon the intention of the writer or speaker as disclosed in his writing or speech. And for that purpose it is permissible to adduce the evidence of his other writings and speeches to prove or disprove his particular intention (§ 1203). If there is such evidence, the actual effect that a writing or speech did produce upon any particular class would be a question of secondary importance. For instance, there is a well-known book published on "Babu English," which holds up to ridicule and contempt the Babu class and the ridiculous mistakes they commit. It may have the effect of intensifying the estrangement between the two races, but the writer could not be convicted of an offence under this section, because he had written the book to amuse and not to beget hatred between the two classes. But the same view cannot be taken of Macaulay's portraiture of the character of the Bengalees or of Shakespeare's portraiture of the character of the Jews. To them must then be applied the rule which exempts the poet and the historian from the ordinary standard of criminal law (§ 1207). But the production of even a classic drama calculated to promote class hatred may fall within the mischief of the rule, and such was the case with "The Mikado" the staging of which was prohibited during the official visit of the Japanese fleet to Europe.

1477. A fair criticism of the character of any two classes, intended to open their eyes to their own follies, is not an offence, whatever the two classes affected may think. But such a criticism must be sincere and not malicious, calculated to do good and not produce hatred. Here again the test is the intention to be proved as in other cases.[3]

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees,

Owner or occupier of land for which an unlawful assembly is held.

if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station.

and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power

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(1) *Joy Chandra Sarkar*, 38 C. 214; *Rai Pal*, 7 L. 15.

(2) *Rahimat Alli*, 62 I. C. (B.) 401.

(3) *Joy Chandra Sarkar*, 38 C. 214; *Dhammaloka*, 10 I. C. (Bur.) 789; *Deshbandhu*, 6 L. L. J. 162.

to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

[*Reason to believe*—s. 26. ***Unlawful assembly***—s. 141. ***Riot***—s. 146.]

1478. Analogous Law.—The duty of preventing riots is cast upon the owners and occupiers of land by the Code of Criminal Procedure.[1] This section makes the non-prevention of unlawful assembly and riots on their land an offence. This section proceeds upon a presumption that the owner or occupier of land allowing a riotous gathering on his land could not but be cognizant of their object, and that he was, if so minded, able to prevent it. His non-interference consequently afforded it a facility for meeting which it could not have otherwise possessed. The section obviously pre-supposes a premeditated riot and not a lawful gathering suddenly becoming unlawful and riotous.

1479. Procedure and Practice.—This is a highly penal section, and the Courts have enjoined the greatest caution before starting proceedings under it.[2] The offence under this section is non-cognizable and summons may issue in the first instance. It is bailable, but not compoundable, and is triable by a Presidency, or a First or a Second Class Magistrate. It may be tried summarily.

1480. Proof.—The points requiring proof are :—

(1) That the accused was the owner or occupier of the land ;
(2) Upon which there was an unlawful assembly or a riot ;
(3) That the accused (or his agent or manager) knew that it was being or had been committed, or had reason to believe that such riot had been committed;
(4) That the accused (or his agent or manager) omitted to give the earliest notice in his power to the nearest police ;[3]
(5) And moreover did not use all in his power to prevent the unlawful assembly or riot though—
(6) He had reason to believe[4] that it was about to be committed and if the riot or unlawful assembly did take place, then—
(7) He did not use all lawful means in his power to suppress or disperse the riot or unlawful assembly.

1481. Principle.—This is an instance of the extension of the doctrine of *respondeat superior* to criminal law. It makes the master criminally liable for the act or omission of his servant of the nature specified in the section. His liability does not depend upon his knowledge of the riot or of the acts and intention of this agent.[5] Owners and occupiers of land have been invested by law with certain duties of the police, which they are expected to discharge by virtue of their position as landholders. They are not unconnected with the use of land, and their responsibility is declared upon the assumption that as landholders they possess the power of preventing the gathering of men upon their land, and to suppress or disperse disorderly gatherings if they are so minded. The section was never intended to punish the owner of land for any riot committed upon it. It was merely intended to punish the owner who or whose agent or manager does any of the things specified in the section. (§ 1478).

1482. Meaning of Words.—"*Any person claiming an interest*" : The words "interest" here apparently means any right in the land as a mortgagee, lessee, remainderman or a reversioner. It would not include a person having a mere charge or a license, or a right in the nature of an easement. Persons jointly interested in the land, *e.g.*, co-widows, would be both liable.[6] "*His agent or manager*" means one in actual charge of the management. "*All lawful means in his power*" : He is not therefore entitled to shoot down every one so found upon his land.

1483. Criminal Non-feasance of Landholders.—Three classes of persons are responsible under this section : (*a*) Owner, (*b*) occupier, (*c*) persons having or claiming an interest in land upon which an unlawful assembly or a riot takes place. These classes are wide enough to include almost any person, whatever

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(1) S. 45, Cr. P. C.
(2) *Nripendra*, (1924) C. 1018.
(3) *Raja Bhagwan Baksh*, 8 O. C. 418.
(4) *Saroop Chandar Paul*, 12, W. R. 25.
(5) *Nripendra*, (1924) C. 1018.
(6) *Siva Sundari*, 39 C. 834.

may be his connection with or right to the land. But this is scarcely what the section was intended to lay down. For instance, a non-resident partner or co-sharer, who had taken no active part in the management of the estate, could not be held responsible for not complying with the directions of the section.[1] On the other hand, a person in occupation of the land could not claim exemption on the ground that he was merely a squatter, and had no right to it. The section requires that if a person is a *de facto* owner or occupier of land, he is charged with the duty of preventing unlawful and riotous assemblies, though he may be found to possess no title to the land. The same duty is cast upon persons who are in subordinate charge of land, such as lessees and mortgagees in possession. So where a land is owned by one, and is in the occupation of another, both are jointly and severally liable, and the same liability attaches to those who have, or even claim an interest in such land. But such claim must, it is apprehended, be something more than a bare assertion of a right. It must be a claim supported by at least some show of title.

1484. Now in order to establish an offence under this section, it is necessary to prove (*i*) that there was an unlawful assembly, or a riot took place, (*ii*) that the accused is the owner, or occupier of, or interested in, the land, (*iii*) that either he or his agent or manager *knew* that the riot was about to take place, (*iv*) that knowing this neither he nor the agent nor the manager used all lawful means to prevent or suppress the riot, and (*v*) that he did not give the earliest notice to the police.[2] Knowledge of the landholder, or of his agent, is therefore the first essential element of an offence under this section. After knowledge, comes his duty to prevent or suppress the riot. Now a person could not be held liable for an offence under this section, unless it is shown that he had failed to do what he could have reasonably done. For instance, an owner or occupier of land on which an unlawful assembly is held cannot be convicted under this section unless there is a finding that the riot was premeditated.[3] But if it was premeditated, it is then immaterial that he did not come to know about it, or that the land was managed by his agent or manager who had kept him in ignorance of it.

1485. The provisions of the section impose on non-residential landholders and their agents, the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates, and the former are held responsible for any dereliction of duty in this respect on the part of their agents, and independently of any knowledge on their part, of the acts and intentions of their agents.[4] He is liable for the acts of commission, and omission not only of himself but also of his agent or manager. The fact that the latter has made himself criminally liable under the section does not exonerate the principal or master. The latter is liable because the section enjoins on him a duty which it was upon him to discharge, for which he should have appointed a competent agent.[5] If he appoints an incompetent agent he takes the risk, and he cannot complain. So the master was held liable under this section for the act of his agent who was present when a riot was held upon his land, and instead of suppressing or preventing the riot accompanied the rioters, and stood close by, while the riot was going on, after which he absconded. The accused was held to have had no knowledge of the riot, but nevertheless he was convicted under this section, it being held that he was responsible for the act of his agent.[6] In another case the title to the estate had vested in the adopted son, but the estate was managed for him by three ladies who appointed a manager who created a riot apparently to promote his own ends. The three were all convicted because they had appointed the manager and in not dismissing him after the riot.[7] So in another case the accused was convicted of this offence because a

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(1) *Radha Nath Chowdhury*, 7 C. L. R. 289.
(2) *Raja Bhagwan Baksha*, 8 O. C. 418.
(3) *Swoopchunder Paul*, 12 W. R. 25.
(4) *Kazi Zeamuddin*, 28 C. 504; *Tarakant Das*, 4 C. W. N. 691; *Siva Sundari*, 39 C. 834; *Prayag Singh*, 12 A. 550; *Lekhraj*, 1 A. L. J. R. 145; *Hurnath Roy*, 3 W. R. 54.
(5) *Hurnath Roy*, 3 W. R. 54.
(6) *Kazi Zeamuddin*, 28 C. 504; *Siva Sundari*, 39 C. 834.
(7) *Siva Sundari*, 39 C. 834.

riot had been committed upon his threshing floor though the registered owner of it was his brother and the riot did not relate to the threshing floor at all.[1]

1486. It will be observed that the section prescribes a penalty for three breaches of duty, namely; (*a*) omission to give notice; (*b*) abstention from preventing; and (*c*) negligence to suppress an unlawful assembly or a riot. In other words, it is the duty of landholders to prevent a riot before it is committed, and to suppress it after it is committed, and in any case to give the earliest notice to the police. The question whether the notice was the earliest possible depends upon the information possessed by the landholder or his agent. So again the power to prevent and suppress a riot threatened or committed depends upon the influence he possesses and the means at his disposal. But when a person is charged for not doing his best, it is for the prosecution to show what he could have done, which he had failed to do. So Norman, J., in one case observed: "It may be that Babu Rakhal Das Roy might have used his influence with the ryots of the Paul party, and by that influence might have induced them to disperse and cease from rioting. But there is nothing to show that he had any such influence, and could have induced them to disperse, or that he wilfully kept out of the way, leaving the riots to take its own course. If we allowed the conviction to stand, it would be on some bare conjecture that he might have had some means of dispersing the riot, of which there is no evidence."[2] As Stanley, J., added in a case under this section "where entrusted to the Magistrates, the Court must always act upon proof and not on mere surmises."[3] Such proof must be given in a case instituted and in the presence of the accused tried under this section. The records of the rioting case are wholly inadmissible to convict them for an offence under this section.[4] Prosecutions under this and the following sections should be instituted without delay, having regard to the object of the law laid down in these sections, which is to impress upon landholders, their responsibilities and obligations in respect of riots and unlawful assemblies, committed under circumstances mentioned in those sections, and thus serve as a wholesome warning not only to persons concerned but to others.

Liability of person for whose benefit riot is committed.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

1487. Analogous Law.—This section is the same as the last with the aggravating circumstances superadded, that the riot was committed for the person's benefit. This is reflected in the unlimited fine that the section provides as the penalty for the offence. In two minor points this section must, however, be distinguished from the last. That section is more general, and punishes a non-feasance not only in connection with the riot, but also in connection with an unlawful assembly. This section refers only to a riot, and an offence under this section is not complete until a riot is actually committed. As regards the persons, those liable under this section are larger than those held liable under the last section. For while under the latter section in order that a person may be criminally liable, it is necessary that he should at least have claimed an interest in the land. Under this section, however, a person who has derived any benefit from the riot or who was a party to any dispute whether or not connected with the land which gave rise to the riot

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(1) *Doma Sahu*, 38 I. C. (Pat.) 1007.
(2) *Suroopchunder Paul*, 12 W. R. 25 (26).
(3) *Tarakant Das*, 4 C. W. N. 691 (692), following *Brae*, 10 C. 338.
(4) *Eshak Meah*, 7 C. W. N. 245; *Sarat Chandra Shah Chowdhry*, 7 C. W. N. 301.

is equally liable. The object of the last section, this, and the next section is the same. They are directed to the punishing of persons to whom the origin of the most agrarian riots may be remotely traced.

1488. Procedure and Practice.—An offence under this section is not cognizable, and summons may issue in the first instance. It is bailable but not compoundable, and may be tried by a Presidency, First or Second Class Magistrate, and is triable summarily. The points requiring proof under this section are these :—

(1) That a riot was committed, which must be proved independently in the case, the record of the riot case being excluded from evidence ;[1]
(2) That it took place with respect to some land, or that it arose out of some dispute ;
(3) That the accused was the owner or occupier of such land, or claimed an interest therein, or claimed some interest in the subject of such dispute ;[2]
(4) That the riot was committed for the benefit, or on behalf of the accused, or t at the accused accepted or derived some benefit therefrom;
(5) That the accused or his agent or manager had reason to believe—
  (*a*) that such riot was likely to be committed, or
  (*b*) that the unlawful assembly which committed such riot, was likely to be held ;
(6) That the accused, his agent or manager did not respectively use all lawful means possible—
  (*a*) to prevent the unlawful assembly or riot from taking place, or
  (*b*) for suppressing and dispersing the same.

1489. Limits of Liability.—This section is generally worded but it is manifestly directed against persons who encourage or connive at a riot, and who, at any rate, consider it as to their advantage. This presupposes at least a reasonable belief into its imminence, and that belief is by the express words of the section made essential to charge a man with criminal liability, and it must be established by the prosecution.[3] The fact that the riot was sudden and unpremeditated, and such as there was no reason to infer the accused could have anticipated, or thought likely to happen, would be sufficient for his exoneration, though it may have been to his interest or benefit.[4] So, where there is no evidence to show that an absentee co-sharer in a zaminadari takes an active part in the management, he could not be convicted under this section, after a resident co-sharer has been so convicted.[5] As before observed, the provisions of these sections are so general that they require a strict construction.

Liability of agent of owner or occupier for whose benefit riot is committed.

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

[***Unlawful assembly***—s. 141. ***Riot***—s. 146.]

1490. Analogous Law.—This section merely extends the provisions of the last section to the agent or manager. The language of the two sections is in other respects the same.

1490-A. Procedure.—Same as under s. 155, *see* § 1488.

1491. Limits of Vicarious Liability.—These sections confer on the Magistracy powers of startling magnitude, so that, as observed by Pigot, J., "it

(1) *Betts v. Mhd. Ismail Chowdhry*, 15 W. R. (Cr.) 76; *Pramotha*, 22 I. C. (C.) 767.
(2) *Pramotha Nath, Ib.*
(3) *Brae*, 10 C. 338.
(4) *Hurnath Roy*, 3 W. R. 54.
(5) *Harendra Lal Roy*, 8 C. W. N. 908.

is incumbent upon those entrusted with the exercise of such powers to act not upon inference or suspicions, but upon evidence, not upon surmise but upon proof."[1] So where certain servants of an indigo factory of which the accused Brae was the manager, went armed with *lathis* and one of them with a gun, to the lands of which lawful possession had been delivered to same tenants, against the factory of which Brae was the manager, and a riot occurred in which one of the tenants was shot dead by one of the factory men, and Brae was thereupon prosecuted under this section and it was proved against him that on the morning of the day of the riot at 7 a.m., he had been seen riding in the direction or the lands in dispute, that later on in the morning and before the hour of the riot at 10-30 a.m., or 11 a. m., he had passed close to, and inspected the indigo growing on them. Brae was in the factory when the riot took place, but took no steps to prevent it. He was convicted by the Magistrate, but this conviction was quashed on appeal by the High Court, who held that, thus one Brae could not be convicted because the facts proved created a suspicion, but not proof of what was essentially necessary to constitute an offence under this section namely, (*i*) that a riot was committed ; (*ii*) that the riot, if committed, was committed for the benefit of the accused and (*iii*) that the accused had reason to believe that a riot was likely to be committed.[2]

Harbouring persons hired for an unlawful assembly.

157. Whoever harbours, receives or assembles in any house or premises in his occupation or charge or under his control, any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[***Harbour***—s. 136.]

1492. Analogous Law.—This section as compared with s. 150 is of a wider application. The latter section dealt with the hiring of promotion of, or connivance at, the hiring of persons to join an unlawful assembly.

1493. This section deals with the harbouring of the persons, so or otherwise hired. Under English Law one who harbours persons riotously inclined is punishable as an accessory. But this section is wider, inasmuch as it makes it an offence to receive persons before they have brought themselves within the pale of criminal law. Persons *about* to join an unlawful assembly may not be guilty of any offence, but a person who harbours or receives them is guilty of an offence under this section.

1494. Procedure and Practice.—An offence under this section is cognizable, but summons must issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency, First or Second Class Magistrate and may be tried summarily.

1495. Proof.—The points requiring proof are :—

(1) That certain persons had been or were about to be hired, engaged or employed, to join or become members of an unlawful assembly ;[3]
(2) That the accused harboured, received or assembled them, in any house or premises under his control ;
(3) That he then knew that the persons were as in (1) above.

1496. Meaning of Words.—"*Harbours receives or assembles*": For the maening of the word harbour, *see* §§ 1298, 1302. The words "receive or assemble" are more extensive than the word "harbour," which means to give shelter. The words receive implies the physical act of receiving without intending to give shelter, while assembling may mean either marshalling or collecting in a body. "*Or under his control,*" so that he has access to it. A house let is in the control of the lessee and not of the owner. The words imply any right even a license as gives access to the house or premises. "*Or are about to be hired, etc*":

(1) *Brae*, 10 C. 338 (341).
(2) *Brae*, 10 C. 338 (341).
(3) *Samuel Aaron*, (1931) M. 440 ; *Radharaman Saha*, 58 C. 1401.

These words if not properly understood, may create a difficulty. They do not refer to a remote contingency of the men being hired, but rather to the imminence of an unlawful assembly for which the men had been bespoken.

1497. What Harbouring is Prohibited.—This section makes the "hiring, receiving and assembling" of certain persons an offence. The harbouring of persons who have already been employed to join or become members of an unlawful assembly presents no difficulty, for in such a case all that the prosecution has to establish is that (*a*) the men had been so hired, (*b*) that the accused knew it, and (*c*) that he harboured, received or assembled them. As to the last, the term "harbouring" is again a term well understood, the significance of which has been explained in another connection §§ 1298, 1302. It implies that the men were specially engaged to commit a riot, and that the accused had, as such, given them shelter. Where, therefore, the accused had taken in his service men from a district where men have a well-known character as *lathials*, and a riot subsequently took place, the accused could not be convicted under this section for harbouring men about to join an unlawful assembly.[1] But what is "receiving or assembling"? The word "assembles" may mean either marshalling or merely collecting. A person may, for example, assemble his forces at certain points of vantage with a view to use them to the best advantage, or he may merely collect them in one place before starting them upon their unlawful mission. If the men then knew the object of their meeting they would themselves be members of an unlawful assembly. If they did not, they might be innocent, but even then the person who assembles them may be guilty under this section if he knew that they had been foregathered for an unlawful purpose. Again, a confederate may send a batch of men to another at a distance, and the latter may depute some one to receive them, or show them the way. If he knew of the purpose for which the men had been indented for, he is guilty of this offence, though he may have taken no further part in the matter. But this is an extreme case. Ordinarily, a person is said to receive another, if he welcomes him, and renders him some assistance in finding food and shelter. He who gives him food and shelter "harbours" him, if he knew of the illegal purpose for which the men had come, otherwise he is not liable.

1498. Principle.—In making it criminal to receive persons who are not themselves yet criminals, the section aims at cutting them off from all assistance, and thereby render their task more difficult, if not impossible.

1499. The avenues of knowledge are many. It may be gained as much from the casual conversations of those interested in the approaching conflict, as from the attitude and demeanour of the hirelings; as much from the preparations made, and the precautions taken as from the plans discussed and the views expressed by those interested in the raid or contest. Such contest must be imminent and not remote, probable and not merely contingent. For instance, persons may discuss plans against a contingency which might never happen. The may have no present intention of committing a riot and no intention at all unless they are driven to it by the force of circumstances. In such a case, it would be stretching the language of the section too far to say that the men were *about* to be hired or employed to become members of an unlawful assembly.[2] So, where the Magistrate found that the accused had collected and harboured men for the purpose of committing a riot should he find it to his interest to do so, the High Court set aside his conviction, holding that as the section "contemplated the imminence of an unlawful assembly, and the proof of facts which in law would go to constitute an unlawful assembly," the accused could not be convicted for what was a mere preparation against a possible contingency.[3] The fact that the same persons had formed an unlawful assembly may be some evidence of their intention, but it is no ground for a proceeding under this section.[4]

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(1) *Radha Nath Chowdhry*, 7 C. L. R. 289. this case further discussed under s. 150, *ante*.
(2) *Ram Lochan Sircar*, 29 C. 214 (217). (4) *Radharaman*, 58 C. 1401.
(3) *Ram Lochan Sircar*, 29 C. 214 (217). *See*

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141 shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

Being hired to take part in an unlawful assembly or riot;

and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

or to go armed.

1500. Analogous Law.—This is the last of the set of sections dealing with the offence of rioting, and it makes it penal to hire oneself out to assist in an unlawful assembly or rioting. The section is divided into two parts, and the punishments prescribed in each depends upon the weapons possessed by the hireling—and for an obvious reason. For a person who goes armed with a deadly weapon, naturally strikes greater terror into the minds of people than one who is unarmed.

1501. Procedure and Practice.—An offence under this section is cognizable, but summons should issue in the first instance, unless the offence falls under the second clause in which case a warrant should so issue. But it is in either case bailable, though not compoundable, and it may be tried by a Presidency, First or Second Class Magistrate, and is triable summarily.

1502. Proof.—The points requiring proof under this section are :—

(1) That the accused offered or attempted to be hired or engaged ; or was in fact hired or engaged ;

(2) That the object of it was to assist in doing any of the five acts provided under s. 141 ;

(3) That the accused offered to go armed or went with a deadly weapon.

1503. Being Hired for Unlawful Purpose.—This section completes the *catena* of cases in which law seeks to bar out rioters by penalizing their aiders and abettors, employers and supporters. It cuts the ground from under their feet by penalizing those who allow or suffer an unlawful assembly or a riot to take place on their land, or from which they in any way gain an advantage. It punishes those who hire and those who harbour mercenaries for the purpose, and the latter are themselves punishable under this section.

1504. As to these last, the section looks upon them with varying gravity according to the nature of the arms borne by them. If they were not armed with *lethal* weapons, they are not visited with punishment of the same gravity as when they make themselves formidable by the possession of those weapons.

1505. The section speaks of (*a*) an offer, (*b*) an attempt, and (*c*) an engagement to assist in the doing of an unlawful act. A person who merely purposes to assist, would thus bring himself within the penalty of the section, though his proposal may have been promptly refused. Law regards an offer made as a facility given to a person to riot, which it is its object to discourage. It therefore visits those who offer and those who join with the same punishment. A person who "attempts" to be so hired or employed is similarly treated. An attempt in this sense is only an offer carried a step higher.

1506. It has already been seen as to what constitutes a deadly weapon, so as to aggravate the crime (§ 1362).

159. When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray."

Affray.

1507. Analogous Law.—This definition of affray[1] corresponds with its definition in English Law. "Affrays," says Blackstone, "are the fighting of two

(1) French "*affraier*" meaning terrify.

or more persons in some public place, to the terror of His Majesty's subjects; for, if the fighting be in private, it is no affray but an assualt."[1] The gist of the offence consists in the terror it causes to the public. There can be no affray in a "private place." It may be an assault or something more, but it is not an affray. An affray is an offence against the public peace because it is committed in a public place and is likely to cause general alarm and disturbance. No quarrelsome or threatening language whatsoever will amount to an affray.[2] But if the language used be such as to amount to an assault, it may become an affray if it is committed in a public place. And if it involves five or more persons it may amount to a riot, if it was *premeditated*, otherwise it is still an affray irrespective of the number. An affray differs from a riot inasmuch as it cannot be committed in a private place and does not require five or more persons, and is sudden and not premeditated.[3]

1508. What is a Public Place.—A public place is a place where the public go, no matter whether they have a right to go or not. If the public resort to a place without let or hindrance it is a public place, though, strictly speaking, they may be trespassing.[4] Many shows are exhibited to the public on private property, yet they are frequented by the public—the public go there.[5] There are some places which are by their very nature public, others which are public and private at times. An omnibus,[6] a public urinal,[7] a market, a public street, a public ferry, a passenger train, and a goods yard of railway station[8] are instances of the former. A public garden is not necessarily a public place at all hours, but only when it is open to the public, and so a railway station and platform is only public when a passenger train is expected, it is not a public place at other times, and not even when a goods train is expected.[9] So a goods train is not a public place, for the public do not travel by it. A private garden is not a public place, though the public may have an access to it at times.[10] A Court of law, a Church, mosque or a temple[11] are similarly public places during the hours the public have access to them. So are a hospital, a Town Hall, a theatre or other place of amusement. A Caravan Serai is however by its nature always public, and so would be hotel, a Dak bungalow and other places intended for the reception of travellers. But a boarding house is not a public place, for it is not open to the public, though some of the public may avail themselves of it. A public house is only public during open hours, after which it is private, and so would be a grog shop in this country. A school or college is not a public place, because the public do not go there, and the fact that the public are permitted to pass through it for convenience does not make any difference. There is a distinction between an act done in public, and an act done in a public place. In England, some statutes make acts penal which are done in public, others make acts penal which are done in a public place, so that in the criminal statute law in England the distinction is, it will be observed, between doing an act in public, and doing an act in a public place.[12] The same distinction is observable in the Acts of Indian Legislature. The offence here contemplated must be committed in a public place, and in the presence of the public without whom there can be no breach of the public peace. A private *chabutra* adjoining a public thoroughfare may be public, because it is exposed to public view, but it is not a public place unless the public had a right of access, or were used or permitted to have access to it.[13]

1509. In order to constitute an affray, there must be not only fighting, but it must cause disturbance of the public peace.[14] The familiar example of

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(1) 4 Black, 145, citing 1 Hawk, P. C. 134.

(2) 1 Hawk P. C., s. 2, 487; 4 Black, 146; *Angappa Ansar*, (1892) 1 Weir 71.

(3) 1 Hawk P. C. 65, s. 3; but *contra* in *Lokenath Kar*, 18 W. R. 2.

(4) *Per* Coleridge. C. J., in *Wellard*, 14 Q. B. D. 63 (65, 66); *Ramkaranlal*, 13 N. L. R. 68.

(5) *Per* Grove, J., in *Wellard*, 14 Q. B. D. 63 (63, 67).

(6) *Holmes*, 22 L. J. (M. C.) 122.

(7) *Harris*, (1871) L. R. 1 C. C. 282; but see *Orchard*, (1848) 83 Cox. 348.

(8) *Cowasji*, 26 B. 609.

(9) *Madan Mohan*, (1883) 3 A. W. N. 197.

(10) *Ngachet Ky*, (1885), S. J. L. B., 333.

(11) 1 Weir 71.

(12) *Sri Lal*, 17 A. 166.

(13) *Ibid.*

(14) *Babu Ram*, 53 A. 229.

this is a drunken brawl in a public street where two or more persons shout at and pull about one another. The fighting here spoken of means a quarrel accompanied by some use of some little force. For if the force used is considerable, the offence may be criminal assault or hurt and not merely affray, which is an offence of the nature of disorderly behaviour in public. But mere abuse and the use of threatening language, however violent, is not affray.

Punishment for committing affray.

160. Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

[*Affray*—s. 159.]

1510. Analogous Law.—This section lays down the penalty for the offence described in the last section. Affray is an offence allied to riotous or disorderly behaviour in public for which the Police Act empowers any police-officer to take into custody, without a warrant, any person who within his view commits the offence.[1]

1511. Procedure and Practice.—An offence under this section is non-cognizable, but it may be cognizable if it amounts also to an offence under section 34 of the Police Act. In either case summons must ordinarily issue in the first instance. It is bailable but not compoundable, and may be tried by any Magistrate, and is triable summarily.

1512. Proof.—The points requiring proof are :—

(1) That the accused and another person or other persons were fighting ;
(2) That such fight was in a public place ;
(3) That the fight disturbed the public peace.

1513. The evidence required to establish an affray is (*a*) that there was a fight, (*b*) that it was in a public place, and that (*c*) it led to the breach of the public peace. Of course where a large number of persons commit an affray, specific evidence as to the acts of each fighter cannot be expected ; but only general evidence as to the accused taking part in it. So where two parties fought over their right to fish in a *bhil*, it was held that the men who punted the boats on which the fight took place, and in whose interests the fight on the boats took place were just as guilty as those who actually struck the blows.[2]

1514. Charge.—The charge should run thus :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of accused*), as follows :—

"That you——on or about the——day of——at——, committed offence of affray, and thereby committed an offence punishable under section 160 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1515. Characteristics of an Affray.—The general characteristics of an affray have been before set out (§§ 1507-1508). An affray should, on the one hand, be distinguished from an assault. On the other it must be distinguished from a riot. It differs from the latter in that it is unpremeditated and sudden, and does not require five or more persons, and from both in that it is committed in a public place (§ 1508). Ordinarily an affray is a sudden quarrel between two or more persons resulting in fighting and a breach of the peace. But it may become aggravated either from the nature or character of the *place* where and the *person* against whom it is committed. For example, an affray committed in the Courts of justice or within their precincts, receives an aggravation from the fact that it implies defiance of the law,[3] and want of respect to the Courts. And for the same reason affrays in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are

(1) Act V. of 1861, s. 34.
(2) *Moher Sheikh*, 21 C. 392.
(3) 1 Hawk, P. C., c. 21, ss. 6, 10 ; c. 63. s. 23.

immediately dedicated.[1] So as regards persons, an affray may receive an aggravation from the persons against whom it is committed, as where the offences of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or by the bare attempt to make such a rescue.[2]

Sudden Quarrel.

1516. It has been before remarked that an affray differs from a riot in that it is unpremeditated, being a sudden quarrel in which the people act on the impulse of the moment. So if a number of persons meeting together at a fair or market "happen, on a sudden quarrel, to fall together by the ears, it seems agreed that they will not be guilty of a riot but only of a sudden affray, of which none are guilty but those actually engaged in it; and this on the ground of the design of their meeting being innocent and lawful and the subsequent breach of the peace happening unexpectedly and without any previous intention."[3] Bayley, J., considered this view untenable in view of the law enacted in section 141 under which an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.[4] But this observation was evidently made with reference to the facts of the particular case before him, and it cannot be laid down as a general rule that whenever five or more persons quarrel they are, apart from the other facts, necessarily members of an unlawful assembly. Of course, an affray may become an unlawful assembly if it acquires the requisite attributes, but a sudden unpremeditated quarrel leading to blows can scarcely be so designated.

Fighting must Disturb Peace.

1517. There can be no affray unless there is fighting, and that fighting causes a disturbance of the public peace. So where an Assistant Station Master and a railway pay office peon fought on a railway platform when a goods train was in the station, and the Magistrate convicted them holding that the peace of the guard and the engine-driver of the goods train had been interfered with, it was held that there being no disturbance of the public peace, there was no affray, and that the case was one of an ordinary assault.[5]

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(1) 1 Hawk, P. C. C. 63, s. 23; for Statutes against brawling, *see* 5 and 6 Edw., c. 4; 23 and 24 Vict., c. 32, s. 1.
(2) 1 Hawk, P. C. C., 63, s. 22.
(3) 1 Hawk., P. C. C. 65. s. 3.
(4) *Lokenath Kar*, 18 W. R. 2.
(5) *Madan Mohan*, (1883) A. W. N. 197.

CHAPTER IX.[1]

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

1518. Topical Introduction.—As this chapter is intended to reach offences which are committed by public servants, and are of such a description that they can be committed by public servants alone, so the next chapter (chapter X) deals with the contempt of the lawful authority of the public servants in its various forms which can only be committed by members of the public in relation to such public servants. As this chapter is intended to ensure probity among the public servants, the next chapter creates certain obligations on the part of the public to assist public servants in the discharge of their duty. It must not be understood that this chapter is an exhaustive Code for the public servants, since the State can make rules for the conduct of its own servants, though it cannot regulate the morality of the public at large, beyond that implied in the enactment of this Code. Misconduct and abuse of their power by persons other than public servants have to be left to be otherwise dealt with by the penal visitation of a criminal Code.

1519. Those offences which are common between public servants and other members of the community, are left to the general provisions of the Code. If a public servant embezzles public money, he is left to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the Government to allow it in his accounts he is left to the ordinary law of cheating. If he produces forged vouchers to back his statement he is left to the ordinary law of forgery. There is no reason to punish these offences more severely when the Government suffers by them than when private people suffer. Since the security of Government lies in the purity of its administration, without which it would lose both revenue and prestige.[2]

1520. This chapter does not provide punishments for all kinds of misconduct of public servants, and this the authors were not unaware of. They also admitted that the puuishments enacted in this chapter are not generally proportioned, either to the evil which the abuse of power produces, or to the deprivity of a man who, having been entrusted with power for the public benefit, employs that power to gratify his own cupidity or revenge. But the penalty of an offence committed by a public functionary in the exercise of his public functions has been fixed on the supposition that it will often be only a part, and a small part of the penalty which he will suffer. It is in the power of the Government to punish him for many acts which the law has not made punishable. "It is in the power of the Government to add to any sentence pronounced by the Courts, another sentence which will often be even more terrible." Such a sentence may consist of degradation or dismissal, the infliction of which must be left to the executive Government which may be trusted to suppress and punish corruption and oppression.

1521. This chapter makes the receiving of a bribe an offence while another punishes the giver as an abettor.[3] The authors did not, however, consider this course advisable, being of opinion that, in many cases, the receiver is the tempter and the giver has no option. In other words, bribes in this country partake of the nature of extortion.[4] But the Legislature has followed the normal law, and has made, both the giver and the receiver, criminally liable. Besides the normal cases of bribes, public servants are prohibited from using their office to benefit themselves in more indirect ways. The authors of the Code instanced two such cases, *viz.*, a deposit made with a private banker who pays a heavy rate of

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(1) As to authority for institution of prosecutions against certain public servants, *see* the Code of Criminal Procedure, 1898 (Act V of 1898), S. 197. As to offering bribes to offences under the Bombay Land Customs Act, 1857 (XXIX of 1857), *see* S. 19 of that Act.

For the purposes of this Chapter every Railway servant shall be deemed to be a public servant—*see* Indian Railways Act, 1890 (IX of 1890) s. 137. Every manager or servant of the Court of Wards under the Bombay Court of Wards Act, 1905, shall be deemed to be a public servant within the meaning of this Chapter—Bom. Act 1 of 1925, s. 1 (2) Bom. Code; *see* also the Central Provinces Courts of Wards Act, 1899 (XXIV of 1899), s. 19 (2), C. P. Code; the Ajmer Government Wards Regulation, 1855 (1 of 1855) s. 11 (2) Aj. Code.

(2) *Cf.* Note E, Reprint, pp, 120, 121,

(3) S. 109, Ill. (*a*).

(4) Note E. Reprint, p. 126.

interest, and a house taken on low rent and furnished with costly furniture. Illegal gratifications may take other forms, which may be penalized by the promulgation of rules for the conduct of public servants made under s. 166. Cases not covered by that section would, the authors hoped, be dealt with by the executive Government.[1]

Public servant taking gratification other than legal remuneration in respect of an official act.

161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency or with any Lieutenant-Governor, or with any public servant, as such shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—"*Expecting to be a public servant*": **If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in the office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.**

"*Gratification*" : **The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.**

"*Legal remuneration*": **The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government,[2] which he serves, to accept.**

"*A motive or reward for doing*" : **A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.**

Illustrations.

(*a*) *A*, a munsif, obtains from *Z*, a banker, a situation in *Z's* bank for *A's* brother, as a reward to *A* for deciding a case in favour of *Z*. *A* has committed the offence defined in this section.

(*b*) *A*, holding the office of Resident at the Court of a subsidiary Power, accepts a lakh of rupees from the Minister of that Power. It does not appear that *A* accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the British Government. But it does appear that *A* accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. *A* has committed the offence defined in this section.

(*c*) *A*, a public servant, induces *Z*, erroneously to believe that *A's* influence with the Government has obtained a title for *Z*, and thus induces *Z* to give *A* money as a reward for this service. *A* has committed the offence defined in this section.

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(1) Note E. Reprint, p. 127.

(2) The word "Government" in the definition of "Legal remuneration" includes,—

(*a*) A Court of Wards, for the purposes of s. 19 (2) of the Central Provinces Government Wards Act, 1899—*see* Act XXIV of 1899, s. 12 ; the United Provinces Court of Wards Act, 1899 (United Provinces Act III of 1899) ; the Ajmer Government Wards Regulation, 1888 (I of 1888) ; s. 11 (2) ; United Provinces Municipalities Act, 1900 (United Provinces Act I of 1900) s. 51 ; Bombay Court of Wards Act, 1905 (Bombay, Act 1 of 1905), s. 21 (2) ; the Punjab Court of Wards Act, 1903 (Punjab Act II of 1903) s. 42 (3).

(*b*) The Senate of the Allahabad University, for the purpcse of s. 18 (1) of the Allahabad University Act, 1887—*see* Act XVIII of 1887 s. 18 (2).

(*c*) An employer of a railway servant, as such, for the purposes of s. 137 (1) of the Indian Railways Act, 1890 (IX of 1890) s. 137 (2).

Giver of bribe—s. 109, Ill. (*a*) ; ***Receiver of bribe***—ss. 162, 163 ; ***Official abetted***—s. 164 ; ***Official receiving valuables***—s. 165 ; ***Official's conduct***—s. 166 ; ***Official's false preparation of record***—s. 167; ***Official trading***—s. 168; ***Official unlawfully buying and selling***—s. 169 ; ***Personating an Official***—s. 170 ; ***Wearing a garb of an Official***—s. 171.

1522. Analogous Law.—In England bribery is a misdemeanour punishable at common law. Bribery in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place, taking any valuable thing, except meat and drink of small value of any man who has to do before him in any way, for doing his office, or by *colour* of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also, bribery sometimes signifies the taking or giving a reward for offices of a public nature.[1]

1523. The same rule has been enacted by the statutes. With regard to the Judges the rule is thus enacted : " Ye take not by yourself or by other privily nor apertly, gift nor reward of gold or silver, nor of any other thing which may turn to your profit, unless it be meat or drink, and that of small value, of any man that shall have any plea or process hanging before you, as long as the same process shall be so hanging ; nor after for the same cause."[2] This form was embodied in the oath taken by the Judges on their appointment, and it was the oath which the Bengal Regulation also introduced into this country in the case of the Company's Judges.[3]

1524. In other cases, bribery has been provided against by specific statutes passed " for the effectual prevention and punishment of bribery and corruption of and by members, officers or servants of corporations, councils, boards, commissions, and other public bodies."[4] So the Corrupt Practises Prevention Act[5] enacts elaborate rules directed to the prevention of bribery and corruption at parliamentary elections, and another Act extends similar rules to municipal elections.[6] All these, are however, extensions of the same principle, which is enunciated in this section, and which with some verbal variations underlies all statutes directed against the same abuse.

1525. Procedure and Practice.—An offence under this section is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session or a Presidency or First Class Magistrate. The sanction of Government is moreover necessary for the prosecution of Judges and public servants not removable from their office without the sanction of Government.[7]

1526. An aggravated form of this offence is made punishable by section 214, and where if the fact stated in that section are proved, the proper procedure is to proceed under that, and not this section.

1527. Proof.—For a charge of bribery against a public servant the evidence should, it is said, be conclusive[8] but the evidence of the bribe-giver, corroborated by that of one from whom he had raised money for the purpose, was held to be sufficient.[9] And in one case the court accepted the uncorroborated testimony of two accomplices as sufficient, as they were shown to bear no *animus* against the accused.[10] The giver completes his abetment so soon as the bribe offered by him is accepted though the briber did not accept it as a bribe but merely as evidence of the giver's guilt.[11] The fact that the complaint is lodged under this section does not prevent

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(1) 1 Hawk, P. C. C. S. 67, ss. 1, 2 and 3.
(2) Statute 4, 18 Edw. III.
(3) Beng. Reg. V. of 1703, cl. 2.
(4) 52 and 53 Vict., c. 69, s. 1 (1).
(5) (1883), 46 and 47 Vict., c. 51.
(6) Corrupt and Illegal Practices (Municipal Elections) Act, 1884 (47 and 48 Vict., c. 70).
(7) S. 197, Cr. P. C.
(8) *Kehri Illahi*, (1911) P. W. R. 26; 12 I. C. 93.
(9) *Harsukh Rai*, (1919) P. W. R. 3.
(10) *Ghulam Mohammad*, (1917) P. R. No. 9, 39 I. C. 680.
(11) *Raghudatt*, (1892-96) 1 U. B. R. 154; *Nga Hnin*, 38 I. C. (L. B.) 439.

the court from convicting under another section, *e.g.*,171-E provided that the accused is not misled by the charge.[1] The points requiring proof are :—

(1) That the accused atthe time of the offence was, or expected to be, a public servant.[2]
(2) That he accepted or retained, or agreed to accept, or attempted to obtain from some person a gratification.
(3) That such gratification was not a legal remuneration due to him.
(4) That he accepted such gratification as a motive or reward, proof of which is essential,[3] for—
  (*a*) doing or forbearing to do an official act, or
  (*b*) showing or forbearing to show favour or disfavour to someone in the exercise of his official functions, or
  (*c*) rendering or attempting to render any service[4] or disservice to some one. with the Legislative or executive Government, or with any public servant.

1528. Charge.—The charge under this section should specify the nature of the office held by the accused, by virtue of which he was a public servant, and the name of the person from whom the bribe was taken,[5] and of the public servant who had to be influenced in the excerise of his official functions.[6] Again, the accused cannot be tried at one trial or more than three offences committed within the space of one year. Consequently, where a bribe was collected from certain inhabitants of a village by subscription, and handed over to the recipient in a lump sum, the latter could not be charged under this section with the receipt of the whole sum so collected, but only in respect of any three separate items constituting the total collection.[7] But where in pursuance of the same purpose the bribe is paid in two instalments on two different days, the offence committed is one, and there cannot be two convictions on account of two separate payments.[8]

1529. The charge should be thus worded :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you——being a public servant in the——Department directed, accepted from——[(*state the name of the giver*) *if received for another, add* for another party, namely,——)] a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within my cognizance (*or* of the Court of Session *or* High Court).

"And I hereby direct that you be tried (*in case of committal* by the said Court) on the said charge."[9]

1530. Principle.—The giving and taking of bribes, as a crime, is an outcome of refined jurisprudence. In crude early age the payment of the Judge by the parties was a matter of course. Its abuse was sale of justice to the highest bidder. Thus payment led to corruption and corruption to the notion that it was the concern of the State to pay its Judges, and the duty of the Judge was to decide in accordance with the light of his conscience and not in accordance with the magnitude of his reward. And as the placing of man in a position in which his interest clashes with his duty leads to the subordination of duty to self-interest, law began to reprobate the practice of allowing Judges to receiving any payment from the parties or to hold any communion with them. With the elevation of morality the attainment of this end was an easy task, for Judges become as anxious to preserve themselves from the blemish of being considered partial, as the public were concerned in seeeing them dispense even handed justice uninfluenced by fear or favour. Hence the peculiar privileges and liabilities of Judges.

1531. Meaning of Words.—"*Being a public servant,*" a public servant remains a public servant, so long as he can legally exercise the power.[10]

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(1) *Ponnuswamy*, (1922) M. 62.
(2) *Qazi Rahimulla*, (1935) Pesh. 26.
(3) *Chinnaswami*, 8 I. C. (M.) 668; *Upendra Nath*, 39 I. C. (C.) 805.
(4) *Allauddin Ahmad*, (1935) S. 7
(5) 5 W. R. (Cr.) L. 8.
(6) *Setul Chunder Bagchee*, 3 W. R. 69.
(7) *Nanda Lal*, (1904) A W. N. (223.)
(8) *Jagat Chandra Sarma*, 5 C. W. N. 332.
(9) Cr. P. C., Sch. V, Form XXVIII, (I) (3)
(10) *Ajūdhia Prasad*, (1928) A. 752.

"*Expecting to be a public servant*": A mere hope not ending in fruition will not do.[1] The expectation must be realized, and in practice the recipient must have acted officially in the corrupt manner previously promised,[2] though this is not necessary to complete the crime. "*For doing or forbearing to do*". A public servant arrogating to himself a power which he does not possess, for the exercise of which he receives bribes is liable to conviction under this section, since the language of the section is wide enough to cover such a case, as is clear from illustration, (*c*) appended to this section.[3] "*Or attempt to obtain*": A mere asking is sufficient to constitute such an attempt.[4] "*A motive or reward for doing any official act*": This does not mean that if the bribe-taker receives a bribe from a person not as a motive or reward for judging in his favour, but for judging rightly he would not be guilty. But it would seem that a thanks-offering is not a bribe[5] though it would be punishable under s. 165. But a reward by the patient to a doctor for keeping him longer in the hospital, after the latter had decided to discharge him is a bribe.[6] "*Gratification estimable in money*": Such may be the case where two officials exchange favours, or where one has sexual intercourse in return for an official favour.

1532. What amounts to a Bribe.—Three things are requisite to constitute the offence of bribery here described: (*i*) the receiver must be a present or prospective public servant, (*ii*) he must solicit or receive an illegal gratification, and (*iii*) it must have been received as a motive or reward for doing any official act which he was empowered to do, otherwise, it is extortion.[7] The section deals only with persons who are or expect to be public servants. It has no reference to any other person; whatever may have been their inequity in selling their favours to persons similarly circumstanced. This chapter had been enacted to insure honesty on the part of public servants. Law cannot regulate the morality of all its subjects. Such a task is as much beyond its scope, as it is impossible (§ 1528). It, therefore, extends its prohibition only to two classes of persons, (*a*) those who are actually public servants, (*b*) those who expect to be so.

1533. The first question must be answered with reference to what has been said in under section 21 (§§ 131-169). As according to that definition not only persons properly designated public servants, but also persons, being to all appearance public servants, are entitled to the rights and are subject to the liabilities of public servants, persons who are *de facto* public servants may be convicted under this section, whatever defect there may have been in their appointment. In other words whenever, a person has received a bribe professing to act as a public servant, he could not afterwards turn round and plead the illegality of his appointment as a defence to his criminality.[8] A goods clerk employed by a Railway administration is a railway servant, within the meaning of s. 3 (6) of the Railways Act, 1890, and he is under s. 137 of the said Act also a public servant for the purposes of offences under this chapter. Railway servants properly, as long as they do not cease to be such, continue to be "public servants" for the purposes of this chapter, whatever functions they may be temporarily discharging at the time when the offence by, or in respect of, them is committed.[9]

1534. The second question calls for notice. What is meant by a person expecting to be a public servant? Now a person may "expect" to be a public servant, and in the hope of that expectation coming true, he may ask or receive a bribe. Now his expectation may have been well-founded though it may or may not be realized; or it may be merely a fraud to inveigle another. If it is realized and the person becomes a public servant, he may or may not bestow the favour, which he had promised and was paid for. It is clear from the explanation appended to the section that if he did not himself *believe* that he was to be a public servant, but led

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(1) *See* Expl.
(2) 2nd Rep., s. 66.
(3) *Ajudhia Prasad*, (1928) A. 752.
(4) *Ma Ka*, (1892-1896) U. B. R. 158.
(5) *Amiruddin*, 67 I. C., (B.) 818.
(6) *Barham Sahib*, (1930) M. 671.
(7) *Nga Kan Tha*, 20 I. C. (Bur.) 237.
(8) *Ramkristo Das*, 16 W. R. 27.
(9) *Zaharia*, (1898) P. R. No. 9.

others to believe that he was to be so appointed and who thereupon paid him money, he could not be convicted under this section, though he may then be, probably will be, guilty of cheating under section 420. Eliminating then this case from our present consideration there still remain two cases in which a person *bona fide* expects to be a public servant, but in which he is disappointed, or becoming a public servant he disappoints the briber by not doing what he had promised to do. In either case it seems to be clear that he is liable under this section, in the former case because, as the Law Commissioners explained it, that if " a person expecting to be appointed to a public office obtains money from another as the price of favour to be shown to that other, in the exercise of his functions in that office, he is surely as corrupt as one who does the same, being actually in office. It must be proved, of course, that he gave the other party reason to believe that he was about to obtain the office ; it must be proved, also, as appears by the first 'explanation,' that he himself expected to obtain it. In practice, the provision would probably be brought into action only against persons who, after having obtained the expected office, are found guilty of the previous corrupt transaction, and generally only against persons, who, having obtained the expected office, have acted officially in the corrupt manner previously promised."[1] But as a matter of law, it is clear that not only a person who *is* but also one who *expected to be* a public servant may be gulty of an offence under this section.

1535. What is Gratification.—Secondly, the person must have received " any gratification " as a " motive or reward " for doing any official act. The word " gratification " is not defined in the section or the Code, but its sense is extended by the explanation, which says that the word " is not restricted to pecuniary gratification, or to gratification estimable in money ". The word " gratification " is thus used in its larger sense as connoting anything, which affords gratification or satisfaction or pleasure to the taste, appetite or the mind. Money is, of course, one source of affording pleasure, inasmuch as it implies command over things which afford pleasure, but there are various other objects which afford gratification. The satisfaction of one's desires, whether of body or of mind, is a gratification in the true sense of the term. The craving for an honorary distinction, or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification not estimable in money. A person may desire to marry his son to another's daughter, who may consent to the match on condition of his doing him some official favour. It is bribery. A person may be taken into a caste on his promising to do an official act as a motive or reward for his re-admission. It is bribery. In short gratification is any benefit or reward given to influence one in one's behaviour in office, and incline one to act contrary to the rules of honesty and integrity. Anything, whether a sum of money, an object which appeals to one's sense, a dinner, a plateful of fruit, a medicinal pill is gratification within the meaning of the term, though the recipient may not be punishable on that account.

1536. Motive or Reward.—For, it is not the receipt of " any gratification" alone that constitutes the offence. It must have been given as a " motive or reward " to do any official act. The word " motive " evidently refers to a future act, while the word " reward " is manifestly intended to apply to a " past service." What is forbidden, speaking generally, is the receiving any gratification " as a motive " to do or a " reward" for having done any such thing as is described in the definition. It is explained that "a person may receive a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done." This explanation appears to be intended to guard against such a plea as, to refer again to that well-known case, was set up as an excuse for Lord Bacon. " It is pretended," says Hume in his history, " that Bacon had still in the seat of justice, preserved the integrity of Judge, and had given just decrees against those very persons from whom he had received the wages of iniquity.[2]

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1) 2nd Rep., s. 66, Reprint, p. 359.

(2) 2nd Rep., s. 67, Reprint, p. 359.

1537. A motive or reward may be received in any form, and it may be called by any name, but it is a bribe if it is received under the promise or on the understanding of an official favour or disfavour.[1] A person may receive a bribe to do what is his duty, and still it is a bribe if it is not a legal remuneration. Such is the demand of a *dasturi* or a customary due, by a Civil Court peon, from the complainant if he wished him to serve the summons without an identifier.[2] In another case, there was a semblance of consideration, but still the Court held it to be a case of bribe. There the Mahars of a village had been suspended from service, but subsequently there was a meeting of the villagers under the presidency of the *patel* and it was then agreed to re-employ them on payment of Rs. 300 which was to be employed in repairing the village temple. The payment itself was exacted as a fine from the Mahars who were supposed to have poisoned the village cattle during the period of their suspension, which was only from their private services to the villagers, and not from their public service to Government. The village *patel* who had taken a leading part in arranging for the settlement was prosecuted under this section, and Jardine, J., upheld his nominal conviction holding that the payment promised by the Maharas was a motive for their reinstatement by the village community of which the accused was the head, though in his case there was the absence of corrupt or oppreseive motive, and his conduct might be explained by referring it to a wish to end quarrels, and promote a public object.

1538. But in order to constitute a bribe, it is not necessary that the motive should be corrupt or oppressive, or that the money received should have been appropriated by the receiver.[3] It is equally a bribe, if the money is promised to a deserving institution in return for the favour received from the officer. The mere fact that there is the show of consideration would not take the offence out of the rule. It was so held in another case, in which the accused, a *kulkarni* of a village, obtained 12 annas from a tenant who had received Rs. 8 as a *tacavi* (or agricultural loan) in consideration of his having written out the necessary papers and given the necessary evidence to enable him to obtain the loan, which was a part of his routine duty. It appeared that the accused had given out that he had worked for the tenants for eight days and that they must pay him 12 annas each, failing which he should get them into trouble. The Court held that the accused was either guilty of bribery or extortion, and his conviction for the former offence was affirmed, the Court holding that the accused made use of his official position and claimed and obtained the money as a reward for rendering services which he had not rendered in that position.[4]

1539. Where a constable and others entered a house and apprehended certain persons and gamblers, and afterwards released them on payment of a sum of money by the latter, the offence committed is not house-trespass and exortion, but taking a bribe as regards the constable, and abetment of that offence as regards the others.[5] The taking of a gratification by the reader of a judge to influence him, is clearly an offence under this section, it being wholly immaterial whether as a fact he did or did not influence him.[6] The question in such cases is not what the receiver did, but what he professed to do, and what the payer believed he could do, upon which he made the payment.[7] Indeed, the receipt of a valuable thing by a public servant, apart from motive, without consideration is in itself an offence apart from the motive of the giver or the recipient,[8] but if the receiver was in a position of authority over the giver, the presumption will rather be that the property was given and received as a motive for the conferral of some official favour. So where a *patwari* took grain presumably from the ryots of his village the Court considered it an offence under this section rather than under s. 165.[9]

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(1) *Nga Kan Tha*, 20 I. C. (B.) 237.
(2) *Ratan Moni Dey*, 22 C. 292.
(3) *Appaji*, 21 B. 517.
(4) *Mahomed Hossein*, 5 W. R. 49.
(5) *Krishnaji Ganesh*, (1898) B. U. C. 955.
(6) *Kaleechurn*, 3 W. R. 10.
(7) *Kishanlal*, (1904) A. L. J. R. 207.
(8) S. 165.
(9) *Mudsooddeen*, 2 N. W. P. H. C. R. 148.

1540. Whenever a public servant receives an illegal gratification from persons over whom he is set in authority, the Court may naturally connect the receipt of gratification with the abuse of office. But it is not conclusive, for the fact disclosed may point to another inference. Where, for example, two chowkidars discovered an amour between a widow and a goldsmith at whose shop she was seen by them at night, and who thereupon gave them a bribe to hold their tongues and thereby to save him from the disgrace that might attach to a person detected in a clandestine intrigue, it was held that, as the receipt of money was unconnected with the performance of any official act, they could not be convicted of bribery, as the hush-money received was received in a private matter in no way connected with the performance of their official duties.[1] The same view was taken in another case in which a vaccinator had received a sum of money from the parents of children whom he had previously vaccinated, and whom he otherwise threatened to lance to take out lymph. It was held that, since he could not legally do this without the consent of parents, his threat to cause pain to the children with a view to obtain money constituted extortion, and that the offence was not one of bribery as his abstention from lancing their arms could scarcely be said to have been forbearing to do any official act, for whether he was so ordered or no, he had no legal power to lance children for the purpose.[2]

1541. Legal Remuneration.—There can be, of course, no offence unless the gratification solicited or accepted was illegal. It would be illegal if it was forbidden by law, or by the rules of Government. For example, medical men, though public servants, are permitted by Government to charge their fee for medical attendance. A grateful patient may pay them a douceur for their skilful cure, but it is not a bribe, unless its acceptance was prohibited. So again, the pay received by a public servant is a legal remuneration, though it is a motive for doing an official act, namely, their duties. So again, public servants are entitled to receive any reward given or sanctioned by Government, in which case it ceases to be a gratification, but becomes a "legal remuneration". The Government Architect may be permitted to charge a fee for designing buildings for private persons, an engineer may be permitted to charge for his services in supervising their construction. In short, the sole test of legality is the order of Government. It is not a case of *mala in se* but of *mala que prohibita*.

1542. Attempt to Obtain a Bribe.—This section speaks of the "attempt" to obtain a bribe, as being in itself an offence. Now, this word has been held to imply no more than a mere solicitation, which again may be made as effectually in implicit as in explicit terms.[3] Moreover, in order to constitute an attempt it is not necessary that a specific sum be asked for, or that any definite promise of return service be made. It is enough that the giver is led to believe that his money was likely to be profitably spent. So where a clerk in the Pension Department met an applicant for pension, and told him that he had succeeded in securing increased pensions in two cases, that much authority was vested in him, and that the complainant might be similarly benefited by a similar *karrawai* or procedure. The candidate refused to adopt the suggestion and the clerk was prosecuted for "attempting to obtain illegal gratification," and he was convicted by Spankie and Pearson, JJ., the latter observing that "to ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as in explicit terms."[4] Indeed, it is seldom that a person is so incautious as to call a bribe a bribe. He calls it by some euphemistic ambiguous name, *dasturi*, *inam*, *or baksheesh*, but a bribe is a bribe by whatever name it may be called, and howmuchsoever customary its payment may have become. The *baksheesh* paid to peons of Government officials, by persons having anything to do with them is a bribe, pure and simple, though its payment has passed into a tradition. So again, some degree of circumlocution is inevitable

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(1) *Per* Tyrrel, J., in *Abdul Aziz*, (1883 A. W. N. 179.
(2) *Harihar*, 1 C. P. L. R. 24.
(3) *Baldeo Sahai*, 2 A. 253.
(4) *Baldeo Sahai*, 2 A. 253.

when an offer of a bribe is made to a comparative stranger. Sometines the offer is made in a language which leaves much to be understood. For instance, where the prosecutor in a nose-cutting case fearing an adverse verdict offered some money to a juryman's brother which he refused, and he then approached the juryman, who was also the foreman, direct and said : " The nose-cutting case is a true one. There is something to be had in it. Please see your brother before going to Court. I can spend as much as Rs. 1,000 in this matter," the conversation was rightly construed to be the offer of a bribe, and the accused was thereupon convicted under section 116 read with this section.[1]

1543. Service in Consideration for a Bribe.—The section specifies a number of acts which form, as it were, the consideration for a bribe. They are all instances of the abuse of official position, either by favouring the giver of the bribe, or by confounding his enemies. The offence being directed against maladministration, a public servant receiving a gratification, whether for himself or for another, is equally guilty. And as there is nothing against the briber being a public servant it may be that both the giver as well as the receiver of a bribe are public servants, *e.g.*, where a person offers a bribe to his superior officer to obtain his promotion. And as one public servant may solicit a bribe for another, it may be that a number of public servants may become involved in the same case. Again, since the receiver may render or " attempt " to render service with Government or any public servant, as such, it follows that the receiver need not necessarily be himself serviceable to the briber ; for it is enough if he procures him some advantage from another, in which case law presumes that he must have exerted his influence on behalf of the person promising or paying him the bribe.

1544. That influence must, however, have been exerted in the definite channel stated in the section, that is to say, it must either amount to the doing or forbearing to do an official act or favour or service with any public servant. As an instance of such service may be mentioned the following case : A railway goods clerk suspected certain frauds in the goods office of which he made a report to his superiors. The matter was referred to the District Magistrate who referred it to the police for enquiry, and the goods clerk was deputed to assist them in the discovery and prosecution of the culprits. While on such duty, the accused offered him Rs. 500 if he closed the inquiry and returned his account-books unchecked. He was prosecuted and the question was whether the offence fell under this section, it was held that the goods clerk was a public servant, but inasmuch as he had not then any official functions in the discharge of which he could do any act or show any favour, the offence was not covered by the first and second clauses, but it was covered by the third clause of this section, inasmuch as the accused thought that the clerk alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the goods office, and that if he represented to the police that there was nothing disclosed in the accused's books on comparison with the railway records to prove anything against them, he could probably succeed in persuading the Police Inspector in charge of the enquiry, who was a public servant, acting as such, to make a report to that effect to the District Magistrate, and to get the case dismissed, and the books returned.[2]

1545. An offence committed under such circumstances may conceivably fall under the graver, though in some respects, more general provisions of section 214. If, suppose in this case, the accused, instead of approaching the clerk, had approached the Police Inspector and made him a similar offer, his offence would then be one under section 214, and not under this section. Indeed, it was so held in a case in which the accused had offered a bribe to a public servant in consideration of his not proceeding against him whose papers and books he had seized for the purpose of bringing them to legal punishment.[3]

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(1) *Bawool Chunder Biswas*, 1 W. R. 36, followed in *Ratan Moni Dey*, 32 C. 292.

(2) *Zaharia*, (1898) P. R. No. 9.

(3) *Magraj*, (1881) P. R. No. 13.

1546. Briber's Liability.—The sections in this chapter deal only with the criminal liability of public servants. For reasons already given (§ 1521) they do not provide for the punishment of the giver of bribes. Such a person, however, is not wholly exempt from criminal liability. For his case is met by section 109 of the Code. A person offering a bribe, whether received or rejected, is under the provisions of that section guilty of abetment. But in order to make that section applicable, the circumstances therein stated must be strictly fulfilled. If, therefore, the offence was more in the nature of extortion than bribery, the briber would hardly be proceeded against as an abettor, whatever may be the strict view of that section. For it was not the intention of the Legislature to punish the mere payment of an illegal gratification (§ 1521). At the same time it was not intended to exempt from punishment the payer in all circumstances. If he was the tempter, he will be liable as an abettor. If he was coerced into the payment, he would not be liable merely because the payment was to his interest. But the mere fact that the briber paid the bribe because the public servant concerned had directly or indirectly solicited it, does not exempt the briber from his liability as an abettor, for to pay a bribe, on demand is an abetment of the offence,[1] though it may then be a question whether the demand was a mere demand or anything more. Again, in order to make a person liable for abetment there must be evidence to show that the abetment was of an offence falling under any section of the Code. So, in order to render a person liable for abetment of an offence described in this section, it must be shown that the offer was made for any of the purposes here mentioned. If such an offer be made the offence of abetment is complete, it being immaterial whether the offer was or was not accepted; the only difference it then makes, is in the degree of abetment, an offer rejected being punishable under the milder provisions of section 116, an offer accepted being punishable under section 109.[2]

1547. It has been, sometimes, said that, not only he who offers, but they who are present at the time of the offer or the payment, are guilty of abetment.[3] But this is by no means the case, for a person may be present as a *spectator haud particeps*.[4] Such a person is of course, to be distinguished from those who actually contribute to or negotiate for its payment.[5] But failing to be an abettor, such a person may be regarded as an accomplice, as one upon whose testimony the courts regard it as unsafe to convict a person of bribery. This question is so intimately connected with the proof of an offence under this section that a short reference to it is here necessary. (§ 1549).

1548. Testimony of Accomplices.—According to the practice of the Courts a varying degree of credibility attaches to a person who was present at the giving of a bribe. It is a rule of evidence that an accomplice is unworthy of credit, unless he is corroborated in material particulars.[6] It is also a rule that a conviction on the uncorroborated testimony of an accomplice is not illegal.[7] The question, therefore is, what are the rules under which the Court may give effect to these two seemingly contradictory rules in cases falling under this chapter. Now it is a rule established by the practice of the Courts that, though a conviction on the uncorroborated testimony of an accomplice is not illegal, it is nevertheless improper.[8] This rule then necessitates some degree of corroboration of the testimony of an accomplice, to warrant a conviction for an offence under this section. The payer of a bribe may or may not be an abettor; but he is in every case an accomplice

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(1) *Ma Ka*, (1892-1895) U.B.R. 158, (163); *Nga Hnin*, 38 I. C. (L. B.) 439, followed in *Dinker Rao*, 55 A. 654. But even such a person is less of an abettor than one who pays unasked; *Deonandan Pershad*, 33 C. 649; or pays to one who merely received it as evidence against the giver; *Nga Hnin*, 38 I. C. (L. B.) 439.

(2) *Jagat Chandra Sarma*, 5 C. W. N. 332.

(3) *Mahomed Hossein*, 5 W. R. 49.

(4) "Spectator and not a participant."

(5) *Deodhar Singh*, 27 C. 144; *Deonandan Pershad*, 33 C. 649.

(6) S. 114, Evidence Act (I of 1877).

(7) S. 133.

(8) The leading case on the subject is still the Full Bench ruling in *Elahee Buksh*, (1866) 5 W. R. 80, F. B., in which Sir Barnes Peacock enunciates the rules since embodied in the Indian Evidence Act; see *per* Fulton, J., in *Malhar Martand*, 26 B. 193.

for the purpose of this rule.[1] His evidence, consequently, requires corroboration, but the degree of corroboration forthcoming must necessarily vary in each case. Therefore the Courts have considered the degree of corroboration required to justify a conviction under this chapter. For this purpose the Courts consider whether the payer was or was not a free agent in offering the bribe. And it has been held that the degree of corroboration required is not in each case the same. In other words, a person coerced into the payment requires less corroboration to his testimony, than one who was entirely a voluntary accomplice.[2]

1549. But in either case some corroboration is nonetheless indispensible. But whether it is or is not sufficient to warrant a conviction is a question of fact which must be left to the jury, it being then competent to them to reject the corroboration and convict the accused on the uncorroborated testimony of the accomplice.[3] So, where the accused, a police-officer, was charged with receiving a bribe from the complainant, and it appeared that the former had demanded it from the latter before commencing the inquiry into his complaint of the theft of lac from his forest, and the latter at first refused but eventually paid it, it was held that the case was one in which the payment was involuntary and a much slighter degree of corroboration was needed to support a conviction of the receiver, and the Court therefore accepted the testimony of persons, who had lent the money to the complainant and who were present when it was paid, as sufficient corroboration.[4]

1550. It has been sometimes said that persons who are present at the commission of a crime, but who do nothing to prevent or disclose it, are no better than accomplices,[5] and being so, they are incompetent as corroborative witnesses, as the rule undoubtedly is that the corroboration required is by independent testimony, one accomplice being incompetent to corroborate another, for two incredible witnesses do not make a story credible.

Spectators Not Accomplices.

1551. Now the question whether a person who is merely present, but does nothing to prevent or disclose the commission of an offence committed in his presence, is or is not an accomplice, depends upon the nature of the offence committed and the duty cast upon him for preventing or disclosing it. The question, however, is not a question of the competency, but of the credit of such a witness. And the true rule appears to be that a person who was present at the commission of a crime, cannot be regarded as an accomplice merely because he did nothing to prevent or disclose it, unless he was under a legal obligation to do so. The cases in which spectators have been treated as accomplices are cases of murder[6] or theft[7] committed under circumstances in which the Court could justifiably suspect the non-disclosure as being due to some degree of participation in the crime. Such participation may be inferred in the case of persons who had subscribed to the payment of a bribe.[8] Even in such a case, they cannot be treated as accomplices if they paid the money under threats, in which case, the offence is rather one of extortion than of bribery.[9]

1552. No Offer.—A somewhat curious case arose in Bombay in which the Judges were not quite agreed on the subject of the accused's guilt though he was acquitted. The accused's cousin had applied for sanction to erect a building. He had himself tendered for the supply of sleepers to the Municipality. The objection to building was waived by the Commissioner. The accused came to see the Commissioner, thanked him for the waiver and reminded him of his outstanding tender

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(1) *Maganlal*, 14 B. 115; *Chagan*, 14 B. 331; *Malhar Martand*, 26 B. 193; *Deodhar Singh*, 27 C. 144.

(2) *Deonandan Pershad*, 33 C. 649; *Malhar Martand*, 26 B. 193. *Papa Kamalkhan*, (1935) B. 230 (232).

(3) *Atwood*, 1 Leach 464; cited *per* Peacock C. J., in *Elahee Buksh*, 5 W. R. 80 (81); *Ghulam Mahommed*, (1917) P. R. No. 9, 39 I. C. 680.

(4) *Deonandan Pershad*, 33 C. 649.

(5) *Ishan Chunder*, 21 C. 328.

(6) *Chando Chandaline*, 24 W. R. 55.

(7) *Ishan Chunder*, 21 C. 328.

(8) *Chagan*, 14 B. 331; *Maganlal*, 14 B. 115.

(9) *Akhoy Kumar* v. *Jagat Chunder*, 27 C. 925.

for sleepers. He also enquired if it was any good putting in a tender for cement for which the Municipality had invited tenders. He said that it needed influence to secure the contract. He then said that he wanted to see the Commissioner, as his cousin wished to give him Rs. 5,000. The Commissioner became indignant whereupon the accused apologized. The accused was acquitted, and on appeal by Government it was held that the words, "my cousin wishes to give you Rs. 5,000" did not amount to an offer, but that the accused wished merely to sound the Commissioner, and that, therefore, the accused's acquittal was right.[1]

Taking gratification, in order, by corrupt or illegal means, to influence public servant.

162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or [with any member of the Senate of the Allahabad University], or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

1553. Analogous Law.—The words "or with any member of the Senate of the Allahabad University" were added by the Allahabad University Act[2] both in this as well as in the next section. This section is complementary to the last, and is intended to reach the aiders and abettors of the offence. It, therefore, extends to all persons whether or not they are public servants. Where, however, a person accepting a bribe, is a public servant, the proper section to convict him under, is the last section, and not this, which is directed against the suppression of crime by a different class of persons.[3]

1554. Procedure and Practice.—An offence under this section is non-cognizable, and summons must ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session and a Presidency or First Class Magistrate.

1555. Proof.—The points requiring proof are :—

(1) That the accused accepted or obtained, or agreed to accept or attempted to obtain a gratification ;
(2) That it was a motive or reward for inducing by corrupt or illegal means any public servant to do or forbear to do any official act or to show favour or render any service to any of the persons specified in the section.

1556. Charge.—The charge under this section should specify the name of the person from whom the gratification was obtained, and of the public servant to be influenced in the exercise of his official functions.[4]

1557. It should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——accepted, (*or* obtained, *or* agreed to obtain, etc.), for yourself (*or* for——) a gratification, namely, from——as a motive (*or* reward) for inducing——a public servant to do or forbear to do an official act to wit——(*or* to show some favour or disfavour to any person, to wit——, *or* to render or attempt to render any service or disservice to any person——with the Legislative or Executive Government, etc.), and thereby committed an offence punishable under s. 162 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (*in case of committal* by the said Court) on the said charge."

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(1) *Amiruddin*, 67 I. C. (B.) 818; *Dinkar Rao*, 55 A. 654.
(2) Act XVIII of 1887, s. 18 (2).
(3) *Obhoy Chunder Chuckerbutty*, 3 W. R. 19.
(4) *Obhoy Chunder Chuckerbutty*, 3 W. R. 19.

1558. Principle.—This and the next section deal with the offence of improperly influencing a public servant in return for consideration paid or promised by a third person. In this respect the two sections[1] are identical, the only difference between them being the means by which the public servant is influenced. Under this section he is influenced by corrupt or illegal means, while the inducement in the next section is by the exercise of personal influence. In other respects the two sections are identical. They are both intended to prevent the public servants from swerving from their duty by the sordid lust of gain, or yielding to the personal influence of another. But the offence in both sections depends upon the presence or promise of a consideration. If then the public servant was improperly influenced by one who was unmoved by a gratification, the result may be the same, but the seducer commits no offence, though if the means employed be "corrupt" both the seducer as well as the public servant would be guilty, the one for abetment, and the other for bribery as defined in the last section.

1559. There is no reason why a gratuitous seducer should not be held guilty, but in such a case, the seducer may have acted from the best of motives, and in this respect, Law judges criminality from the motive. Now as the motive in the two sections is palpably corrupt, it excludes the presence of nobler sentiments as prompting the interference. The sections generally agree with the English Law.[2]

1560. Gratification to Influence Another.—The last section dealt with the case of a public servant soliciting or receiving an illegal gratification for doing an act himself, or for rendering some service with the Government or a public servant. This section deals with such gratification in which the recipient need not be a public servant; though it must be a motive or reward for doing something by a public servant.[3] One public servant acting as a bribe agent of another, should preferably be punished under the last section, though there is no difference in the gravity of offences under the two sections, as measured by the maximum punishments provided therein. But a person so acting, who is not a public servant, is only punishable under this section.[4]

1561. In order to constitute an offence under this section, three things are essential. In the first place, there must have been the solicitation or offer or receipt of a gratification. Such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means some one, and that some one, a public servant. And lastly, it must be for the public servant to do an act, or confer a favour or render some service as stated in the section. It will be observed that while the last section speaks of a gratification "other than legal remuneration," this section speaks of "any gratification whatever." The difference in phraseology is intentional, and is intended to guard against a possible plea that the gratification received was legal, inasmuch as it was a fair compensation for the favour actually performed. Suppose, for instance, a pleader is engaged to defend a case. The remuneration paid to him is a gratification, and is legal; but if he receives it as a motive for inducing, not by fair argument but "by corrupt or illegal means," the Judge in favour of his client, he will be punishable under this section, though but for this section, he might have escaped unpunished, for he might have induced him by means which though "illegal" were still not corrupt in which case he could not be punished as an abettor.

1562. The gist of the offence consists in receiving a gratification in order to prevent a public servant "by corrupt or illegal means." Ordinarily, such will be the case where the public servant concerned employs an intermediary as his tout or bribe-agent. But where he is no more than a conduit-pipe between the giver and the receiver of the bribe, conveying what he receives, retaining nothing for himself, the section is inapplicable, for then he receives nothing "for *inducing* by corrupt or illegal means," the public servant, which is the gist of the crime

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(1) *Seetul Chunder Bagchee*, 3 W. R. 69.
(2) English Law Commissioners' 5th Rep., p. 15; Digest, Ch. IV, s. 4, Art. 2; 2nd Rep. ss. 68, 69.
(3) *Chinnaswami*, 8 I. C. (M.) 668.
(4) *Obhoy Churn Chukerbutty*, 3 W. R. 19.

(§ 1558). The section requires that the payment must be in promise of the inducement and the inducement must be by " corrupt or illegal means." If then a person induce a public servant without a gratification, he commits no offence under this section, though, if the means he employs be " corrupt," he may be guilty of abetment of an offence under the last section, and if the means employed be " illegal ," he may conceivably be guilty of some other offence depending upon the nature of the illegality practised.

1563. If, for instance, it consisted in suppressing a part of the record of a case, or substituting therein some forged documents for the genuine documents originally filed, the offence committed by a person would be not only an offence here described, but also an offence made punishable by section 466. A person, who falsely certifies another as fit for an office, may fall within the provisions of this section if he did so far a consideration received from a third person, as a motive for inducing a public servant to appoint his nominee.[1] Again, if the means employed were " corrupt," it would be a question whether the corrupter is liable under this section, or as an abettor under the last. A person is said to "corrupt" another, when one draws him aside from the path of rectitude and duty by a bribe. The employment of " corrupt means " implies the payment or promise of a bribe. In such a case the public servant would almost invariably be an abettor of this offence. For one is not likely to receive a bribe to share it with another, unless the latter is privy to it. In any other case, the receiver may be guilty of cheating, but he could scarcely be convicted under this section. Of course a perosn may *bona fide* believe that he may be able to induce a public servant by " corrupt means," without having previously consulted him. His attempt to corrupt him may fail, and still he may be guilty of an offence under this section. In such a case the accused has the option of choosing his own section for his condemnation.

Taking gratification for exercise of personal influence with public servant.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor [or with any member of the Senate of the Allahabad University], or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust,—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

1564. Analogous Law.—The words " or with any member of the Senate of the Allahabad University" have been added by the Allahabad University Act.[2] This section is exactly the same as the last, with the only difference that the means here employed are neither corrupt nor illegal, though the same result is attained by the " exercise of personal influence."

1565. This section was clause 139 of the Bill, and as to it the Commissioners wrote thus: " This clause is much more comprehensive than the English Law, which appears to punish private persons taking reward for influencing public officers,

(1) 2nd Rep., s. 70.

(2) Act XVIII of 1887, s. 18 (2).

only when their influence is used to procure office for a party.[1] We think the generality of clause 139 of the Code is expedient."[2]

1566. Procedure, Practice, and Proof.—The procedure and practice under this section is exactly the same, as under the last section, and the points to be proved are the same, with the difference above noted.

1567. The offence under this section is not cognizable, and summons may issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or Magistrate of the first class.

1568. Exercise of Personal Influence.—The exertion of personal influence upon a public servant, howmuchsoever deprecable is not an offence under the Code. The exertion of such influence in return for a consideration received from a third person—presumably the person interested—is, however, an offence under this section. In order to amount to an offence, such influence must be improper ; for, without impropriety, some degree of personal influence is ordinarily exercised by one person over another. The illustration speaks of an advocate arguing a case before a Judge as excepted, because he does not exercise or profess to exercise personal influence. Now it is perfectly correct to say that he does not *profess* to exercise personal influence. It would also be correct to say that he does not receive his fee as a *motive* for the exercise of personal influence. But it is probably not quite correct to say that he *does not* exercise any personal influence at all, for it is common knowledge that advocates and suitors appearing before Courts cannot avoid exercising some personal influence upon the Courts in which they daily appear. That they ought not to is manifest. For it is the duty of the Judge to decide without fear or favour and influenced by any consideration other than that of doing absolute justice. It is this ideal that the section aimed at, by punishing the mercenary exercise of personal influence. If it has reprobated the exercise of personal influence in any case, its provisions would have been probably too wide. It therefore confines its penalty only to those who prostitute their personal influence.

1569. What is "Personal Influence."—The term "personal influence" has been nowhere defined, but it is a phrase allied to "undue influence" of civil law,[3] and it is probably used in an allied sense as meaning such influence as dominates the will of the public servant, in consequence of which, one party obtains an unfair advantage over the other. In one respect the term is even wider as implying not only the exercise of what would be termed undue influence in civil law, but also such influence as the wife wields over her husband, or one friend wields over another, which, when put to the service here contemplated, would be within the mischief of the offence here described.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for abetment by public servant of offences defined in section 162 or 163.

Illustration.

A is a public servant. *B*, *A*'s wife, receives a present as a motive for soliciting *A* to give an office to a particular person. *A* abets her doing so. *B* is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. *A* is punishable with, imprisonment for a term which may extend to three years, or with fine, or with both.

[***Public servant***—s. 21. ***Abets***—s. 107.]

1570. Analogous Law.—This is one of the "express provisions" made by the Code for the punishment of abetment, which are referred to and excluded by section 109, and other sections of Chapter V. This section only provides an

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(1) Digest, Ch. IV. s. 4, Art. 2.
(2) 2nd Rep., s. 65.
(3) S. 16, Indian Contract Act (IX of 1872).

enhanced punishment for an offence which would have been otherwise punishable, under the general provisions of that chapter.

1571. Procedure and Practice.—An offence under this section is not cognizable, and summons must ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session or Magistrate, Presidency or First Class.

1572. Proof.—The points required to be proved are :—

(1) That the accused was a public servant ;
(2) That as such he abetted an offence punishable under section 162 or 163 ;
(3) That such offence was committed in respect of the accused.

1573. Charge.—The charge under this section should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——being a public servant in the——Department of Government, abetted the commission of the offence punishable under section 162 (*or* s. 163) by——and thereby committed an offence under section 164 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* of the High Court.)

"And I hereby direct that you be tried (*in case of committal* by the said Court) on the said charge."

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

Public servant obtaining valuable thing without consideration from person concerned in proceeding or business transacted by such public servant.

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punishable with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*c*) *A*, a Collector, hires a house of *Z*, who has a settlement case pending before him. It is agreed that *A* shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, *A* would be required to pay two hundred rupees a month. *A* has obtained a valuable thing from *Z* without adequate consideration.

(*b*) *A*, a Judge, buys of *Z* who has a cause pending in *A*'s Court, Government promissory notes at a discount, when they are selling in the market at a premium. *A* has obtained a valuable thing from *Z* without adequate consideration.

(*c*) *Z*'s brother is apprehended and taken before *A*, a Magistrate, on a charge of perjury. *A* sells to *Z* shares in a bank at a premium, when they are selling in the market at a discount. *Z* pays *A* for the shares accordingly. The money so obtained by *A* is a valuable thing obtained by him without adequate consideration.

[***Public servant***—s. 21.]

1574. Analogous Law.—This section has been recast. It was originally so worded :—

"141. Whoever, being a Judge, directly or indirectly accepts, obtains or attempts to obtain, for himself or for any other party, a gift of any valuable thing other than refreshments according to the common usages of hospitality, from any party whom he knows to be plaintiff or defendant in any proceeding which is pending in the said Judge's Courts, shall be punished with simple imprisonment for a term which may extend to two years, or fine, or both.

"*Explanation*.—By a gift is meant anything which is in reality a gift, whatever colour may be given to the transaction."

1575. Appended to the clause were the three illustrations which have beey substantially reproduced under the section, only their scope being enlarged bn substituting "Collector" and "Magistrate" for "" Judge" in the first and last illustrations.

1576. As before remarked (*see* Introduction) this section is directed against the taking of bribe indirectly in the shape of presents, for which a provision so far as regards the Judges, had been made by the Bengal Regulation, 1793,[1] which in its turn had adopted the form of oath required to be taken under Statute 4, 18 Edward III, which ran thus :—

"Ye take not by yourself or by other, privily nor apertly, gift nor reward of gold or silver, nor of any other thing which may turn to your profit, unless it be meat or drink, and that of small value, of any man that shall have any plea of process hanging before you, as long as the same process shall be hanging, nor after for the same cause."

1577. So it was also provided by a Statute passed in the reign of George III[2] making the demanding or receiving of any valuable thing as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding, or exercising any office or employment under His Majesty or the Company in the East Indies, to be extortion and a misdemeanour at law, and punished as such.

1578. Under this Statute, one Douglas was convicted of this offence by the Court of Exchequer, which held it immaterial whether the sum received amounted to a bribe or merely a present, since the intention of the Legislature merely was to prevent gifts to public servants.[3] This section is narrower than the Georgian Statute which prevents the receipt of any valuable thing as a gift or present. Referring to it the authors of the Code recommended that, though the section was limited to receiving a valuable thing without consideration, which is a paraphrase of the Georgian Statute, still it was open to the executive Government to tighten the rigour of this section by rules made under the next section. The section was originally limited to the Judges, but it was later extended to apply equally to other public functionaries.

For a further discussion on the scope of this section, *see* Principle (§ 1583).

1579. Procedure and Practice.—An offence under this section is not cognizable, and summons should ordinarily issue in the first instance ; it is bailable but not compoundable, and is triable by a Presidency or First Class Magistrate.

1580. Proof.—The points requiring proof are :—

(1) That the accused was a public servant at the time of the commission of the offence
(2) That he accepted or obtained or agreed to accept or attempted to obtain for himself or for some one else, a valuable thing
(3) Which he obtained, etc., from the person described in clauses (2) and (3).
(4) That he gave no consideration for it, or that the consideration given was known by him to be inadequate.

1581. Under this section the evidence of transactions other than those which are the subject of the trial is inadmissible,[4] inasmuch as the question of guilt or innocence of the accused in such cases depends upon the *actual facts* and not upon the state of a man's mind or feeling, so that such evidence cannot be let in under the provisions of section 14 of the Indian Evidence Act. As Garth, C.J., remarked : "We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions."[5]

1582. Charge.—A charge under this section should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—
"That you——being a public servant in the——Department of Government accepted (*or* obtained *or* agreed to accept or attempted to obtain) for yourself (*or* for any other person) a valuable thing to wit——without consideration (*or* for a consideration which you knew to be inadequate,) from——a person whom you knew to have been (or to be likely to be) concerned in any proceeding or business transacted in (*or* to be transacted *or* from——whom he knew to be) interested in (*or* related to the person so concerned by you as public

(1) Beng. Reg. V of 1792, s. 2.
(2) 33 Geo. III, c. 52, s. 62.
(3) Douglas 13 Q. B. 42.
(4) *Vyapoory Moodeliar*, 6 C. 655.
(5) *Ib.*

servant) and you thereby committed an offence punishable under section 165 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1583. Principle.—The principle underlying it is obvious. If public servants were suffered to accept presents, when they were prohibited under a penalty from accepting bribes, they will easily circumvent the prohibition by accepting a bribe in the shape of a present. The difference between the acceptance of a bribe made punishable by section 161 and this section is this. Under the former section the present is taken as a motive or reward for abuse of office; under this section the question of motive or reward is wholly immaterial, and the acceptance of a present is forbidden, because, though ostensibly taken for no consideration, it is in reality a bid for an official favour, the refusal of which, after acceptance of the present, may not be always possible.

1584. Meaning of Words.—"*Any valuable thing without consideration*": A valuable thing is a thing of value. In one sense everything has some value. But as the authors observe, the section does not include things which are given and received by the rules of hospitality, such as *pan* and garlands, fruit or the like. "*Concerned in any proceeding*," *i.e.*, as a party and not merely as a pleader, agent or a witness. The same sense is conveyed by the words "*to be interested in .....the person so concerned*" which means *personally* and not merely professionally interested in him.

1585. Acceptance of Presents by Public Servants.—This section discourages the acceptance of presents of all kinds, by penalizing acceptance of those of value, from persons concerned in any proceeding before them, that is to say, only presents from persons with whom they are officially connected are here prohibited. There is no general prohibition against the taking of all presents from whomsoever: "Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No Government would wish to prevent persons intimately connected by blood, by marriage or by friendship from rendering services to each other; and no tribunals would enforce a law which should make the rendering of such a service a crime. Where no such close connection exists the receiving of large presents by a public functionary, is generally a very suspicious proceeding; but a lime, a wreath of flowers, a slice of betelnut, a drop of atar of roses poured on his handkerchief, are presents which, it would in this country, be held churlish to refuse, and which cannot corrupt the most mercenary of mankind. Other presents of more value than these, may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed, according to the usages of hospitality, are presents of this description; it would be unreasonable to treat a man in office as a criminal, for drinking many rupees-worth of champagne in a year, at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee *in specie*, he might deserve exemplary punishment.'[1] These views find expression in the section which does not make the mere acceptance of a "valuable thing," a crime.

1586. An author of a costly book may present a copy to a Judge, and the latter commits no offence in accepting it. Indeed, it would be churlish in him to refuse such a present. So relations and friends may make and exchange presents however costly, and the recipient would commit no offence, though he be a public servant in accepting them. What the section prohibits is the acceptance of a valuable present by a public servant from a present or prospective litigant or applicant, with whom he has no other connection. In other words, the acceptance of a present when traceable to a corrupt motive is what is intended to be made punishable here.[2] The question whether a thing was or was not of "value" does not depend upon its market-price. It may be an article of *vertu* which may be priceless. The

(1) Note E.

(2) Note E. p. 124.

question is one of fact which the Court will have to decide in each case, having regard to the intrinsic value and price of the thing and the occasion which led to its being presented. In such a case the question of motive is material, not because it is a necessary ingredient of the crime but because it tends to explain the reason for the acceptance. For the same reason, the question of consideration is also material, for it also tends to rebut the suspicion that otherwise attaches to a transaction, which may be inexplicable, otherwise than as a veiled gratification. A thing howmuchsoever valuable may be purchased for its full value by a public servant no less than by anybody else. The section does not cast any special disability upon that class. It only creates an obligation not to circumvent those placed under them, or to make the occasion a pretext for their corruption. The section, therefore, enjoins on public servants the obligation of fair play. It demands that they shall not use their office as a lever for acquiring pelf from persons placed under circumstances in which they are naturally anxious to humour them. This is what is really implied by persons concerned in any proceeding before them.

1587. In the case of judicial officers the clause would include all litigants present and prospective, but not those who may have occasion to sue or be sued in their Courts at any time however remote. The words "likely to be concerned" mean such likelihood as may have influenced the donee in taking that fact into his calculation in offering the present. This may not be always apparent, and in the case of officials receiving presents and court peons receiving them in the form of *bakshish* or *dasturi* from persons who have to resort to Courts, the payment is more in the nature of extortion than a voluntary payment for favours to come. Take for instance, the case of the Police-clerk who was employed in the court of a Magistrate for reading case-diaries to him. One Chattra had a case of theft before that Magistrate, and he got convicted the two persons whom he had prosecuted, and on the conclusion of whose case he received back his Rs. 3, the proceeds of theft. As he left the Court-room the Police-clerk followed him and demanded from him Re. 1 as *dasturi*, which the latter paid. He was prosecuted and convicted under section 161 which was, of course, obviously wrong, as the payment was made on the conclusion of the case and there was no evidence that it was a reward for any service rendered by the accused. His conviction was however, altered to one under this section, the large terms of which, amply justified it.[1] For Chattra was certainly a person who was concerned in the criminal proceedings, with which the accused had connection in the discharge of his official functions, namely, to read the case diaries to the Magistrate. He had received a rupee without any consideration. His case therefore satisfied all the requirements of this section. Rewards paid to Court clerks, moharrirs and peons fall into the same category. They are either bribes or criminal presents, and as such punishable either under section 161 or this section. It will be observed that in the case last cited, the complainant had no more to do with the accused or the Court to which he was connected. If he had, his case would have then been one like that of the Patwari, who received grain from tenants in his circle and whose case was held to fall under section 161, rather than under this section,[2] because the grain was given presumably for future favours.

Public servant disobeying law with intent to cause injury to any person.

166. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in *Z*'s favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to *Z*. *A* has committed the offence defined in this section.

[***Person***—s. 11. ***Public Servant***—s. 166.]

(1) *Kampta Prasad*, 1 A. 530.

(2) *Mudsooddeen*, 2 N. W. P. H. C. R. 148.

1588. Analogous Law.—This section is directed against official perversity. It makes it a crime on the part of a Public servant to knowingly cause injury to any person by his violation of the rules of law regulating his conduct. The section has nothing to do with the disciplinary rules of his department, the violation of which may call for departmental punishment. It is only concerned with the violation of the express direction of law, which alone is punishable, if it has resulted in the injury to any person. On this subject elaborate provisions exist in English Law, under which the neglect of official duty is an indictable offence[1] and a person holding a public office, whether directly or derivatively under the King, is considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it.[2] And an indictment lies at common law against all subordinate officers for neglect as well as misconduct in the discharge of their official duties.[3]

1589. In the words of the Law Commissioners this section is very comprehensive and includes several offences respecting the abuse of official authority, and regarding officers omitting to arrest offenders and suffering prisoners to escape, so far as the offence is voluntary, and in general, any breach of official duty, by which it is intended, or which is known to be likely to injure any party, or to save any person from legal punishments.[4]

1590. Procedure and Practice.—An offence under this section is non-cognizable, but summons may issue in the first instance. It is bailable but not compoundable, and is triable by a Magistrate—Presidency, First or Second class.

1591. Charge.—It was pointed out by Trevor, J., that a charge under this section should describe the imputed offence as nearly as possible in the language of the Code.[5] It should specify the *particular* direction of the law which the accused is alleged to have disobeyed.[6]

1592. It should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——at, did (*or* omitted to do, *as the case may be*)——such conduct being contrary to the provisions of Act——section——and known by you to be prejudicial to——and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (*in case of committal*, by the said Court) on the said charge."[7]

1593. Principle.—The offence made punishable by the section consists in the wilful disobedience of an express direction of law ; a disobedience to an order is not sufficient, even though that order may be one that was given under a provision of law.[8] So the mere breach of departmental rules and regulations not having the force of law cannot be visited with punishment under this section, which contemplates only the breach of some statutory duty, not merely through inadvertence or negligence, but of purpose to cause injury to any person. It is an abuse of office in which law presumes that the injury was caused from some ulterior corrupt motive. A mere dereliction of duty unconnected with injury to any one is not an offence under this section, though it may be, under some other Act. For example, a postal official absenting himself from his station without leave may be punished under the Post Office Act. He could not be punished under this section, though his absence may have occasioned inconvenience and injury to the public.[9]

1594. But a bailiff who refuses to seize property in execution, with the knowledge that it is likely to cause injury to the decree-holder offends under this section, because there is in his case a wilful disobedience of law resulting in injury to

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(1) *Wyat*, 1 Salk, 380 ; *Anon*, 6 M. 96.
(2) *Bembridge*, 1 Salk, 380, Note (*a*).
(3) *Wyat* 1, Salk, 381.
(4) 2nd Rep., S. 383, p. 365.
(5) 2 W. R. Cr. L. 2.
(6) *Karm Din*, (1890) P. R. No. 34 ; *Appaji Narain*, (1895) B. U. C. 764.
(7) Sch. V, No. XIII (1) (4), Cr. P. C.
(8) *Appaji Narain*, (1895) B. U. C. 764.
(9) *Virasami Naick*, (1876) Weir 72.

a person. Such injury need not result in permanent deprivation of property. For it is an "injury" that the decree-holder is delayed in the recovery of his debt. Indeed, the term "injury" is comprehensive enough to include any harm illegally caused to any person in body, mind, reputation, or property.[1] So it has been held in England that if an under-sheriff obtain his fees by refusing to execute process till they are paid.[2] or take a bond for his fee before execution issued out, it is extortion,[3] for the sheriff's fee is not due until execution. The accused, a peon of a Civil Court, was given a notice for service on the complainant. He misrepresented it to be a warrant and actually arrested the complainant, under colour of the alleged warrant, presumably with the object of extorting money. He was convicted for this offence, and the High Court naturally upheld his conviction.[4] The word "person" has been described in section 11. It bears that sense in this definition. Consequently, a disobedience of law resulting in injury to the public, could not be punished under this section.

Public servant framing an incorrect document with intent to cause injury.

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect intending thereby to cause, or knowing it to be likely that he may thereby cause, injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[***Public servant***—s. 21. ***Document***—s. 29. ***Injury***—s. 44.]

1595. Analogous Law.—This section is closely analogous to section 218 and the two offences might more conveniently have been treated as one. They are in fact indistinguishable except that this section specifically penalises the framer as well as the translator of a document. Both are, however, specific cases in which the public servant knowingly disobeys a direction of law knowing it likely that it would cause injury to any person.[5] Being, however, offences calling for condign punishment, they form the subject of special sections. The language of this section was objected to on the ground of its vague generality but the Commissioners observed that the section, though comprehensive, was not indefinite.[6] An offence under this section may be included in those punishable under ss. 467 and 471, in which a dual conviction would be illegal.[7]

1596. Procedure and Practice.—An offence under this section is non-cognizable, but summons may ordinarily issue in the first instance. The offence is bailable but not compoundable; it is triable by the Court of Session or Presidency or First Class Magistrate.

1597. Proof.—The points requiring proof are:—

(1) That the accused was a public servant.
(2) That he was charged with the preparation or translation of any document.
(3) That he framed or translated it in an incorrect manner.
(4) That he did so knowingly.
(5) That he did so with intent or with knowledge that it was likely that he would thereby cause injury.

1598. Charge.—A charge under this section should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——at——being a public servant to wit,—— and being as such public servant, charged with the preparation (*or* translation) of the document relating to——, framed (*or* translated) that document in a manner which you knew (*or* believed) to be incorrect, intending thereby to cause (*or* knowing it to be likely that you might thereby cause) injury to——, and that you thereby committed an offence punishable under section 167 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

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(1) S. 44.
(2) *Hescott's* cases, 1 Salk, 330.
(3) *Empson* v. *Bathurst*, Hutt. 52.
(4) *Rangasami Naidu*, 16 I. C. (M.) 773.
(5) S. 166.
(6) 2nd Rep., § 64.
(7) *Gulzari Lal*, 3 C. W. N. 760.

"And I hereby direct that you be tried (*in case of committal*, by the said Court) on the said charge."

1598-A. Principle.—Public records owe their sanctity to the presumption that arises as to their correctness, and as representing the true record of proceedings of the Courts and the public servants concerned. The tampering of such records by the very persons charged with the duty of preparing them correctly is, therefore, regarded as an egregious offence and as such punishable under this section, if it was prepared to cause injury to any person. Otherwise, there being no motive to falsify the record, the misconduct, if any, is left for departmental punishments.

1599. Meaning of Words.—"*Preparation or translation of any document*": Does "preparation" or "framing" include also copying? According to one view it does,[1] according to another it does not,[2] but the latter appears to be the correct view, as the copying of a document cannot be said to be preparing or framing it, and the collocation of the word "translation" excludes its figurative extension. "*Intending thereby to cause*": Such intention and knowledge must necessarily be a matter of inference. But facts justifying that inference must be established by the prosecution.

1600. Preparation of False Record by Public Servant.—This section punishes a public servant for incorrectly "framing or translation" a document, the preparation or translation of which is within the scope of his official duty, provided that he knew of it, and it was done with the intention or knowledge that it was likely to cause injury to any person. The public servants affected by this rule are not only those who are ordinarily employed to prepare or translate documents, but it includes also those, who may have been at any time ordered to prepare or translate documents, though that work may not fall within the ordinary sphere of their official duty. It must, however, be a work entrusted to them in their capacity as public servants, for they are not otherwise so liable.

1601. Again the section speaks of the *framing* or translating of a document, with the preparation and translation of which the public servant was charged. The word "framing" would thus appear to convey the same sense as the word "preparation." And since the word "translation" has been expressly mentioned, it would seem that the terms "preparation," and "framing" were not intended to include a mere translation. If so, they would certainly not include copying. And it has been so held in a case in the Punjab.[3] On the other hand, the contrary was laid down in another case of the same Court.[4] The words "preparation" and "framing" are etymologically different,[5] but they both suggest the making of something original, and not a mere translation or a copy. And the fact that the word "translation" has been advisedly used in the section, would seem to confirm this view. The falsification of the document must be made in a manner which he knows or believes to be incorrect, and which excludes mistakes, and mistranslation due to mere ignorance or negligence.

1602. The section is intended to punish official perversity, and not mere incompetence. It penalizes those who, from base or corrupt motives, prostitute their office, whether by doing a wrong act, or by preparing an incorrect document. Certain cartman had reported a dacoity to the Station House officer, who falsely recorded their statement that there had been no dacoity "as they had previously stated to the Inspector." This statement was intended to shield the Inspector and support his conduct. The Court held him guilty under section 218, and he might have been equally convicted under this section.[6] So where an Amin who

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(1) *Per* Lindsay, J., in *Hira Singh*, (1872) P. R. No. 32.
(2) *Per* Barkley, J., *Dewa Singh*, (1879) P. R. No. 15.
(3) *Dewa Singh*, (1897) P. R. No. 15.
(4) *Hira Singh*, (1872) P. R. No. 32.
(5) "Prepare" from Lat. *proe*, before and *paro*, to get ready—to fit, adopt or qualify for a particular purpose; to put into such a state as to be fit for use or application, to make ready. "Frame" from A. S. *fremmon*, to form—to construct by fitting and uniting together the several parts.
(6) *Pasupuleti*, 12 I. C. (M.) 222.

was entrusted with the execution of a warrant for the attachment of moveable property, submitted a report to the Court with a certificate falsely stating in them, that certain persons had forcibly rescued the attached property, while as a matter of fact, it had been released by an amicable settlement with the consent of the attaching creditor, it was held that he was a public servant charged with the preparation of a document, and had, as such, framed an incorrect document, and, that he was, therefore, liable to punishment under this section.[1]

1603. Of course, where a document is wantonly framed incorrect, it will be presumed that it could not have been done so innocently, and it may then be presumed that the person who so made it must have known that it was likely to cause injury to the person affected thereby. Where this is not the case some evidence on the point would, of course, be necessary.

168. Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant unlawfully engaging in trade.

[***Public Servant***—s. 21. ***Legally bound***—s. 43.]

1604. Analogous Law.—All public servants are not debarred from engaging in trade, nor are all public servants punishable for trading. Only those who are legally bound not to engage in trade are punishable by the section; others transgressing departmental rules against trading being only liable to departmental punishment.

1605. Public servants have been legally prohibited from engaging in trade by a number of enactments.[2]

1606. Procedure and Practice.—An offence under this section is non-cognizable, and summons must ordinarily issue in the first instance. It is bailable. but not compoundable, and is triable by a Magistrate, Presidency or First Class, The question whether a previous sanction of the Local Government, as provided by s. 197 of the Criminal Procedure Code, is necessary, depends upon whether the officer is discharging an official duty. Thus, a Municipal Commissioner taking a contract from the Municipality, of which he is a member, would, under several Municipal Acts, be punishable under this section.[3]

1607. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That you——on or about the——day of——at——being a public servant, to wit——, and being as such public servant legally bound not to engage in trade, did engage in trade, and thereby committed an offence punishable under s. 168 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

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(1) *Muthalagiri Raju*, (1892) 1 Weir 74; *Dalip Singh*, (1930) L. 92.

(2) Arranged chronologically, these are: Governor-General, Governor, or Member of Council (33 Geo. III, c. 52; 3 & 4 Will, IV, c. 85) Revenue Officers (Beng. Reg. II of 1793; Mad. Regs. I & II of 1803; Bom. Act V of 1879, Act XVIII of (1881). Officers of the Supreme Courts and now of the Chartered High Courts (Act XV of 1848). Police officers (Act XXIV of 1859; Act V of 1861; Bom. Act VII of 1867; (Act XX of 1871). Pound-keeper (Act I of 1871). The Administrator-General (Act II of 1874). Officers of the Presidency Banks (Act XI of 1876; Act V of 1879). Forest Officers (Act VII of 1878; Act XIX of 1881). Judges and other Officers of the Presidency Court of Small Causes (Act XV of 1882). Members and servants of the Municipalities to the extent limited by the Acts (Calcutta Municipality—Beng. Act II of 1888; mofussil—Beng. Municipalities Beng. Act III of 1884; Madras City Municipal Act—Mad. Act 1 of 1884; Mad. Dist. Municipalities Act—Mad. Act I of 1904; Bombay City Municipality Act—Bom. Act III of 1888; Bombay District Municipalities Act — Bom. Act III of 1901; N. W. P. Oudh Municipal Act XV of 1873; The Punjab Municipal Act—Act XX of 1891;; C. P. Municipalities Act—Act XVI of 1903; Burmah Municipalities Act—Burmah Act III of 1898; Ajmer Municipalities Regulation V of 1886.

(3) *Dulloomiyan* v. *Tularam*, 28 N. 156 following *Mhd. Ismail*, 8 L. 647 (649). *Contra*, *Bhairo Prasad*, 51 A. 377.

1608. Principle.—There are two reasons why public servants should not engage in trade. In the first place, they are employed by the State, and it is their duty to devote all their time to its service. And secondly, if public servants were permitted to engage in trade, they will neglect their legitimate duties for the purpose of trade, and moreover secure an unfair advantage over rival traders not so favourably circumstanced. Public servants are therefore universally restrained from engaging in trade during the period of their service.[1]

1609. But they are only debarred from trading and are not otherwise prohibited from laying out their savings to advantage. They may, for instance, lend money on interest, which is not "unlawfully engaging in trade" within the meaning of the rule.[2] They may buy and sell stock, take shares in a public company, though they cannot act as its director. They may build and rent houses, own and manage landed property. All they must not do is to "engage in trade" which means that they must not habitually buy and sell with a view to profit, *e.g.*, keep a shop.[3] either in their own name or as a partner or *benami* in the name of another.

Public servant unlawfully buying or bidding for property.

169. Whoever, being a public servant, and being legally bound, as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

[***Public Servant***—s. 21 ***Legally bound***—s. 43]

1610. Analogous Law.—This section is a continuation of the last section and deals with the same subject. It punishes bidding for or buying property which the public servant is *legally* prohibited from bidding for or buying.

1611. Procedure and Practice.—An offence under this section is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable but non-compoundable, and is triable by a Magistrate, Presidency or First Class.

1612. Proof.—The points requiring proof are:—

(1) That the accused was a public servant.
(2) That, as such, he was legally bound not to purchase or bid for the property in question.
(3) That he had purchased or bid for that property either in his own name, or in the name of another, or jointly or in shares with others.

1613. Charge.—The charge should run thus:—

"I (*name and office of Magistrate etc.*,) hereby charge you (*name of the accused*) as follows:—

"That you——on or about the——day of——, at——, being a public servant, to wit——, and being as such public servant legally bound not to purchase or bid for certain property, to wit——purchased (*or* bid for) that property, either in your own name (*or* in the name of another jointly *or* in shares with others), and thereby committed an offence punishable under section 168 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1614. Principle.—The prohibition here contemplated must be in respect of property with which the public servant was connected in his official capacity. Being thus placed in a position of advantage, he could not be permitted to purchase property of which he is in effect a trustee. So where a Sub-Inspector of Police in charge of a station-house was charged with having purchased a pony, which had

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(1) *A. B.*, 7 N. L. R. 53.

(2) *Nek Muhammad* (1903) P. R. No. 22 In *Narayan*, 6 N. L. R. 114; *A. B.*, 7 N.L.R. 53; *contra* held on the authority of s. 146 (1) of the Berar Municipal Law which rendered a member "directly or indirectly interested in any contract" guilty under this section. *Held* that a Vice-Chairman who lent money to a municipal contractor to whom he gave contracts and made payments was guilty under this section as ordained by s. 146 (1) of the Berar Municipal Law.

(3) *Sagar Singh*, 43 I. C. (C.) 440.

been impounded at that station, and it appeared that he had in fact held no sale but falsely reported that a sale had been held and the pony sold to another party, from whom he alleged to have subsequently purchased it, it was held that the accused should have been convicted under this section, and not of breach of trust of which he was convicted.[1]

Personating a public servant.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

[*Public servant*—s. 21.]

1615. Analogous Law.—This section may be compared with s. 140 of the Code under which it is an offence to wear garb or carry token used by a soldier. This section, and the next punish similar offences. Under this section the mere personation of a public servant is not an offence, unless it is accompanied by any act done under colour of such office. In short the offence consists in the fraudulent personation of a public servant, and not merely in personation, apart from fraud.

1616. Procedure and Practice.—An offence under this section is cognizable, and warrant must ordinarily issue in the first instance. It is bailable, but non-compoundable, and is triable by any Magistrate.

1617. Proof.—The points requiring proof are :—

(1) That the accused falsely pretended to be or personated a public servant.
(2) That he did so knowingly.
(3) That when assuming such character he did or attempted to do something under colour of such office.

1618. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*,), hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——, at——, pretended to hold that office of——, as a public servant (*or* falsely personated——holding such office), and in such assumed character did (*or* attempted to do) under colour of such office, and thereby committed an offence punishable under s. 170 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1619. Principle.—This section punishes fraudulent acts done in the guise of a public servant. It does not punish a mere false personation, but an act done in that guise the doing of which is therefore fraudulent.

1620. Meaning of Words.—"*Pretends to hold any particular office,*" that is, whoever falsely holds himself out, or alleges that he is a public servant. "*Knowing that he does not hold such office*" : If a person "pretends" to be a public servant, he must of necessity know that he does not hold such office. "*And in such assumed character,*" that is, the false personation must have been used to gain some advantage or in that capacity some act should have been done. "*Under colour of such office,*" that is, making use of such office.

1621. Fraudulent Personation of Public Servant.—The offence punishable under this section consists of fraud practised in the guise of a public servant. The person either falsely gives out or makes people believe that he is a public servant and, impressing others as such, he does or attempts to do any act in his assumed capacity. As the gist of the offence consists in *acting* under the colour of his pretended office, a person cannot be convicted under this section unless there was both pretension or personation followed by an act.[2] The pretension or personation must relate to any "particular office," such as a Police Constable, a Municipal Secretary, a Revenue Peon or the like. It means that the office pretended must

(1) *Rajkristo Biswas*, 16 W. R. 52.

(2) *Nga Pe*, (1892-1896) U. B. R. 168.

be a particular rank, for it is only then that the personator can defraud others, so as to commit an offence under this section.

1622. Of course, fraud is otherwise equally possible, as a person pretending to be a servant of Government may travel through a district and obtain money and supplies, though he may not pretend to hold any particular office. But in such a case the offence he would be guilty of is cheating, and not of false personation here described. So where the accused got admission to a railway platform without a ticket by falsely giving himself out as a C.I.D. officer, who were admitted free, the court set aside his conviction holding that the mere assumption of a false character without any attempt to do an official act was not sufficient to expose the offender to the penalty of this section.[1] But where a person falsely personated a Head Constable of Police, and under colour of such pretended office went to some of the villagers of Jaypore and extorted from them a small fee reprimanding them on the state of their roads, it was held that the accused having practised imposition on the villagers who expected a visit from the police officers for a similar purpose, was guilty of an offence under this section.[2] Here it will be observed that the accused had done the act of reprimanding, which would have been legal in the public servant he had falsely personated. But this is by no means necessary. For a person may, under the colour of his office, do an act wholly illegal and unconnected with it, though it must bear some relation to his pretended office. In other words, the pretended office must be used as a means to facilitate the commission of the act.

1623. So where a person pretended to be an octroi patrol and as such, intercepted the complainant while passing to a city and charged him with smuggling oil without payment of duty. He showed the pass he had received in proof of payment, but nevertheless the accused extorted Re. 1 by threats of imprisonment. He was held guilty both of extortion, as well as of an offence under this section.[3] In another case, the accused pretending to be a Head Constable was caught demanding one anna's worth of fruit from a fruit-seller for one pice, on the ground that he was a Head Constable, and his conviction under this section was upheld.[4] In all such cases, the accused did an act, and that act a fraudulent one, under colour of an office. But if a person acts in good faith, he cannot be convicted under this section, though he may otherwise do an act wholly illegal under colour of an office which he has no right to hold. So where a village Revenue officer exercised the powers of a village Magistrate in the absence of the regular incumbent, and it was found that he believed that he was so empowered, it was held that having acted in good faith he could not be convicted under this section.[5]

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description, for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Wearing garb or carrying token used by public servant with fraudulent intent.

1624. Analogous Law.—This section may be generally compared with section 140, the provisions of which are analogous. The two sections are designed to prevent persons masquerading as public servants, and making the public believe them to be so. As such, deception lies on the threshold of greater fraud which becomes thereby possible, law deems it an offence and punishes it as such, though no act be done or attempted in that guise. If, of course, an act is done or attempted, it then constitutes an offence under the last section. So it has been held in England that the mere wearing of a garb or carrying a token of a public servant with the

(1) *Sukhdeo*, 43 I. C. (Pat.) 785.
(2) *Sadanund Das*, 2 W. R. 29.
(3) *Wazir Jan*, 10 A. 58 (69, 70); followed in *Azizuddin*, 27 A. 294.
(4) *Azizuddin*, 27 A. 294.
(5) 1 Weir 74.

intention or knowledge that one will thereby pass off as a public servant, is enough to constitute an offence.[1]

1625. Procedure and Practice.—An offence under this section is cognizable, but summons may ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate and may be tried summarily.

1626. Proof.—The points requiring proof are :—

(1) That the accused wore the garb or carried a token of a public servant.

(2) That it either was the garb or token of a public servant or resembled it.

(3) That the accused was not a public servant entitled to use such garb or token.

(4) That he wore the garb or carried the token with the intention or knowledge that he was likely to be believed that he was such a public servant.

1627. Fraudulent Disguise.—The wearing of a garb or carrying the token of a public servant without the intention of practising deception upon others is not an offence. (§ 1621). It becomes an offence only if there was that intention, law regarding such an act as preparatory to the preparation of crime by making use of that disguise, which must, however, be at least as complete as is contemplated by the section. For instance, if it is a garb, he must *wear* it and not merely carry it under his arm ; if it is a token he must carry it, and not merely have it in his possession. So it was held in a case that where the accused was carrying a police *jacket* under his arm intending thereby to pass himself off as a Police Constable, he could not be convicted of an offence under this section.[2]

1628. A person may both wear the garb of a public servant, and use it for the purpose of fraud. In that case the wearing of the garb being subservient to the commission of the greater offence under the last section, he could only be convicted of that offence, and not of both the offences made punishable by this and the last section.[3]

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(1) *Barnard*, 7 C. & P. 784.
(2) *Nga Po Kyaw*, (1904) U. B. R. P. C. 3.
(3) *Tukaram*, (1888) B. U. C. 405.

CHAPTER IX-A.

OF OFFENCES RELATING TO ELECTIONS.

1629. Topical Introduction.—The nine sections comprising this chapter constitute Part I of the Indian Elections Offences and Inquiries Act, 1920.[1] This Act comprises two parts, the first part adds Explanation 3 to section 21 and the whole of this chapter to the Code. Part II comprises 13 clauses and deals with Election Inquiries. In his speech introducing the Bill[2] in the Indian Legislative Council, Sir William Vincent, Home Member, acknowledged its origin[3] to the recommendation of the Joint Parliamentary Committee appointed to report on the Government of India (Amendment) Bill 1919,[4] to enact such a measure. They said: "The Committee are firmly convinced that a complete and stringent Corrupt Practices Act should be brought into operation before the first election to the Legislative Council. There is no such Act at present in existence in India and the Committee are convinced that it will not be less required in India than it is in other countries."

1630. The Government of India improved upon this recommendation and drafted a Bill applicable to elections to all public bodies. The Select Committee to whom the Bill was referred approved of its extended scope in the following terms:—

"We feel that there are distinct advantages at the present time when election is to play an important part in the new public life of India, that the public conscience should be markedly drawn to the danger of corrupt practices in relation to the franchise, whether that franchise relates to legislative or other bodies. We feel it is of the greatest importance that the principle of the purity of the franchise should be insisted on in the general criminal law of the country, and that it should not be left to local Legislatures to deal with the broad principles enacted in Part I of the Bill. There will be sufficient scope for those bodies in elaborating and supplementing the law as proposed in the Bill for we recognise that it is by no means exhaustive. Experience may no doubt show that minor offences will require to be provided against and that local conditions may need local treatment. We feel, however, that to lay down the broad basis of a law so necessary to protect the purity of the franchise is an appropriate piece of work for the Imperial Legislative Council."[5]

1631. The Bill came up for consideration on the 25th September 1920 when it was passed.[6]

1632. It will be seen that Part I of the Act penalizes the five offences of bribery, undue influence, personation, the publication of a false statement of fact, and the failure to keep accounts.

The Bill was admitted to follow generally the present English practice.

1633. Before the enactment of the Corrupt Practices Prevention Act 1854[7] there was no statute law penalizing malpractices at elections which were however punishable at Common law. A reference to the early cases, however, shows that it was inadequate to prevent and punish all malpractices. Consequently, the Act of 1854, which applied only to Parliamentary elections, exhaustively defined the offence of bribery.[8] A similar clause against bribery was inserted in the Representation of People Act, 1867.[9] This Act was likewise limited to Parliamentary elections. The Ballot Act, 1872[10] added to the offence of bribery that of personation at Parliamentary and Municipal elections.[11] All these Acts were repealed and a more comprehensive Corrupt and Illegal Practices Prevention Act was enacted in 1883.[12] It penalizes the offences of bribery,[13] undue influence,[14] personation[15] and publication of false statements under the head of illegal practice.[16] The provisions of this Act have since been extended to Municipal[17] and other elections.

1634. In England, malpractices in connection with an election are punishable either as felonies, misdemeanours or corrupt and illegal practices. "A corrupt

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(1) Act XXXIX of 1920.
(2) Bill XX of 1920 published in the *Gazette of India*, Pt. V. dated 3rd July 1920, pp. 131-136.
(3) Gazette of India, Pt. VI, dated 4th September, 1920, pp. 1003-1006.
(4) 9 and 10 Geo. 5 c. 101.
(5) *Gazette of India*, Pt. V, dated 4th September 1920, pp. 177, 178.
(6) For discussion *see* Gazette of India Pt. VI, dated 25th September, 1920, pp. 1146-1163.
(7) 17 & 18 Vict., c. 102.
(8) *Ibid*, ss. 2, 3.
(9) 30 & 31 Vict., c. 102, S. 49.
(10) 35 & 36 Vict., c. 33.
(11) *Ib.*, s. 24.
(12) 46 & 47 Vict., c. 51.
(13) *Ib.*, 3rd. Sch. Pt. 3.
(14) *Ib.*, s. 2.
(15) *Ib.*, 3rd Sch., Pt. 3.
(16) *Ibid*, ss. 9, 10.
(17) Municipal Elections (Corrupt and Illegal Practices) Act 1884, 47 & 48 Vict., c. 70.

practice is a thing the mind goes with. An illegal practice is a thing the Legislature is determined to prevent, whether it is done honestly or dishonestly."[1] In this chapter sections 171-B and 171-D (bribery and personation) afford instances of felonies, sections 171-C and 171-G (undue influence and false statement) afford instances of a corrupt practice, and sections 171-H and 171-I of an illegal practice.

1635. In the ensuing commentary under this Chapter references will be made to the corresponding provisions of English Law and the cases decided under the Common and Statute law on the subject. It is, however, held that, since elections in India are of recent origin, this chapter prescribes punishments more lenient than the English Law[2]

171-A. For the purposes of this Chapter—

"Candidate" and "electoral right" defined.

(*a*) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat : provided that he is subsequently nominated as a candidate at such election ;

(*b*) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

1636. Analogous Law.—The definitions in this section are adopted from the definition of those terms in the English Statutes mentioned below :—

(*a*) **"Candidate."**

"The term 'candidate' is thus defined in the English Municipal Corporations Act, 1882, s 77 and adopted (except where the context otherwise requires) by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 34 in which the term 'candidate' means a person elected, or having been nominated, or declared himself a candidate for election to a corporate office."

1637. In point of time a person becomes a candidate under the English Act[3] as soon as he is "declared by himself or by others to be a candidate on or after the day of the issue of the writ for such selection, or after the dissolution or vacancy in consequence of which such writ has been issued." The same idea is crystallized in the definition which makes a person a candidate as soon as a vacancy has occurred, and "an election is in contemplation" which must ordinarily mean in contemplation by Government. But a person who gives himself out as a candidate is as it were *in fieri*. He becomes a full fledged candidate with his nomination though his liability relates back to the date of his declaration. Such declaration must be in the form of a formal announcement made to the electors in the form of a manifesto, election address or the publication of one's intention that one would offer himself for election.

1638. No one is a candidate before the dissolution or vacancy.[4] In England a person was held to have become a candidate as soon as he announced his intention even three years before the actual election.[5] There is no room for this latitude in construction under the present definition, since an election cannot be said to be in contemplation until after the dissolution of or vacancy in the body.

1639. The term "electoral right" has an analogoue in the English Law.

(*b*) **"Electoral Right."**

It is here used to embrace not only the voter's right but also the right which the candidate, whether a voter or not possesses of offering or not offering himself as a candidate for an election or to withdraw his candidature therefrom.

Bribery.

171-B. (1) **Whoever—**

(*i*) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right ; or

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(1) *Per* Field, J., in *Barrow-in-Furness*, (1886) 4 O'M. & H. 77.

(2) *Per* Eqbal Ahmad, J., in *Badan Singh*, (1928) s. 150.

(3) Correct and Illegal Practices Prevention Act 1883, 46 & 47 Vict., c. 51, s. 63.

(4) *Montgomery*, (1892) 4 O'M. & H. 167; *Walsall*, (1892) 4 O'M. & H. 123; *Stepne*, (1892) Day's El. Cases. 117; *Rochester, Ib.* 98; 4 O'M. & H. 159.

(5) *Hoggerton*, (1896) 5 O'M. & H. 69.

(*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right, commits the offence of bribery :

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification, shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

1640. Analogous Law.—The terms of this section are abridged from the definition of bribery in the Corrupt Practices Prevention Act, 1854,[1] adopted by the Municipal Elections (Corrupt and Illegal Practices) Act 1884, Sch. 3.

"S. 3. "(*i*) Every voter who shall, before or during any election directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election.

" (*ii*) Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election."

1641. To this must be added the one taken from the Representation of the People Act, 1867 :[2]—

"S. 49. Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at the future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punishable accordingly ; and any person on whose behalf and with whose privity any such payment as is mentioned in this section, is made, shall also be guilty of bribery, and punishable accordingly."[3]

1642. Clause (1) refers to giving, Clause (2) to taking a bribe defined in terms " of a gratification " and limited by the Proviso. Clause (3) defines the giver and the last Clause (4) the receiver of such gratification. The term " gratification " has been previously used in and explained under s. 161. It is not necessarily limited to money or money's worth, since anything done or omitted to be done may amount to a gratification and consequently a bribe. For example, the promise of a situtation or employment[4] or the offer to vacate an office in favour of the bribe[5] are within the mischief of the rule. So was the abetment of a nuisance held to fall within it. The landlord's estate was infested with rabbits. He allowed trappers but on the eve of the election yielded to the solicitude of his tenants to destroy them. He was held to have bribed because " what was done was done not so much from an abstract sense of justice as from a desire to influence the election."[6] The distribution of refreshments,[7] the hiring of a voter's house,[8] or paying him for the exhibition of bills and posters[9] are other instances.

1643. Bribery and Corruption.—The number of cases on bribery and corruption in connection with the election is a legion. Those which fall on the border line are alone worthy of consideration. In England, it has been held that

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(1) 17 & 18 Vict., c. 102.
(2) 30 & 31 Vict., c. 102.
(3) Corrupt etc. Prevention Act 1883, Sch. 3, s. 3 (46 & 47 Vict., c. 51).
(4) *Plymouth*, (1859) 2 P. R. & D. 238.
(5) *Waterford*, (1870) 2 O'M. & H. 25.
(6) *Per* Mellor, J., in *Launneston*, (1874 2 O'M. & H. 129.
(7) *Tynemouth*, (1853) 2 P. R. & D. 186; *Bodwin*, (1869) 1 O'M. & H. 124.
(8) *Huddersfield*, (1869) W. & Br. 39; *Dartmouth*, (1859) W. & Br. 21.
(9) *Westminister*, (1869) 1 O'M. & H. 90; *Pontefract*, (1893) Day's El. Cas. 130.

while the payment of the money to a voter before election is a bribe, it is not a bribe if it is paid after he has voted, unless it is shown to have been done corruptly,[1] that is, in fulfilment of a previous promise[2] or done what is wrong or with an evil purpose,[3] that is, in the language of the section it is a reward for his vote. Gift of money or a loan made to a voter stand on the same footing. So is the conferral of office or employment whether temporary or permanent.[4] Payment of rates and taxes on behalf of a voter to enable him to get his name registered on the electoral roll is treated with suspicion and would be regarded as a bribe if the voters were expected to support their paymaster.[5] Payment of travelling and conveyance expenses to a voter is *per se* not a bribe, though it would be so treated if it is made conditionally upon his coming and voting for the payer.[6] It is not conditional if the payer merely expresses a hope that the payee would vote for him.[7] But it is otherwise if the promisor say to the voter that he would pay his expenses if he would vote for him.[8] Excessive payment of travelling expenses was held to be a bribe.[9] Payment made to keep away voters from voting is a bribe.[10]

1644. Payment for Loss of Time.—Payment to the voter for loss of time is equally within the rule.[11] But payment of wages by an employer to his employee for the time necessary to record his vote is not within the rule, provided it is done to all alike and not with the intention of influencing votes.[12] The declaration of the election day as a public holiday is justifiable on this ground.

1645. In England, the payment of the necessary expenses for travelling has been held to be no bribery, provided the expenses were not excessive and the payment is not made in return for a promise to vote in favour of the payer.[13] It is said that such payment is not intended to induce but only enable him to vote.[14]

1646. Contributions to Charities.—Contributions to charities are not bribes if they are not unusual or excessive[15] nor it is a bribe to assist a voter in distress.[16] So where the candidate distributed a sum of money to the poor, not voters of a parish, the day before the poll, it was held to be no bribe,[17] even though the distribution be shown to have been made in view of the election. In such cases it was said that where two motives could exist, one pure and the other corrupt, there was no necessity to impute the corrupt motive.[18] But this is a question of degree and it would always be a question in each case whether the distribution was made out of a charitable impulse or as an inducement to catch votes.[19] Where the candidate had two years before the election distributed £250 for the relief of miners and their families during a lockout with a request that his name should not be disclosed, but afterwards his agent appealed to them for their votes on that ground, it was held that his *post facto* conduct could not convert the gift into a bribe.[20] In such cases the question is what was the governing principle in the mind of the donor.

1647. Treating.—"Treating" includes the giving of refreshments and entertainment to voters at an election. It is probably not an offence at Common Law[21]

(1) *Bradford*, (1869) 1 O'M. & H. 36; *Limerick*, (1869) 1 O'M. & H. 261.
(2) *Cooper* v. *Slade*, (1856) L. J. Q. B. 329.
(3) *Bradford*, (1869) 1 O'M. & H. 37; *Strond case*, (1874) 2 O'M. & H. 184.
(4) *Nottingham*, (1843) B. & Arn. 105; *Penryn*, (1869) 1 O'M. & H. 129.
(5) S. 49, 30 & 31 Vict., c. 102; *Worcester*, (1819) C. & D. 173; *Bridgenorth*, 8 L. J. M. C. 86.
(6) *Cooper* v. *Slade*, 6 H. L. C. 746.
(7) *Bolton*, (1874) 2 O'M. & H. 145.
(8) *Horsham case*, (1876) 3 O'M. & H. 52.
(9) *Beverly*, (1869) W. & Br. 188.
(10) *Brandford*, (1869) 1 O'M. & H. 32.
(11) *Simpson* v. *Yeend*, (1869) L. R. 4. Q. B. 626; *Harwick*, (1848) 1 P. R. & D. 74; *Liverpool case*, 1853) 2 P. R. & D. 248.
(12) *Per* Field, J., in *Aylesbury*, (1886) 4 O'M. & H. 60.
(13) *Bolton*, (1874) 2 O'M. & H. 145; *Salisbury*, (1880) 3 O'M. & H. 132: *Northallerton* (1860) 1 O'M. & H. 197, *Peterborough*, (1860) W. & Br. 158; *Hardsham*, (1876) 3 O'M. & H. 52; *Pontefract*; (1893) 4 O'M. & H. 200; *Beverley*, (1860) W. & Br. 188.
(14) *Ashburton*, (1859) W. & Br. 5.
(15) *Westbury*, (1869) 1 O'M. & H. 49.
(16) *Windsor*, (1869) 4 O'M. & H. 2.
(17) *Youghal*, (1869) 1 O'M. &. H. 294.
(18) *Windsor*, (1874) 2 O'M. & H. 39, *Carrickfergus*, (1896) 5 O'M, & H. 95.
(19) *St. George*, (1896) 5 O'M. & H. 95; *Boston*, (1874) 2 O'M. & H. 161.
(20) *Lichfield*, (1895) 5 O'M. & H. 27; *Higgerton*, (1896) 5 O'M. & H. 74.
(21) Per Willes, J., in *Lichfield*, (1869) 1 O'M. & H. 25.

until it became excessive and extravagant leading to enormous expense on the one hand and debauchery on the other. Later on its abuse led to its recognition even as a form of bribery at Common Law. It was prohibited by several statutes[1] now consolidated in the Corrupt Practices Act, 1884, s. 1 which prohibits the giving or paying for any entertainment "for the purpose of corruptly influencing that person or any person to give or refrain from giving his vote at the election." This clause classes as corrupt practice the treating of non-voters in order that they might influence votes.[1] The question whether anything amounts to treating is a question of fact. It is however clear that all treating is not bribery, As Cave, J., observed: "The statute does not apply to that form of treating which exists occasionally between social equals, where the first one treats, and then the other treats, which is only one form of hospitality. Neither does it apply to certain kinds of treating which exist in relation to business matters.....It applies to that sort of treating which exists where the superior treats his inferior, the treating which gives the greater influence over the person treated and secures to the former the goodwill of the latter. .....It must have reference to some election, and it must be for the purpose of influencing the vote of the person treated."[2] Subject to this, wherever the intention is to secure popularity and thereby to influence the votes, it is a corrupt practice.[3] It is not necessary that the treating should be by the candidate himself or his agent. Treating by Political Associations interested in the election of its members is equally within the rule,[4] unless of course it is a treat given by a non-political Association to which the rival candidates belong and it could not therefore influence the election or arouse suspicion as to its motive of influencing the votes.[5]

1648. It should be added that many of the English cases were cases of treating in which the sole question was whether the election should not be avoided for corrupt practice. As this section enacts an offence, cases of treating which would be considered sufficient to avoid an election would not necessarily be those in which the offender would be held to have committed the offence punishable under this section.

1649. What is not Bribery.—The payment of large sums of money to election agents is not bribery.[6] So payment may be made to persons to maintain order at the poll;[7] so is also the employment in large numbers of clerks, messengers, bill-posters and sandwichmen, though many of them be voters.[8] The payment of the election expenses to a candidate whether by subscription or by another candidate is not a bribe unless the payment was made on conditions which contravene the statute.[9]

Undue Influence at Elections.

171-C (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(*b*) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

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(1) *Longford*, (1870) 2 O'M. H. 15; *Tamworth*, (1869) 1 O'M. .& H. 86.
(2) *Norwich*, (1886) 4 O'M. & H. 91.
(3) *Wallingford*, (1869) 1 O'M. & H. 59; *Mallow*, (1870) 2 O'M. & H. 22; Louth (1880) 3 O'M. & H. 61.
(4) *St Georges*, (1896) 5 O'M. & H. 98; *Hexham and Rochester*, (1892) Day's Elec. Cases, 14, 104.
(5) *St. George's* (1896) 5 O'M. &. H. 98; *Hexham & Rochester*, (1892) Day's Elc. Cases. 14, 104.
(6) *Youghal*, (1869) 1 O'M. &. H. 295, 296.
(7) *Gloucester*, (1873) 2 O'M. & H. 52.
(8) *Cambridge case*, (1857) W. & D. 39.
(9) *Belfast*, (1869) 1 O'M. & H. 285; *Coventry*, (1869) 1 O'M. & H. 97.

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

1650. Analogous Law.—The following explanation refers to this section in the Statement of Objects and Reasons appended to the Bill :—

" Undue influence at an election is defined as the voluntary interference or attempted interference with the right of any person to stand, or not to stand, or withdraw from being, a candidate, or to vote or refrain from voting. This covers all threats of injury to person or property and all illegal methods of persuasion and any interference with the liberty of the candidates or the electors. A sub-section is added to explain that the inducing or attempting to induce a person to believe that he will become the object of Divine displeasure is also interference. It is not, however, interference within the meaning of the clause to make a declaration of public policy or a promise of public action."[1]

1651. The English Corrupt and Illegal Practices Prevention Act 1883 contains the following definition of " undue influence " :—

" Every person who shall directly or indirectly, by himself or by any other person on his behalf make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either to give or refrain from giving his vote at any election, shall be guilty of undue influence."

1652. The essence of undue influence is the use of unfair pressure upon a voter exerted by the use of coercion, intimidation or inducement which deprives a person of the freedom of his judgment. As Willes, J., said : " the law cannot strike at the existence of influence. The law can no more take away from a man who has property, or who can give employment, the insensible but powerful influence he has over those whom he can benefit by the proper use of his wealth, than the law could take away his honesty, good feeling, etc., or any other qualities which give a man influence over his fellows. It is *the abuse* of influence with which alone the law can deal.....It is only abuse in cases of this kind, where an inducement is held out by a promise to induce voters to vote or not to vote at an election"[2]

1653. Undue influence, under English Law as under this section, only refers to the influence exerted upon individual voters[3] by any of the three following means namely: (*a*) The use of open force or violence, or the threat thereof; (*b*) The infliction of any temporal injury, damage, harm or loss, or by the threat thereof; (*c*) The infliction of any spiritual injury, damage, harm or loss, or by the threat thereof.

1654. It is not necessary that the unfair means employed should be effective in converting the votes, all that is necessary is that the influence should be exerted and that it should be " undue " within the meaning of law.[4]

1655. The ensuing commentary exemplifies the application of these rules in practice.

1656. Undue Influence at Election.—This section merely crystallizes the judicial view on the subject of undue influence. In one case Blackburn, J., said : " Where a person in order to prevent another from voting or to force him to vote, either beats him, or threatens injury to his person or his house, or the like, that is undue influence.....Where such a thing is done and is brought home to the agent, according to my view it avoids the election."[5]

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(1) Cl. 9, Statement of Objects & Reasons; *see* Gazette of India, Pt. V, dated 3rd July 1920, p. 135.

(2) *Lichfield*, (1869) 1 O'M. & H, 25 (28).

(3) *Cheltenham*, (1869) 1 O'M. & H. 64; *Nottingham*, (1839) *ib.*, 246; *North Durham*, (1874) 2 O'M. & H. 156.

(4) *South Meath*, (1892) 4 O'M. & H. 142; Lay's Elec. Cases, 140.

(5) *North Norfolk*, 1869) 1 O'M. & H. 240.

1657. No Undue Influence.—It has been laid down that in order to amount to undue influence by a threat of loss or injury to one's business, the loss threatened must be an appreciable loss so as to affect the saleable value of the business. So it is open to one to say: "I will deal with you not in accordance with the quality of your goods, but according to the quality of your politics."[1] So an influential person may address the voters, and the latter may feel persuaded by him which they would not have done if a less influential personage had approached him. Such influence is subtle but not improper. So where a clergyman attended a meeting to select a candidate[2] or addressed his congregation in favour of a candidate[3] or canvassed persons for him, the Court held his conduct unobjectionable.[4] So while it was an objectionable misrepresentation for a candidate to distribute a circular amongst the voters containing a copy of the ballot paper with a cross mark against the candidate's name asking the voters to make that mark against the name of the candidate and to make no mark against the name of any other candidate otherwise their votes would be lost, still it did not amount to the exercise of undue influence.[5] It was pointed out that the Act did not penalize every species of misconduct, but only that which was specified. So it has been held that the creation of a riot or other disturbance has not the effect of undue influence unless it was designed and had the effect of deterring the voters.[6] The test in such cases is, was the disturbance calculated to overawe the electors and was it such that a man of ordinary nerve and courage would be deterred from proceeding to the poll.[7] Here again it is not necessary that any voter was in fact deterred from voting although, of course, if any voter was so deterred it would strengthen the case for the prosecution.[8]

171-D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name; and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

Personation at Elections.

1658. Analogous Law.—In the Statement of Objects and Reasons this section is thus justified: "The definition of 'personation' closely follows the definition in s. 24 of the Ballot Act, 1872, and covers both a person who attempts to vote in another person's name or in a fictitious name, a voter who attempts to vote twice and any person who abets, procures or attempts to procure such voting."[9]

1659. Section 24 of the Ballot Act, 1872[10] runs as follows:—

"A person shall for all purposes of the laws relating to parliamentary and municipal elections, be deemed to be guilty of the offence of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election, applies at the same election for a ballot paper in his own name."

1660. This definition is adopted in s. 6 of the Corrupt and Illegal Practices Act, 1883,[11] which constitutes this offence as felony punishable by imprisonment

(1) *North Durham*, (1874) 2 O'M. & H. 158; *North Norfolk*, (1869) *ib.*, 241.
(2) *Longford*, (1870) 2 O'M. & H. 14.
(3) *Galway*, (1869) 1 O'M. & H. 307.
(4) *South Meath*, (1892) Day's Elec. Cases, 133.
(5) *Stepney*, (1886) 4 O'M. & H. 55. Down, (1880) 3 O'M. & M. 122; *South Meath* (1892) 4 O'M. & H. 142.
(6) *North Meath and East Clare*, (1892) Day's Elec. Cases, 144, 164; *Marpeth*, (1774) 1 Dougl., 147; *Nottingham*, (1802) 1 Peck. 85; *Knavesborough*, (1805) 2 Peck. 382.
(7) *Salford*, (1869) 1 O'M. & H. 141: *Nottingham*, (1869) 1 O'M. & H. 245; *Thornbury*, (1886) 4 O'M. & H. 66.
(8) *South Meath*, (1892) 4 O'M. & H. 188.
(9) Cl. 10, Gazette of India, Pt. V. dated 3rd July 1920, p. 135.
(10) 35 & 36 Vict. c. 33.
(11) 46 & 47 Vict. c. 51.

for a term not exceeding two years, together with hard labour. This one collateral effect is to avoid the election. It had that effect at Common law on the ground of fraud.[1]

1661. Undue Influence and Personation.—The offence of undue influence is defined in s. 171-C where the prerequisite *mens rea* is provided by the word "voluntarily" which implies that the act is done with the knowledge that it would have the effect of interfering with the freedom of elections. No similar qualification occurs in defining the offence of personation which is almost bodily copied from the English Act without removing its defects, which are obvious, for, the language of the section as of its prototype is too wide and would include the case of a person who innocently applies for a ballot paper in the name of some other person or votes a second time, because it contains no such words as "voluntarily," "wilfully" or "corruptly." But these words have been held to qualify the language of the English Act,[2] and the same qualification must be read into the language of s. 171-D.[3] Where therefore, a person was shown to have assisted another to vote but he did not know that he was not entitled to vote, Cave, J. acquitted him, holding that only one corruptly aiding or abetting was intended to be punishable under the Act.[4] So where a person was registered in the voter's list under a wrong name and he applied for his paper under that name, he was acquitted.[5]

Punishment for Bribery.

171-E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both ;

Provided that bribery by treating shall be punished with fine only.

Explanation.—**"Treating" means that form of bribery where the gratification consists in food, drink, entertainment or provision.**

1662. Analogous Law.—This section prescribes the punishment for the offences of bribery and treating, defined in s. 171-B where they are explained. The distinction between bribery and treating follows the English Law under which bribery is an indictable offence, while treating is merely an illegal practice and the penalty for it is only half of that attached to bribery.[6] As Willes, J., observed, "Different considerations apply to it than to bribery because men often give and accept drinks—but not money."[7] The giving of food and drink at election times is not treating unless it is limited to one's partizans or for the purpose of influencing votes.[8] The whole question depends upon the motive and intention.[9] So Pollock, B said : "The question of corrupt treating must, as it seems to us, be in each case a question of fact. If the refreshments provided were excessive, if the occasions were numerous, and if there were other circumstances calculated to excite suspicion, a corrupt intention might be inferred."[10] "Treating is sometimes defined to be getting at voters through their mouths and through their stomachs—supplying them with food and giving them drink."[11]

1663. Procedure and Practice.—No prosecution can be instituted for this offence without the previous sanction of Government as provided in s. 196 of the Code of Criminal Procedure as amended by the Elections Offences and Inquiries Act 1920.[12] The offence is non-cognizable and summons must issue in the first instance. It is bailable but not compoundable. It is triable by the Presidency Magistrate or a Magistrate of the first class.

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(1) *Per* Willes, J., in *Coventry*, (1869) 1 O'M. & H. 105.
(2) *Stepney*, 4 O'M, & H. 43.
(3) *Venkatayya*, 121 I. C. (M.) 763.
(4) *Hexham*, (1892) Day's Elec. Cases, 68 ; *Gloucester*, (1873) 2 O'M. & H. 63 ; *Athlone*, (1880) 3 O'M. & H. 57.
(5) *Fox*, (1887) 16 Cox. C. C. 166.
(6) *Per* Willes, J., in *Windsor*, (1869) 1 O'M. & H. 4.
(7) *Montgomery*, (1892) Day's Elec. Cases, 150.
(8) *Rochester and Montgomery*, (1892) Day's Elec. Cases, 103, 151.
(9) *Per* Bruce, J., in *Haggerston*, (1896) 5 O'M. & H. 80.
(10) *St. George's*, (1896) 5 O'M. & H, 99.
(11) *Per* Channell, J., in *Great Yarmouth* (1906) Printed Judgments, 7.
(12) S. 3, Act XXXIX of 1920.

1664. Proof.—The points requiring proof are :—

In case of giver :—

(1) That the accused gave, offered, agreed to give or offer, or attempted to procure a gratification ; or

(2) That he did so with the object of inducing him or any other person, to stand or not to stand as, or to withdraw from being a candidate or to vote or refrain from voting at an election.

In case of receiver :—

(1) That the accused obtained or agreed to accept or attempted to obtain a gratification,

(2) That he did so as a motive for doing what he did not intend to do or as a reward for doing what he would not have otherwise done ;

(3) That he received the gratification for exercising his own electoral right or for inducing or attempting to induce any other person to exercise such right, *i.e.*, the right to stand or not to stand as, or to withdraw from being a candidate or to vote or refrain from voting at an election.

1665. Charge.—The charge should run thus :—

In the case of the giver of the bribe :—

"I (*name and office of Magistrate, etc*)., hereby charge you (*name of the accused*) as foliows—

"That you, on or about the——day of——, at——gave a gratification, to wit——, to——with the object of (inducing him *or*——to exercise his electoral right) (*or* rewarding——for having exercised his electoral right) and thereby committed an offence under s. 171-E of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

In the case of the acceptor of the bribe :—

"I (*name and office of Magistrate, etc*)., hereby charge you (*name of the accused*) as follows :—

"That you accepted for yourself or for——a gratification, to wit——, as a reward (for exercising your or his electoral right) (*or* for inducing or attempting to induce——to exercise his electoral right).

"And I hereby direct that you be tried on the said charge."

1666. Principle.—Both the English and Indian Law distinguish between bribery, which is sufficient merely to avoid an election and one which is an offence. The question is one of degree, which it is however, for the authority sanctioning a prosecution to take into account. The terms of the section are large enough to comprise any case of bribery and the comparatively venial offence of treating comprised therein.

For further commentary on this offence *see* s. 171-B.

Punishment for undue influence or person at an election.

171-F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

1667. Analogous Law.—This section prescribes the sentence for the two offences of undue influence and personation defined in ss. 171-C and 171-D respectively. In England, "undue influence" is a misdemeanour punishable with imprisonment for a term not exceeding one year or to a fine not exceeding £ 200.[1] Personation is, however, a more serious offence, being felony, punishable with imprisonment for a term not exceeding two years together with hard labour.[2] A person convicted of this offence would be disqualified from exercising his electoral rights for a period of five years.[3]

1668. Procedure and Practice.—The offence is non-cognizable, and summons must issue in the first instance. It is bailable but not compoundable and is triable by the Presidency Magistrate or a first class Magistrate. Previous

(1) S. 6 (1), Corrupt Practice Act 1883, (40 & 47 Vict., c. 51).
(2) *Ib.*, s. 6 (2).
(3) *See* Electoral Rules under the Government of India Act.

sanction of Government is necessary to initiate prosecution.[1] The fact that the abettor is a member of Legislature is no mitigation, but rather an aggravation of the offence.[2]

1669. Proof.—The points requiring proof are :—

In the case of undue influence :—

(1) that the accused interfered or attempted to interfere
(2) with the free exercise of an electoral right
(3) of any person or persons named
(4) that he did so voluntarily, *i.e.*, knowingly or corruptly.

In the case of personation :—

(1) that there was an election to a public body (s. 21 Expl. 3),
(2) that the accused applied for a voting paper, or
(3) voted in the name of another voter, or
(4) having voted once applied again for a voting paper in his own name, or
(5) that he procured, attempted to procure or abetted the voting by any person in any such way.

1670. Charge.—The charge should run thus :—

In the case of undue influence :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of the accused*) as follows :—

"That you, on or about the——day of——at——voluntarily interfered (*or* attempted to interfere) with the free exercise of an electoral right, to wit——(*here state the act charged*) [*or* threatened——,a candidate (*or* voter *or* in whom a candidate *or* voter) to wit——is interested with injury, to wit——] or [induced (*or* attempted to induce)——a candidate (or voter) at an election, to wit—— to believe that he or any person in whom he is interested, to wit——will become an object of Divine displeasure (*or* of spiritual censure)] and thereby committed an offence punishable under s. 171-F of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

In the case of personation :—

"I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you, on or about the——day of——at the election, to wit——, applied for a voting paper (*or* voted) in the name of another person to wit——who is living (or dead), *or* in a fictitious name to wit——, *or* in your name after having voted once at the said election and thereby committed an offence punishable under s. 171-F of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

Where the offence falls under the second paragraph of s. 171-D the following should be substituted in place of the second paragraph in the above charge :—

"That you, on or about the——day of——at the election to wit——, abetted (*or* procured *or* attempted to procure) the voting by——(*specify the act committed and which is punishable under the first para of* s. 171-D) and thereby committed an offence punishable under s. 171-F of the Indian Penal Code and within my cognizance.

1671. This offence may be committed in a variety of ways ; one such way is to abet the wrong personation of a voter in which case the accused, though guilty of the abetment of an offence punishable by s. 465, can now be convicted only of this offence, being a special election offence, so that if he is convicted of the former his conviction could not be altered to one under this section for which previous sanction is a prerequisite.[3]

False statement in connection with an election.

171-G. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

1672. Analogous Law.—The offence punishable by this section is the subject of a Special Statute in England[4] to which acknowledgments are made in the Statement of Objects and Reasons.[5]

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(1) S. 196, Cr. P. C. as amended by Act XXXIX of 1920.
(2) *Badan Singh*, (1928) A. 150.
(3) *Ram Nath*, 47 A. 268, dissenting from *Ram Nath*, 46 A. 611.
(4) Corrupt and Illegal Practices Prevention (Amendment) Act, 1895 (58 & 59 Vict., c. 40).
(5) Cl. 11 ; *see* Gazette of India, Pt. V. dated 3rd July 1920, p. 135.

1673. Procedure and Practice.—No prosecution can be initiated for this offence without the sanction of Government as provided in s. 196 of the Criminal Procedure Code. The offence is not cognizable and a summons must issue in the first instance. The offence is bailable but not compoundable. It is triable by the Presidency or first class Magistrate.

1674. Proof.—The points requiring proof are :—

(1) That an election was impending.
(2) That the accused made or published a statement.
(3) That it purported to be a statement of fact.
(4) That it related to the personal conduct or character of a candidate.
(5) That he published it with intent to prejudice his election.
(6) That it was false.

1675. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That you without the general (*or* special) authority in writing of——incurred (*or* authorized) expenses on account of the holding of a public meeting at——(*or* upon any advertisement, circular *or* publication Exhibit——, *or* in any other way whatsoever) f r the purpose of promoting (*or* procuring) the election of——and thereby committed an offence punishable under s. 171-H of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on that charge."

1676. Principle.—This section penalizes the publication of a false statement *of fact* concerning the personal conduct or character of a candidate. This offence may be committed by any person or association, whether corporate or incorporate.

1677. Meaning of Words.—"*A statement of facts*," and not merely an opinion.[1] "*Personal character or conduct*": Only personal attacks are penalized. An attack on the public conduct or character is not punishable under this section, though it may be otherwise, as when it amounts to defamation or slander.

1678. Election Lies.—This section penalizes the publication of election lies concerning the personal conduct and character of a candidate. Two things are essential. It must be a statement of fact and relate to his personal character or conduct. Such was held to be the case where the accused had distributed a leaflet amongst the electors, falsely stating that the firm, of which the plaintiff was a member, had locked out their miners for six weeks.[2] So to say of a temperate man that he had drunk wine, or that there was a very dark passage in his life, and a skeleton in his cupboard which might be exposed, would be punishable because it is a statement of fact and reflects upon his character.[3] The statement that a candidate had been guilty of lying, cowardice and bribery, supported by instances is, of course, an egregious instance of this offence.[4] So are the following statements : that the candidate was living on the profits of cheap foreigners whom he employed at nine pence a day, or that the candidate befriended England's enemies whom he supplied with reliable information and smuggled ammunition.[5]

1679. Limits of the Rule.—On the other hand the section would not be contravened where the statement was a statement, not of a fact but merely an opinion, unless the expression of opinion was supported by instances. It would then be punishable provided it refers to the personal conduct and character of the candidate. Such reference must not be merely inferential, as where it was said that Radical Members of the House of Commons were in correspondence with the enemies,[6] or even where, referring to the opposing candidate, it was said that he

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(1) *Radhakrishna Iyyar*, 55 M. 791, (submitted) on the facts wrongly decided as it was found that several statements were statements of alleged facts which were false.

(2) *Barley* v. *Edmunds*, (1895) 1 T. L. R. 587.

(3) *Silver* v. *Benn*, (1896) 12 T. L. R. 199.

(4) *St. George's*, (1896) 5 O'M. & H. 104.

(5) *Monmouth*, (1901) 5 O'M. & H. 171.

(6) *Ellis* v. *National Union of Conservatives*, "*Times*," 3rd Oct. 1900, cited in 2 Rogers on Elections, (11th Ed.) p. 388.

only came to the constituency when he wanted votes, which was not held to be a statement as to his personal character but to his character as a public man.[1]

1680. Again, even where a statement is found to be false, the accused is entitled to show that he had reasonable grounds for believing, and did believe it to be true.[2] Lastly, the statement must be made with intent to influence the result of an election, which again postulates that an election was imminent and that the statement was published in the course of an election campaign. Statements published with a view to turn out a candidate from his seat are thus not within the rule.

Illegal payments in connection with an election.

171-H. Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees :

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

1681. Analogous Law.—The author of the Bill cites no precedent in support of this clause.[3] But under English Law certain payments are regarded as illegal, *e. g.*, the use of committee room in a house where intoxicating liquor or refreshment of any kind is sold or supplied to members of a club, society or association other than a permanent political club ; or in a public elementary school,[4] the giving or providing cockades, ribbons or marks of distinction ;[5] and though, the giving or providing of music, torches, flags and banners is not prohibited, no payment should be made " on account of bands of music, torches flags, banners, cockades, ribbons or other marks of distinction."[6] Expenditure on advertisement and circular is perfectly legitimate provided that it is not excessive or unusual or is a blind bribery.

1682. This section attacks the abuse by requiring that all expenditure incurred on behalf of a candidate shall be generally or specially authorised by them in writing. The object of this is twofold, *First*, it secures more correct return of expenditure, and *secondly*, it prevents corruption. In England, the offences of illegal payment, employment and hiring, subject the offender to penalties, but are not illegal practices and do not affect the election, unless extensive or committed by the candidate, or with his knowledge and consent.[7]

1683. Procedure and Practice.—The offence is non-cognizable and summons may issue in the first instance. It is bailable but not compoundable and is triable by the Presidency Magistrate or magistrate of the first class. Previous sanction of the Government is necessary to initiate prosecution.[8]

Failure to keep election accounts.

171-I. Whoever, being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

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(1) *Cookermouth*, (1901) 5 O'M & H. 158.
(2) *Sunderland*, (1896) 5 O'M. & H. 64, (65).
(3) Cl. 12, Statement of Objects and Reasons, *Gazette of India*, Pt. V, dated 3rd July 1920, p. 135.
(4) S. 20, Corrupt, etc. Prevention Act, 1883 (46 and 47 Vict., c. 51).
(5) S. 7, Corrupt etc. Prevention Act 1854 (17 and 18 Vict., c. 102) ; *Pontefract*, (1893) Day's Elec. Cases, 127.
(6) S. 16, Corrupt etc. Prevention Act 1883 (46 & 47 Vict., c. 51).
(7) Ss. 17 (2), 18, Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 and 48 Vict., c. 70).
(8) S. 196, Cr. P. C. as amended by Act XXXIX of 1920.

1684. Analogous Law.—This section penalizes the failure to keep accounts. The question what constitutes election expenses, is not answered in this chapter, but it is clear that they must relate to the candidature of a person which only begins on the dissolution or vacancy. It has been so held in England[1] where, however, the rules prescribe the date from which an account of such expenses should be maintained and it is obligatory upon the candidate to do so.

1685. What constitutes the election expense, is another question upon which this chapter is silent. Here again the provisions of the rules on the subject should be maintained. Generally speaking, all expenses necessary for or incidental to an election whether incurred by the candidate himself or by his election agent, canvassers, committeemen, political associations, societies, clubs and other bodies whether corporate or incorporate, are election expenses.[2] Where a candidate had built a room at the back of his house for the use of a political club, and used it as a committee room it was held that a proportionate part of the rent, and the money paid for cleaning coal and gas were election expenses.[3]

1686. It is, however, clear that expenses incurred by a prospective candidate while nursing his constituency are not included in the term. Nor are those incurred after the election.

1687. Limits of Rule.—It has already been stated that the expenses which a prospective candidate incurs while nursing his constituency to make himself acceptable to his constituents being too remote, are not comprised in the term. So the expenses incurred in starting a newspaper three months before the election to advocate his own political views, were held not to be election expenses, being expenses incurred to popularize the candidate's political views.[4] So was the subsidy paid to a newspaper for the same purpose.[5] On the same ground the expenses incurred in improving the electoral roll in the interest of the constituency were excluded.[6]

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(1) *Walsall*, (1892) 4 O'M. & H. 123; *Rochester*, (1892) 4 O'M. & H. 159; *Montgomery*, (1892) 4 O'M. & H. 167; *Stepney*, (1892) Day's El. Cases, 117.

(2) *Elgin* (1895) 5 O'M. & H. 7; *Lichfield*, (1895) 5 O'M. & H. 36; *Lancaster*, (1896) 5 O'M. & H. 46; *Cockermouth*, (1901) 5 O'M. & H. 156.

(3) *St. George's* (1896) 5 O'M. & H. 115.

(4) *Kennington*, (1886) 4 O'M. & H. 93.

(5) *Lichfield*, (1895) 5 O'M. & H. 33.

(6) *Kennington*, (1886) 4 O'M. & H. 93.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

1688. Topical Introduction.—One great division of the people, subject to the penal provisions of the Code, is between the public and the public servants. As a necessary part of the administrative machinery of a country, the latter possess certain exceptional rights and privileges. As persons possessing often great power they are necessarily subject to special penalties against its abuse. As such, the last chapter dealt with the delinquencies; this chapter relates to their rights against the public. This Chapter which consists of 19 sections denounces all disobedience to the lawful authority of public servants. As such, it codifies the various pre-existing Regulations on the subject and it lays down in one place all contempts whether they relate to the lawful authority of the Courts of Justice, or Officers of Revenue or of the Police.[1]

1689. These three classes of public servants do not necessarily require the same protective provisions, but, as the authors remarked, in view of the combination of the three functions frequently in the same person in this country and "while the division of labour between the different departments of the Public Service is so imperfect it would be idle to make nice distinctions between those departments in the Penal Code."[2]

1690. The chapter deals with contempts in its various forms, but its underlying principles are that, in order to subject a person to the penal visitation of its provisions, the order must be legal and its disobedience intentional. These two elements are common to all offences described in this chapter. There are others which form the special pre-requisites of one or more of them, but these will have to be considered under the sections to which they relate.

1691. Of course, the penalties provided in this chapter do not exclude the imposition of other penalties, if the circumstances of the case so warrant. Indeed, the offences here described are really those acts done in contempts of the lawful authority of public servants, which but for the special provision here made, would not be otherwise punishable. They do not, of course, affect other coercive powers possessed by public servants to compel obedience to their orders, whether by arrest or proclamation, attachment or sale of property, or otherwise.

Absconding to avoid service of summons or other proceeding.

172. Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[***Court of Justice***—s. 10. ***Document***—s. 29.]

1692. Analogous Law.—This section substantially reproduces section 4 of Regulation XI of 1796, which similarly punished evasion of service. The propriety of the word "absconding" was questioned, but as the authors explained it, it is a word used in the corresponding section of the Regulation. Sections 69-74 of the Code of Criminal Procedure lay down the mode of service of summons issued under that Code, while Order XVI of the Code of Civil Procedure[3] provides for the summoning of witnesses in civil cases. The section is generally worded and is not confined in its operation to only parties but extends also to witnesses.

1693. Procedure and Practice.—A prosecution under this section requires the sanction of the public servant concerned.[4] The offence is not cognizable,

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(1) Note F.
(2) Note F.
(3) Act V of 1908.
(4) S. 195, Cr. P. C.

and summons must ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by any Magistrate, and may be tried summarily.

1694. Proof.—The points requiring proof are :—

(1) That a summons, notice or order had been issued.
(2) That it was issued by a public servant,
(3) Who was legally competent to issue it.
(4) That it was issued to be served on the accused.
(5) That the accused had absconded to avoid being served.

1695. The second clause deals with the aggravated form of the same offence, and it requires for its proof the following additional circumstances, namely :—

(6) That the process required the attendance of the accused either personally or by his agent, or required the production of a document by him, and
(7) That such attendance or production was to be made in a Court of Justice.

1696. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——on or about the——day of——at——, absconded to avoid service of summons (*or* notice *or* order) proceeding from——(*name the public servant and state his office*) and thereby committed an offence punishable under s. 172 of the Indian Penal Code, and within my cognizance.

" And I hereby direct that you be tried on the said charge."

1697. Principle.—This section implies that the absconding was with the intention of evading service, which again implies, that the absconder knew that a process had been issued, and that he was attempting to defeat it by his flight. Absconding in order to avoid service is thus an offence of the same kind as disobeying a summons after its service. As in the one case, so in the other, the intention is to resist the process of Court. In the one case there is active disobedience, in the other case there is a passive resistance, but the intention and object is in each case the same.

1698. Meaning of Words.—"*Absconds*" : It does not necessarily imply change of place but absconding may be effected by concealment.[1] It must be with the intention of avoiding service. The summons, notice or order must then be addressed to the person whose attendance is required and who absconds to avoid its service. "*Summons notice or order*" : This does not include a warrant which is not an order served on the accused. It is simply an order to the police to arrest him.[2] "*Legally competent as such public servant*" : Competency, and not the propriety of the summons or order determines the offence.

1699. Absconding to Avoid Service.—In order to prove the commission of an offence under this section, four things must be established ; (*i*) that summons, notice or order had been issued ; (*ii*) that the public servant issuing it was legally competent to issue it ; (*iii*) that the accused knew, or had reason to believe that it had been issued ; and (*iv*) he must have absconded to evade it. To avoid the service of process, which has not issued, is no offence under this Code,[3] nor is it enough that the process had been issued, if the accused did not know anything about it. The essence of the crime consists of intentional evasion of service, and there must, therefore, be both knowledge of the process and absconding to avoid it. The word "absconds" is here used to imply concealment. It does not necessarily imply that a person leaves the place in which he lives. Its etymological and its ordinary sense are to hide one's self : and it matters not whether a person departs from a place or remains in it, if he conceals himself, nor does the term apply only to the commencement of the concealment. If a person having concealed himself before process issues, continues to do so after it has issued, he absconds.[4] The

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(1) *Per* Turner, C. J., in *Srinivasa Ayyangar*, 4 M. 393. The word "abscond" etymologically connotes "concealment"; L. *abs.* from, and *condo*: to hide; hence to withdraw or absent one-self in a private manner.

(2) *Lakshmi*, (1881) B. U. C. 152; *Woomesh Chunder*, 5 W. R. 71; *Allah Baksh*, (1890) P. R. No. 28.

(3) *Srinivasa Ayyangar*, 4 M. 393.

(4) *Per* Turner, C. J., in *Srinivasa Ayyangar*, 4 M. 393.

term is similarily used in English Law of persons who go out of the way in order to avoid a legal process.

1700. But a person cannot be said to abscond if he merely intended to get rid of the process server, *e.g.*, where he refused to accept service, abused the process server and went inside his house.[1]

1701. Knowledge Essential.—Moreover, absconding merely is not an offence punishable under this section. In order to amount to an offence, a person must have absconded in order to avoid service. The absconding must be with a purpose. And, as Turner, C. J., observed, this implies that the absconder knows, or at least has reason to believe, that the process had issued. He may abscond to avoid the issue of process; and this would not be an offence under this section. But "when he knows or has reason to believe that it has issued, he may be unwilling to show contempt of the authority of the Court or officer who has issued it, and may comply with it, or so conduct himself that service may be effected; but he can hardly be said to be guilty of contempt of authority if he does not know, and has no reason to believe, the authority has been exercised, not to the absconding to prevent the service of a process, if he does not know, nor has reason to believe, that it has issued."[2] Moreover, such knowledge on the part of the accused cannot be presumed, from the mere issue of process. It must be established by the prosecution, upon whom lies the burden of proving it.[3]

1702. "Summons, Notice or Order".—Again, the section only applies to contempts in respect of "summons, notice or order." A warrant for the arrest of a person is not, therefore, within these terms. It is no doubt an "order," but then it is not an order addressed to the person to be addressed, but to the police to arrest and produce him before the Court.[4]

1703. The "order," the evasion of which is here condemned is not an order relating to a person but an order addressed to any person, and one which will only take effect from the date of its service on him. There are a large number of orders which are perfectly legal without any special service on the person affected. A copy of such an order may be ordered to be served on him *ex majori cautela*, but evasion of its service is not an offence punishable under this section. On the other hand, there are orders which are binding on one, only from the date of service. It is to prevent the evasion of service of an order of this kind the section was enacted. Such an order may, for instance, be passed both under the Code of Civil as well as Criminal Procedure. Under the former, such an order may be a prohibitory order, or one for a temporary injunction[5] or an attachment of property.[6] It may be an order in execution. And, indeed, as a rule all orders passed in a civil proceeding affecting a party to a suit or proceeding require to be served on the party to be thereby affected. So under the Code of Criminal Procedure an order for removal of nuisance[7] requires to be served on the person against whom it is made, in a manner therein provided for service of a summons.[8] So again, an order concerning a dispute as to immoveable property requires to be served on the person to be bound thereby.[9] In all such cases an evasion would be punishable as an offence under this section.

1704. But in the case of warrants, whether of the Civil,[10] or of the Criminal Court,[11] the section has, as already remarked, no application. This does not mean

(1) *Bhujang*, (1924) 10 O. A. L. R. 439.

(2) *Per* Turner, C. J., in *Srinivasa Ayyangar*, 4 M. 393.

(3) *Ib*.

(4) *Per* Norman, J. (Sir Barnes Peacock, C. J., concurring and Campbell, J., dissenting) in *Woomesk Chunder Ghose*, 5 W. R. 71: followed in *Hossein Manjee*, 9 W. R. 70; *Majhi Mamud*, (1902) 2 C. L. J., 625; *Sardar Pathoo*, 1 N. W. P, C. R. C. 38; *Zahoor Ali Khan*, 4 N. W. P. H. C. R. 97; *Amir Jan*, 7 N. W. P. H. C. R. 302; *Lakshmi*, (1881) B. U. C. 152; *Alla Baksh*, (1890) P. R. No. 28. *Sheo Jangal Prasad*, 50 A. 666.

(5) O. XXXIX, Act V of 1908.

(6) O. XXXVIII, Act V of 1908.

(7) S. 133, Cr. P. C.

(8) S. 134, Cr. P. C.

(9) S. 145, Cr. P. C.

(10) *Zahaor Ali Khan*, 4 N. W. P. H. C. R. 97; *Hira Lal*, (1883) A. W. N. 222. *Alla Baksh*, (1890) P. R. No. 28.

(11) *Woomesh Chunder Ghose*, 5 W. R. 71; *Majhi Mamud*, (1902) 2 C. L. J. 625; *Amir Jan*, 7 N. W. P. H. C. R. 302; *Sheo Jangal Prasad*, 50 A. 666.

that in such a case the party sought to be arrested can evade service with impunity ; but in case of disobedience, the procedure to be resorted to is only that which the law lays down to punish such recalcitrants. Thus the procedure, in the case of a warrant issued by a Criminal Court, is by proclamation and attachment,[1] and similar coercive procedure is prescribed by other Acts.

1705. Again, the summons, notice or order must have been of a public servant *legally competent* to issue it. It may be, as in the case above supposed, supererogatory and even improper, but it must not be illegal. For, there can be no contempt to disobey an illegal order, *a fortiori* to evade it. So where the police reported that the trees of certain persons including the accused Hiralal overhang a certain house endangering its safety against thieves, the Magistrate thereupon issued an order on Hiralal and the rest to lop off the overhanging branches of their trees, or show cause. The police wanted Hiralal to sign a receipt for this order, which he refused to do. He was prosecuted under this section, and it was held that both the order as well as the request made for a receipt, were illegal, and that the accused therefore could not be convicted.[2] So the conviction of the absconder was quashed where the summons issued for his appearance had mentioned no place for his attendance.[3]

1706. The second clause deals with the aggravated form of the same offence, the aggravation being one not to the additional sanctity of the Court of Justice, but to the graver issues therein tried, in which such an evasion might lead to the failure of justice. It was on the ground that the inadequacy of the punishment here prescribed was brought to the notice of the Law Commissioners. As one critic put it : suppose that an important witness in possession of the title-deeds of a party is bribed by his adversary to keep out of the way, at the risk of incurring the small penalty here prescribed, is he to lose his case, and have only the satisfaction of having sent his subdued witness to gaol?[4] Pressed by these considerations the second clause prescribing the enhanced penalty was subsequently added. It has, of course, application only to the two cases therein put, namely (*i*) attendance in person or by agent, and (*ii*) production of a document in a Court of Justice. Other evasion will have to be dealt with under the first clause.

173. Whoever in any manner intentionally prevents the serving on himself, or any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

Preventing service of summons, or other proceeding, or preventing publication thereof.

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ;

or, if summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

1707. Analogous Law.—This section refers to active resistance to prevent service of " summons notice or order "—terms, the meaning of which has already

(1) Ss. 87, 88, Cr. P. C.
(2) *Hira Lal*, (1883) A. W. N. 222.
(3) *Srinivasa Ayyangar*, (Petition No. 568) 4 M. 393.
(4) 2nd Rep., ss. 100, 101.

been explained under the last section (§§ 1702, 1704). Here, again, the knowledge that it is a process from a public servant legally competent to issue it is material.

1708. Procedure and Practice.—The sanction of the Court or public servant whose process was abused is required to initiate a prosecution under this section.[1] The offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Magistrate, Presidency, First or Second Class, and may be tried summarily. The question whether what the accused did amounts to prevention or not is ordinarily a question of fact.[2]

1709. Proof.—The points then requiring proof are :—

(1) That the process in question was a summons, notice or order or a proclamation.
(2) That it was issued by a public servant.
(3) That he had authority to issue it.
(4) That if a summons, notice or order, it was issued for service on some one.
(5) That the accused knew it.
(6) That he either prevented its service or removed it from any place to which it had been lawfully affixed : or that he prevented the making of the proclamation.
(7) That he did so intentionally.

To which the following aggravating facts may be added :—

(8) That the process or proclamation required the attendance of the accused either in person or by agent, or the production of a document, and
(9) That such process or proclamation was to attend or to produce the document in a Court of Justice.

1710. Prevention of Process.—This section refers to the prevention of service of process or issue of a proclamation by the lawful authority of a public servant. Here, as under the last section, three things are the necessary prerequisites of the offence, namely, (*i*) prevention, (*ii*) intention, and (*iii*) lawful authority in the public servant.

1711. As regards prevention of service, two things are essential. The prevention must have reference to the service, and the accused must have prevented it. Prevention may be by a direct act or by evasion and concealment,[3] but a mere refusal of the accused to receive a Summons to attend Court, issued under the Codes of Civil or Criminal Procedure is not punishable under this section, since a refusal to accept service amounts to service and cannot therefore be construed as prevention of service.[4] If, therefore, after the service is effected in the manner directed by law, the accused throws down the summons, it may be in contempt of the authority issuing it, he could not be dealt with under this section, as such an act does not amount to prevention of the service, which is all that the section visits with penal consequences.[5] And since the object of the section is to punish only such prevention as interferes with the completion of service, even the refusal to receive a summons is not an offence under this section, if its actual delivery was not legally necessary to complete its service. So since the mere tender of a summons is sufficient under both the Civil[6] as well as the Criminal Procedure Codes,[7] a refusal to receive does not expose one to the penalty of this section.[8] So, again, while the person receiving a summons is enjoined to "sign a receipt therefor on the back of the other duplicate,"[9] still this is a precautionary measure, intended to afford evidence of service, and is no part of the form required to complete it, for which a mere tender of one of the duplicates is sufficient.[10] It therefore follows, that the refusal to acknowledge

(i) **Prevention**

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(1) S. 195, Cr. P. C.
(2) *Badhua*, 107 I. C. 563 ; (1928) A. 118.
(3) *Ib.*
(4) *Sahdeo Bai*, 40 A. 577 ; *Chandika Prasad*, 46 I. C. (O) 817 ; *Zapantir*, 57 I. C. (U. B.) 928 ; U. *Thudamawasa*, 1 R. 49 ; *Banwari*, (1926) A. 304.
(5) *Arumuga Nadan*, 1 Weir 79 ; 5 M. 200 note.
(6) Ord. V, r. 5, C. P. C. (Act V of 1908).
(7) S. 69, Act V of 1898.
(8) *Punamalia Nadan*, 5 M. 199 ; *Debigir*, (1925) A. 322.
(9) S. 69 (2), Cr. P. C.
(10) S. 69 (1), Cr. P. C.

service is not an offence under this section.[1] So the refusal of a person illegally required to execute a recognisance for his appearance before a Magistrate does not constitute such prevention as is here contemplated. This was pointed out by Wilson, J., in 1886, in a case, since reported,[2] in which the Collector had appointed certain servants of a recalcitrant Zemindar as special constables, in which capacity they refused to serve, whereupon they were tried and convicted under this section. But it was held, as indeed it is only too obvious, that "the facts and the charge have nothing to do with one another, no single point of connection," and the proceedings were accordingly quashed.[3]

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

Non-attendance in obedience to an order from public servant.

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both,

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

Illustrations.

(*a*) *A* being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. *A* has committed the offence defined in this section.

(*b*) *A* being legally bound to appear before a Zilla Judge, as a witness, in obedience to a summons issued by that Zilla Judge, intentionally omits to appear. *A* has committed the offence defined in this section.

[***Public servant***—s. 21.]

1712. Analogous Law.—This section does not supersede the provisions of the several local Acts, which make special provisions for the punishment of such disobedience.[4] In such cases, the preferable course would, of course, be to punish the offenders under the local Acts rather than under this section (§ 79).

1713. Procedure and Practice.—No prosecution can be initiated under this section without sanction of the public servant concerned.[5] An offence under this section is not cognizable, but summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by any Magistrate, and may be tried summarily.

1714. Proof.—The points requiring proof are :—

(1) That the accused was legally bound to attend in person or by an agent,
(2) That such obligation was in obedience to a summons, notice, order or proclamation.
(3) Which proceeded from a public servant.
(4) Who was legally competent, as such public servant, to issue it.
(5) That the accused omitted to attend or departed as stated in paragraph 2.
(6) That he did so intentionally.[6]

To which may be proved the following fact in aggravation—

(7) That the summons, etc., was for attendance in a Court of Justice.

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(1) *Kalya*, 5 B. H. C. R. 34 ; *Khushal*, (1869) B. U. C. 17; *Bhobuneshwar Dutt*, 3 C. 621 ; *Krishna Gobind Das*, 20 C. 358.
(2) *Gopinath Paryah*, (1905) 2 C. L. J. 555.
(3) *Gopinath Paryah*, 2 C. L. J. 555 (564).
(4) *Eg.* Mad. Reg. IV of 1816 ; Mad. Act III of 1869.
(5) S. 195, Cr. P. C.
(6) Any reasonable cause for non-attendance is sufficient.—*Das*, (I. R.) 1 R. 549.

1715. When Non-attendance is an Offence.—This section creates intentional non-attendance in obedience to a summons, notice or order, an offence. But in order to amount to an offence, the section requires that the several particulars should be fulfilled. In the first place, the summons must require the presence of the accused which must be compulsory and not merely optional. A notice to a revenue defaulter is not such a summons.[1] Again, there must be a summons appointing a certain time and place for a person's attendance. It must have been issued by a public servant "legally competent, as such public servant to issue the same."[2] Then the omission must have been intentional.[3]

1716. Requirements of a Summons, Notice or Order.— A summons, notice, or order, ordering a person to attend, should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when, the attendance of the person is required, and it should contain a direction that such person is not to leave the Court without leave, and if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.[4] A summons must, in fact, fulfil all the requirements of the law. If it is in its form and substance defective, the accused is entitled to take advantage of it and say that it was not a legal summons and that it was not one which he was bound to obey. If, therefore, it was required to be signed by the public servant issuing it, it must have been so signed. If it was required to be sealed, it must have been duly sealed and an omission in this respect has been held to vitiate a conviction for non-attendance under this section.[5] Again, the summons, notice or order must be directed to the person, ordering him to appear. Cases have been cited before, in which it was held that a warrant is not comprised in the terms "summons, notice or order" as a warrant is not addressed to the person to be arrested, but to another to effect his arrest. (§ 1704). The disobedience of a warrant is, of course, not an offence punishable under this section. And so where the tahsildar, in a mutation case, issued an order to a peon directing him to produce the accused in Court to support his objection to a claim for pre-emption and the accused refused to attend, whereupon he was prosecuted and convicted under this section, it was held that the conviction could not be sustained as the order had been directed to the peon and not to the accused.[6] The summons, notice or order must be in writing if it is so required by law.[7] Otherwise it may be oral. A verbal order, given to a witness by a Court to attend on a particular day at a particular hour, is sufficient, so, after a witness is before Court, the disobedience of an order directing him to appear at an adjourned hearing would be punishable under this section.[8]

1717. Certain Time and Place.—Again, the specification of time and place are the most essential parts of a legal precept, and omission to mention either is an incurable defect in a summons, notice or order rendering it impossible of enforcement.[9] A summons, merely directing that a person was to attend on a certain day, without specifying the hour when and the place where he was to attend, cannot, therefore, support a conviction for disobedience under this section.[10] The fact that the public servant has a fixed place and hours of business is no answer to a defect in the summons to specify those particulars. For the accused is not bound to infer, but must be told the time and place of his attendance. Moreover, the time mentioned must be such as when the Court actually requires the attendance

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(1) *Bhirgu Singh*, 49 A. 205; *Himanchal Singh*, 52 A. 568, F. B. (A citation to appear issued under s. 147 of the U. P. Land Revenue Act (Act III of 1901) was held not to be a summons, notice or order) *Banwari Lal*, (926) A. 215.

(2) *Shiam Lal*, 25 I. C. (A) 347

(3) *Ram Bali*, 5 I. C. (O.) 805 (disobedience to citation to appear issued under s. 147 of U. P. Land Revenue Actf Act, III of 1901 punishable under this section).

(4) *Per* Straight, J., in *Ram Saran*, 5 A. 7.

(5) *Narasaiya*, (1882) 1 Weir 100.

(6) *Firkha*, (1870) P. R. No. 6

(7) *E.g.*, under s. 110, Cr. P. C; *Virasami Pillai*, (1895) 1 Weir 86

(8) *Guman*, (1873) B. U. C. 75.

(9) *Ram Saran*, 5 A. 7, followed in *Bholanath*, (1883) A. W. N. 109; *Hukum Singh*, (1926) A. 474.

(10) 7 M. H. C. R. (App.) 7; *Narayana Reddi*, (1882) 1 Weir 100; *Bholanath*, (1883) A. W. N. 109.

of a person or party. The conventional mention of 10 o'clock of the day, usually found printed on summonses, is not only useless but misleading, for it is well-known that, in no part of the country is public business transacted before 11 and a person directed to attend at 10 A.M. is well aware of it. Consequently, he could not be convicted for disobedience under this section, if he attended at the usual hours in spite of the printed legend to attend at 10 o'clock, for it could not then be said that his omission was "intentional". A recognizance executed by a party to appear, whenever called upon, does not comply with the requirements of law requiring the specification of time.[1] So, while a verbal order to a party or a witness to appear at an adjourned hearing is not illegal, such an order must specify the time at which his attendance is required. An order to appear when required is, therefore, wholly illegal.[2] So is also an order to a person to appear within a certain number of days.[3] Again, the place where a witness is summoned to attend, must be in British India. A Magistrate cannot order a person to appear before him at a place outside British territory. "If the Magistrate had ordinarily power to summon witnesses to attend at a place outside British India, the act of disobedience would then be done in foreign territory, and amount to an offence, over which he would have no jurisdiction."[4]

1718. As a warrant is something quite distinct from a summons, notice or order (§§ 1702, 1704), a judgment-debtor, escaping from custody under a warrant in execution of the decree of a Civil Court, cannot be dealt with under this section.[5]

1719. No Disobedience Without Personal Service.—The highly penal provisions of this section cannot be put into force, unless a person is personally served with the summons, notice or order.[6] But this is not a necessary pre-requisite, for, if it were, it would be easy to evade this section by evading personal service. What is meant, however, is this that a person cannot be said to be guilty of intentional disobedience, unless knowledge was clearly brought home to him that his presence was required by a public servant at a certain time and place, which a substituted service may not have done. But, even in the latter case, it may be possible to bring home such knowledge, if it is shown that the summons was affixed in a conspicuous part of his house, which the accused must have seen. The posting up of a proclamation on a place temporarily used for making collections of rent and abandoned as soon as the collection season was over is not such a place at a time when the person to be served was known to be residing eleswhere.[7] It is on the prosecution to prove that the non-attendance of the accused was intentional. For that purpose it is on them to show that the accused had knowledge of the summons and of the time and place mentioned therein in spite of which he did not attend.[8]

1720. In any case, there must have been a legal service, for, if there was no legal service, there can be no offence under this section.[9] There could be no legal service, when a summons, required to be delivered or tendered to a witness, is merely shown to him.[10] Indeed, as a matter of ordinary precaution, this is a course advisable even when there is no express provision of law in enjoining the delivery of a written order for, unless a written memorandum is made, or is left with the accused, he might plead forgetfulness as an excuse for his non-attendance.[11]

1721. It is perhaps needless to add that the service of a summons addressed to one person may be validly refused by another, even though he may be a relation or an agent of the person to be served. A person so refusing cannot be proceeded against under this section.[12]

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(1) *Shib Pershad*, 17 W. R. 38.
(2) 6 M. H. C. R. (App.) 10.
(3) *Somannah*, (1883) 1 Weir 82.
(4) *Paranga*, 16 M. 463.
(5) *Sardar Pathu*, 1 B. H. C. R. 38; *Bhola*, (1870) P. R. No. 27; *Ram Saran*, 5 A. 7; *Ala Baksh*, (1890) P. R. No. 28 but *per Lindsay*, J., contra in *Heera Singh*, (1871) P. R. No. 1.
(6) *Hurynath Chowdhury*, 7 W. R. 58.
(7) *Ib.*
(8) 6 M. H. C. R. (App.) 29; *Ganapathi Aiyan*, (1882) 1 Weir 85; *Periannamatawaram*, (1884) 1 Weir 84.
(9) *Hurynath Chowdhury*, 7 W. R. 58.
(10) *Karsanlal Danat Ram*, 5 B. H. C. R. 20; *Kuppan*, 11 M. 137.
(11) See *per curiam* in *Kuppan*, 11 M. 137.
(12) Cf. *Todd*, (1882) A. W. N. 52.

1722. Process must be Legal.—Thirdly, the summons, notice or order must be legal, that is to say, not only must the public servant issuing it have jurisdiction to issue a summons, notice or order, but he must have had jurisdiction to issue *the* summons, notice or order, in consequence of which the non-attendance is complained of.[1] The question whether a summons so issued was or was not within the competency of its author must naturally depend upon examination of the authority under which it purports to have been issued. For the right to compel attendance is not a necessary incident of every public office, nor is it a power possessed by every public servant. Such a power was denied to the Chairman of a Municipality appointed under a Bombay Act,[2] and a Mamlatdar, acting under the Bombay Land Revenue Code, was held to have been under the same incapacity.[3] The Tahsildars in the Punjab are not empowered to summon persons called Munsiffs, who are persons appointed to prepare and attest a list of cattle for the purpose of distributing revenue over waste lands.[4] Nor have the Tahsildars power to order Lambardars of a village in his Tahsil to appear for the purpose of appointing Chawkidars, and the fact that they are to nominate them does not imply a power in the Tahsildars, to summon them for the purpose.[5]

1723. Public servants are sometimes empowered to summon witnesses only in certain cases, and under certain circumstances. In such cases, the test of the legality of their action must depend upon fulfilment of the qualifying conditions. For instance, a second class Magistrate, invested with the powers of a *Mahalkari* is empowered to dismiss a village officer after investigation,[6] and for that purpose, he is empowered to have "the same authority as a Magistrate in compelling the attendance of parties and witnesses, and the production of papers, and in taking evidence."[7] Where, therefore, a Mahalkari issued a summons to the accused, a Kulkarni of the village, to attend to explain why he had failed to have certain books sealed with the Mahalkari's seal, and on his failing to attend, he was convicted under this section, it was held that he could not be so convicted, because the purpose for which the summons had been issued did not justify the Mahalkari to summon the accused.[8] So where a Sub-Inspector of Police summoned the surety of an absconding accused, to admonish and urge him to produce him, and he, having been told the purpose why he was wanted by the constable who served the summons upon him, refused to attend, whereupon he was prosecuted under this section, it was held that the Inspector had no authority to issue a summons for the appearance of accused for the purpose for which he wanted him, and that he had only power under s. 160 of the Procedure Code to enforce attendance of persons in cases in which he was making investigation under Chapter XIV of that Code.[9] So where in a case, instituted upon complaint, the District Magistrate warned the complainant to appear on a certain day at 10 A.M., failing which his complaint would be dismissed, he failed to appear and his complaint was consequently dismissed, it was held that, since there was no unconditional order for the complainant's appearance, nor would the issue of such an order have been legal, his failure to attend was not punishable under this section.[10] The Civil Court has the power to appoint persons to be arbitrators in a case pending before it, but that does not confer upon them the power to enforce the attendance of persons so appointed much less to prosecute them for an offence under this section for disobedience.[11]

1724. These cases are sufficient to show that the competency of the author of the summons must be either apparent, or clearly established by the prosecution.

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(1) *Ramchand*, 66 I. C. (P.) 70; *Shiam Lal*, 25 I. C. (A.) 347; *Behari Lal*, 59 I. C. (A.) 335.

(2) Act XXVI of 1850; *Purshotam Valji*, 5 B. H. C. R. 33.

(3) Bom. Act V of 1879, s. 189; *Vidiadhar*, (1889) B. U. C. 488; the same view was taken in *Mahomed Ismail*, (1873) B. U. C. 70, in which it was laid down that a *Mamlatdar* had no authority to summon witnesses under the Bhagdare and Narvadaree Tenures Act (Bom. Act V of 1862).

(4) *Khota Ram*, (1907) P. R. No. 4.

(5) *Ghulam Khan*, (1887) P. R. No. 14.

(6) Act XI of 1843, s. 7.

(7) *Ib.*, s. 8.

(8) *Venkaji Bhaskar*, 5 B. H. C. R. 19.

(9) *Chattar Singh*, (1885) A. W. N. 43.

(10) *Murad*, (1924) L. 302.

(11) *Kuria*, (1875) P. R. No. 18; *Kashi Ram*, (1871) P. R. No. 2.

It may be that a person is empowered to issue summonses in one capacity, but that does not enlarge his authority to issue summons, while acting in another capacity and for a different purpose. And, even when acting within his authority, a person could not issue a summons except for a lawful purpose. For instance, a summons to take away a bundle of *puttahs* for distribution is not a legal summons.[1] But there is nothing against one officer directing a person to appear before another officer. Such is, indeed, the case in cases committed for trial to the Court of Sessions or the High Court, in which the committing Magistrate directs the witness to appear before another Court. But even in such cases, the legality of the order will, of course, depend upon the power of the Court ordering the summons and not on that before whom it is returnable.[2]

1725. Intentional Non-attendance.—Lastly, the non-attendance must be shown to have been intentional, and this must be done by the prosecution. It is not merely non-attendance, but non-attendance which amounts to wilful disobedience that law visits with its penalty.[3] A person ordered to attend Court at a stated hour may be unable to do so, because he was detained by another Court. He could not then be convicted under this section.[4] So it is scmetimes customary for a person while being served to explain to the process-server his inability to attend. He could not then be convicted of intentional non-attendance, whatever other course the Court might then think fit to adopt to enforce his attendance. So, where the accused was summoned to give evidence before a Settlement Officer and it appeared that he had at the time of service stated to the process-server his inability to be present owing to the expected arrival of a marriage-procession of his relative—a fact which the process-server omitted to mention to the Settlement Officer, it was held that the absence could not be said to have been "intentional."[5]

1726. The fact that a person did not attend after receipt of summons and had not sent timely intimation of his inability to attend, is not sufficient to fasten the guilt of intentional disobedience upon him. For he may have been both unable to attend as also to communicate with the Court. It is, therefore, in every case necessary that the Court, sanctioning a prosecution, should give the party accused, an opportunity of explaining his absence, and in any case, before he could be legally convicted, there must be evidence on record to show that the accused had been guilty of intentional disobedience,[6] which again cannot be presumed, but must be legally and sufficiently proved.[7] The mere production of the summons to the accused, with an endorsement of service, is not sufficient proof of service, in the absence of evidence of the officer who is said to have served the summons.[8] What is required to be proved is that it was brought to the knowledge of the accused that he was required to attend, and that he intentionally omitted to do so.

1727. Ordinarily, a person required to be present in person, cannot appear by a pleader or agent, but, if he does so, it may be then a question whether his personal non-attendance was due to intentional disobedience. Where, for instance, in a case the accused had been summoned to appear before a Magistrate, and he thereupon sent his agent to appear and apply for his personal exemption, while he himself proceeded to apply against the case to the High Court, for which the Magistrate considered him "doubly guilty of contempt of Court," the High Court upset his conviction, holding that the accused had appeared, though not in person in compliance with the summons of the Magistrate, and that he could not, therefore, be accused of intentional disobedience.[9] So, where an accused was summoned to appear at 10 o'clock in Court, and he did then appear, but after waiting for about an hour

(1) *Chikka Honappa*, (1882) 1 Weir 97; *Yellappa* (1883), 1 Weir 93; *Jangama Pattan*, (1883) 1 Weir 98.

(2) *Ram Chand*, 66 I. C. (P.) 70; *Shiam Lal*, 25 I. C. (A.) 347.

(3) *Ungan Lall*, (1869) 1 N. W. P. H. C. R. 303; *Das*, I. R. 1 R. 549.

(4) *Sreenath Ghosh*, 10 W. R. 33.

(5) *Ramdhir*, (1880) P. W. R. No. 22.

(6) *Ramun*, (1907) P. W. R. No. 27.

(7) *Odda Kalantham*, (1889) 1 Weir 85; Weir (3rd Ed.) 47.

(8) *Odda Kolantham*, (1889) 1 Weir 85.

(9) *Durga Das Rakhit* v. *Umesh Chandra Sen*, 27 C. 985.

and being told that the Magistrate may not come till noon, he left the Court, and the latter had him prosecuted for an offence under this section. But the High Court quashed his conviction holding that a person ordered to appear at a certain hour was not bound to await the convenience of the person summoning him more than for a reasonable time, and that an hour is under such circumstances a reasonable time,[1] though two or three minutes would have been under the circumstances wholly unreasonable.[2] But this was a case where the Magistrate was absent, and as the Court took care to point out, the case would have been different, if the Magistrate had been present, and engaged in some other business, or if it were shown that the accused was aware that there was any other such cause for the delay in taking up his case as he was in reason bound to submit to.[3] These were, however, cases in which the summons did not direct as to how long one was to stay in Court, or that the person summoned was not to depart without the leave of the Court. But even in such a case, it is apprehended that the rule would not be wholly different. For a person could not be expected to sacrifice his business and convenience to await his call indefinitely.

1728. Of course, such cases must be approached in the light of reason. For there may be non-compliance with the letter of the law, but it is not the letter, but the substance that is in such cases to be looked to. Suppose, a person were ordered to appear before a Magistrate on a certain day at a certain hour, and he failed to appear; but on that day the Magistrate was absent from the station. Could he be convicted for not having complied with his summons? It was held not. As the Court observed: "The object of the summons was the meeting between the two. How could this object be realised unless the person summoning was present to meet the person summoned? Would it not have been futile even if the latter turned up at the fixed place? But the law compels no man to do that which is futile or fruitless. *Lex neminem cogit ad vana seu inutilia peragenda.* No doubt, in this case the accused did not say that he failed to go to Gooty because of the Tahsildar's absence. Assuming that he intended to disobey the summons, such intention alone is, of course, not punishable under section 174, or under any other provision of law."[4]

1729. Cumulative Penalties.—When an act is punishable both under this section as well as under a local Act, there cannot be a double conviction both under the Code as well as the local Act. In such a case, the preferable course is to punish under the local Act (§ 79). Again, where a person has already given a recognizance for his appearance on a certain day it is not usual to fine him for non-appearance before the Court in addition to escheating his recognizance,[5] though of course, there is nothing in law to prevent the adoption of such a course.[6]

1730. No Offence.—It has already been seen that the mere refusal to receive a summons does not amount to prevention punishable under this section. It has also been seen that any reasonable excuse for non-attendance is a sufficient answer, *e.g.*, attendance in another Court (§ 1725), illness, though it need not be such as wholly incapacitates a person from attending[7] late service on a person living at a distance[8] or the missing of the train, or of the conveyance or the like. So where the Magistrate did not act in that capacity, but in his capacity as Secretary of the Cantonment Committee, a refusal to attend is not punishable under this section.[9] A citation to a person to pay or to appear being a conditional writ, its disobedience is not punishable under this section.[10]

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(1) *Sutherland*, 14 W. R. 20.
(2) *Kisan Bapu*, 10 B. 93.
(3) *Sutherland*, 14 W. R. 20 (21); *Narayanappa*, (1890) 1 Weir 99; *Kisan Bapu*, 10 B. 93.
(4) *Krishtappa*, 20 M. 31.
(5) *Shib Pershad*, 17 W. R. 38.
(6) *Ib.*, and see *Tejumaddi*, 1 B. L. R. (A. Cr.) overruled on a different point in *Chandra Sekhar Ray*, 5 B. L. R. 100.
(7) *Bohra Birbal*, 65 I. C. (A.) 864.
(8) *Tika Ram*, (1928) A. 680 F. B.
(9) *Ram Chand*, 66 I. C. (P.) 70.
(10) *Bhirgu Singh*, 49 A. 205; *Banwari Lal*, 49 A. 215; *Sed Quaere.*

175. Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce, or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

Omission to produce document to public servant by person legally bound to produce it.

or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustration.

A, being legally bound to produce a document before a Zilla Court, intentionally omits to produce the same. *A* has committed the offence defined in this section.

[***Court of Justice***—s. 20. ***Public servant***—s. 21. ***Legally bound***—s. 43.]

1731. Analogous Law.—As regards the sentence here prescribed, this section compares favourably with the corresponding provision of the English law which authorizes a much severer punishment, namely, imprisonment for one year or unlimited fine or both.[1] The Law Commissioners instanced the case of a man suborned to commit perjury by a great bribe, and it was suggested that the fine under this section should be unlimited. The principle is that "no man ought ever to gain by breaking the Law." So the Law Commissioners wrote: "The principle appears to us applicable to a party bribed not to appear upon a summons or order, or not to produce some document of importance, as well as to a party bribed to give false evidence, since justice may be defeated by a witness failing to appear to give evidence, which is essential and which he alone can give, or by failing to produce an essential document, as well as by a witness giving false evidence. We see no greater probability of the power being abused in such cases than in many others in which the fine is unlimited."[2] This eventually led to the addition of paragraph 2 and the enhanced penalty therein provided.

1732. Section 180 of the Code of Criminal Procedure prescribes a summary procedure enabling the Court to punish such contempts, but a procedure under which is optional.[3] Where the Court elects to proceed under it, its record must be prepared as required by section 481 of the Procedure Code. It may also imprison a recalcitrant person to imprisonment as laid down in s. 485. But in every case of conviction or sentence, the accused has the right of appeal.[4]

1733. It will be observed that in the case of a Court other than the High Court the power of the Court to punish is confined only to contempts committed in its view or presence. It cannot punish for contempts not so committed. Such offences must be tried and disposed of by a Court other than that in respect of whom the contempt was committed.[5]

1734. Of course, in this respect the High Courts possess plenary powers of punishing contempts whether committed in its presence or otherwise (§ 83).

1735. Procedure and Practice.—No prosecution for an offence under this section can be initiated without sanction, as required by section 195 of the Code of Criminal Procedure. The offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Procedure Code; or if not committed in a Court, it is triable by a Presidency Magistrate, or Magistrate of the first or second class, and may be tried summarily.

1736. Proof.—The points requiring proof are:—

(1) That the accused was legally bound to produce or deliver up any document to any public servant or to a Court of Justice.
(2) That he omitted to produce or deliver it up.
(3) That he did so intentionally.

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(1) Dig. Ch. IV, s. 3, art. 1; s. 2, art. 4.
(2) 2nd Rep., s. 101.
(3) S. 482, Cr. P. C.
(4) S. 485, Cr. P. C.
(5) *Seshayya*, 13 M. 24.

1737. Intentional Non-production of Document.—The intentional non-production of a document by a person legally bound to produce it is an offence under this section, and not an offence under section 174 of the Code of Civil Procedure.[1] The latter section only applies to a witness, whereas the present section is general and applies to all alike. In all cases of contempt, the Court cannot punish the offender without recording the facts constituting the offence with the statement (if any) made by the offender as well as the finding and sentence.[2] This is the very minimum that the Court, sentencing an offender for contempt, is called upon to record. If, therefore, he fines a person without preparing any record of the facts and the statement of the offender, his sentence cannot be maintained.[3]

1738. In order to constitute an offence under this section, it is necessary for the prosecution to show that the accused was legally bound to produce or deliver up the document which he was called upon to produce or deliver up. This implies that the public servant calling for the production of the document was legally competent to order its production. A Sub-Registrar has no such power. Where, therefore, a Sub-registrar called upon a person to produce the original document which was registered in his office to enable him to compare it with the copy of the deed in the Registration Office Register, which, it was suspected, had been tampered with, it was held that his refusal to produce it did not constitute an offence under this section, as he was not legally bound to produce it.[4] So there is no law which compels an accused person undergoing his trial to produce a document incriminating himself, and his refusal could not, therefore, be punished under this section.[5]

1739. A person may be legally bound to produce a document and yet there may not have been an intentional omission on his part to produce it. Where, for instance, the Court issued a summons for the production of the account-books of a partnership to a junior member of a joint Hindu family carrying on business as a partnership, and it was shown that the father was the manager of the family, he was held justified in failing to produce them.[6]

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees, or with both;

Omission to give notice or information to public servant by person legally bound to give it.

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Public servant*—s. 21. *Offence*—s. 40. *Legally bound*—s. 43.]

1740. Analogous Law.—The obligation to give information to a public servant is cast upon the public by several enactments.[7] The criminal liability to give information depends upon the legal obligation to impart it.

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(1) Now Ord. XVI, rule 12, Act V of 1908; *Premchand Dowlatram*, 12 B. 63.

(2) S. 480 (1), Cr. P. C.; *Panchanada Tambiram*, 4 M. H. C. R. 229.

(3) *Panchanada Tambiram*, 4 M. H. C. R. 229.

(4) *Asmattulla Sirdar*, 2 C. L. J. 621; *Phool Chand Brojobashee*, 16 W. R. 35.

(5) *Ishwar Chundra* v. *Ghoshal*, 12 C. W. N. 1016.

(6) *SaligRam*, (1890) A. W. N. 171.

(7) *E. g.*, ss. 44, 45, 565, Cr. P. C.; The Foreigners Act (III of 1864) s. 20; The Coroner's Act (IV of 1871) s. 17; The Criminal Tribes Act (XXVII of 1871) s. 9; The Dramatic Performances Act (XIX of 1876) s. 7; The Probate and Administration Act (V of 1881) s. 22 (4); The Income-Tax Act (XI of 1922) s. 45; The City of Bombay Municipality Act (Bom. Act III of 1888) ss. 473, 155 (1), (2), 187; The Land Acquisition Act (I of 1894) s. 10 (2).

1741. Procedure and Practice.—No prosecution can be initiated under this section without sanction of the Court or public servant concerned.[1] While a witness is under a legal obligation to answer questions put to him in the witness box, the Court should not sanction his prosecution if he refused to answer questions which had absolutely no bearing on the facts of the case, though the Court might, in such a case, take action under s. 480 of the Code of Criminal Procedure.[2] The offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable and not compoundable. It is triable by a Magistrate Presidency, first or second class, and may be tried summarily.

1742. Proof.—This section has nothing whatever to do with the conduct of accused persons in Court. They cannot be prosecuted under this section if they refuse to reply to questions put to them by Court.[3] The points requiring proof are :—

(1) That the accused was under legal obligation to furnish information to any public servant.
(2) That he omitted to furnish it.
(3) That his omission was intentional.

To which may be added the following aggravating circumstances :—

(4) That the notice or information was as respects the commission of an offence ;
(5) or was required for the purpose of preventing the commission of an offence, or
(6) for the apprehension of an offender.

1743. Charge.—The offence being a "summons" case no charge need be framed, but should one become necessary, it should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false ; and it should appear precisely what his duty it was in the matter.[4]

1744. Principle.—The obligation to assist public servants has to some extent been cast in all countries upon the public in certain cases. Where it is so, it becomes a public duty, the dereliction of which is punishable as a crime. In order to bring an offender within the penal visitation of this section, two things are essential—there must be a duty, and there must be its intentional non-performance, which, again, must have led to some injury, for, if the information withheld has otherwise reached the public servant, the object of the section having been attained, the accused could not be convicted for non-disclosure.[5]

1745. Meaning of Words.—*"In the manner and at the time required by law"* : Not only must the information be given, but it must be given opportunely. *"Respects the commission of an offence,"* *e.g.*, as required by section 44 of the Procedure Code. *"For the purpose of preventing"* : This may either mean that the nature of the information required had been bespoken, as where a subordinate police officer, on patrol only, is told to report any apprehended breach of the peace ; or it may be a duty independently cast upon some section of the public, as it has been by section 45 (*f*) of the Procedure Code.

1746. When Omission to Inform is an Offence.—An omission postulates legal obligation and knowledge, for there can be no omission when there is no legal obligation[6] and knowledge.[7] And a person is not bound to go out of his way to secure it. For he is under no legal obligation to do so. All he is called upon to do is to impart it to the public servant if he possesses it. In order, then, to make him liable for non-disclosure, it is incumbent upon the prosecution to show that he was legally bound to disclose, and that he had the information which he could have, but for reasons of his own, did not communicate. The mere fact that overtures were made to one to join in a dacoity does not show that he was possessed of the

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(1) S. 195 Cr. P. C.
(2) *Chheddi Lal*, (1924) O. 144.
(3) *Tirumala*, 47 M. 396.
(4) *Per* Jackson, J., in *Moosubroo*, 8 W. R. 37.
(5) *Sashi Bhusan*, 4 C. 623; *Gopal Singh*, 20 C. 316 ; *Pandya Nayak*, 7 M. 436 ; *Sher. Singh*, (1889) P. R. No. 58; *Sada*, (1893) B. U. C. 674.
(6) *Tirumala*, 47 M. 396 ; *Hiru Satua*, (1929) B. 12.
(7) Cf. *Abas Khan*, (1883) P. R. No. 30; *Muhammad*, (1887) P. R. No. 37; *Amin Chand*, (1893) P. R. No. 8; *Sashi Bhusan*, 4 C. 623.

information about the dacoity which subsequently took place. If *A* goes up to *B* and says " Let us go and commit a dacoity " and *B* refuses, could it be said that *B* was aware of the dacoity which *A* committed with the help of *C* ? It does not necessarily follow. For *B* may believe that his refusal to join *A* would deter him from committing any dacoity at all, and at any rate, it could not be said that *B* knew of any dacoity merely because there was a proposal to commit one with his assistance.[1]

1747. The notice or information contemplated in this section is naturally notice or information of a definite character, having a credible origin and such as may probably be conducive to the apprehension or prevention of crime. The section does not refer to vague floating gossips in which every bazar abounds. For while it is the duty to give information to a public servant, it is a duty which cannot be discharged perfunctorily by giving any information at haphazard, though it may turn out to be false, for the giving of such information is in itself a crime under the next section. As Prinsep, J., remarked in a case : " The object of the law is clearly that the earliest information should be communicated by those who are in the best position to obtain the same, or who, from their connection with the land, are in some authority and should accordingly be made responsible for this duty."[2]

1748. If, for instance, a man were found with his throat cut in a field, it may be fairly presumed that he died there, and the owner or occupier of field would then be under an obligation to report the occurrence, the omission to do which may well expose him to the risk of being condemned under this section.[3] In such a case it is not necessary that the land-holder should have been an eye-witness to the deed. If that were the law, it would defeat its own object, for it would then take away all responsibility from those who were not actual eye-witnesses to a crime. So, in another case, the accused, who were Lambardars and Chowkidars of a village, were informed that one Mt. *A* had disappeared from the village, and that her body had afterwards been seen in a certain stream ; whereupon the accused, after consulting together what report should be made at the thana, decided that the Chowkidar should merely report the fact that the woman had disappeared and not mention that her corpse had been seen in the stream. It was held that the discovery of a dead body in the stream under the circumstances could not but have given the accused reason to believe that her death was due to foul play, and that, under the circumstances, they were bound to report all they had seen and heard, and that their omission to report it exposed them to the penalty of this section.[4] The duty cast upon owners or occupiers of land under section 45 of the Procedure Code does not extend to the owners or occupiers of houses in a village, so that an omission by an owner of a house to give information of a sudden or unnatural death is not offence under this section.[5]

1749. Who are Legally Bound.—Again, the section only applies to those who are legally bound to give information. Under s. 46 of the U. P. Land Revenue Act, the landlord is bound to inform Revenue officials of the excess collections of rent on his requisitioning him to do so. Consequently, the mere fact that the accused had collected such rent without apprising the revenue officials of the same does not expose him to the penalty of this offence.[6] Nor should a mere non-compliance with a technicality expose a person to the dangers of this section.[7] The word " legal " here means under a legal enactment and not merely under some rules framed under an enactment.[8] So where the accused, a Zaildar in the Punjab, was prosecuted for failing to give information of two cases of house-breaking, and it was urged against him that he was bound " to report heinous crimes to the police and Magistrate " under the rules framed by the Financial Commissioner under the Punjab Land Revenue Act, it was held by the Chief Court that having regard to section 43 of the Code, though a Zaildar is required, by virtue of the rule referred to, to report,

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(1) *Lahai Mundal*, 7 W. R. 29.
(2) *Matuki Misser*, 11 C. 619.
(3) *Matuki Misser*, 11 C. 619, decided under s. 45 (*d*), Cr. P. C. to the effect, *Sher Muhammad*, (1887) P. R. No. 20.
(4) *Sher Muhammad*, (1887) P. R. No. 20.
(5) *Mainda*, (1887) 1 Weir 101.
(6) *Budha Singh*, (1927) A. 111.
(7) *Bhagwant Rao*, 90 I. C. (N.) 145.
(8) *Hari Singh*, (1894) P. R. No 25.

such rule does not cast upon him a legal duty to report, such as is imposed by a direct and express enactment of the Legislature, so that he can be held merely as a Zaildar to be "legally bound to give information" of the commission of the heinous offence.[1] Even when a duty is cast upon a person to inform, it must be strictly construed. The accused, who were Lambardars of a village, were convicted under this section of having omitted to give information that one *D* had released a robber on taking a bribe. The accused denied that they had knowledge of the release until the police came to investigate the case. The Magistrate did not find that they had any knowledge, but convicted them, holding that as they were Lambardars of the village they could not be absolved from liability. But it was held by the Chief Court that the finding was insufficient to support a conviction under this section, for there was no finding that the accused were aware of the release of the robber, and that they were bound to give information of it, and that so far as regards the police-man, the acused were not bound to report about his having taken a bribe which was a bailable offence;[2] or of the release of the robber, which was not the passage of the robber through their village which they were under the statutory liability to report.[3]

1750. Every Lambardar of a village, on becoming aware of the commission of the offence of house-breaking by night, whether with or without theft, is, like every other person, legally bound by section 44 of the Criminal Procedure Code, in the absence of reasonable excuse (the burden of proving which lies upon him) to give information of the same forthwith to the nearest police-officer or Magistrate, and if he intentionally omits to give such information he is, subject to proof of a reasonable excuse, guilty of an offence punishable under this section. But when there are several lambardars, and one of them to the knowledge of the others, directs the village Chowkidars to make a report at the thana, it would be difficult to find that any of them had intentionally omitted to give the information prescribed by law, or that there was no reasonable excuse for not giving it, if the Chowkidar had disobeyed the order.[4]

1751. A Karnam is legally bound to furnish true information regarding the cultivation in his village.[5] But a Karnam who omitted to furnish cultivation-accounts of his village in obedience to the orders of the Revenue Inspector was only guilty of departmental disobedience. He could not be convicted under this section.[6]

1752. The accused person is under no legal obligation to reply to questions put to him by the Court. He cannot, therefore, be convicted of this offence for refusal.[7] No one is personally bound to furnish information to a Sub-Registrar regarding the documents which it is his duty to register. So where a Sub-Registrar suspected an old document and thereupon summoned the accused to appear before him and make a statement concerning the document which the accused refused to do, it was held that as the accused was under no legal obligation to make a statement as desired by the Sub-Registrar, he could not be convicted of an offence under this section.[8]

1753. And since the object of the section is not so much to punish delinquents as to assist public servants in the discharge of their duties, it follows that where the information sought has been obtained *aliunde*, the accused could not be convicted, merely because he had omitted to give the information.[9] It is not the intention of law that if a hundred persons possess an information, they are all to report, though they may be aware that the information had already reached the proper quarter. But where two persons are equally liable to furnish information, one

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(1) *Hari Singh* (1894) P. R. No. 25, following; *Shah Muhammad*, (1886) P. R. No. 19.
(2) S. 45 (*c*), Cr. P. C.
(3) S. 45 (*h*), Cr. P. C.; *Malik Daud*, (1887) P. R. No. 30.
(4) *Sher Singh*, (1889) P. R. No. 5; *Alas Khan*, (1883) P. R. No. 30.
(5) *Venkatanarasappa*, (1894) 1 Weir 111.
(6) *Tolupur Bhagvannulu*, (1897) Weir 105.
(7) *Tirumala*, 47 M. 396.
(8) *Phool Chand Brojobassee*, 16 W. R. 35 · *Asmatulla Sirdar*, 2 C. L. J. 621.
(9) *Sashi Bhusan*, 4 C. 623; *Gopal Singh*, 20 C. 316; *Pandya Nayak*, 7 M. 436; *Sada Shev Singh*, (1889) P. R. No. 58; *Zeri Khan*, 30 I. C. (Bur.) 446.

cannot excuse his omission by pleading that he believed that the other must have done his duty.[1]

1754. Lastly, the omission must have been intentional, otherwise there can be no offence.[2] The word "intention" as used in this connection implies the wilful withholding of information, from a motive not quite unconnected with the desire to suppress it. But this is not necessary. If there is an omission, and the omission cannot be accounted for, it is intentional, and as such punishable.

1755. Not Legally Bound.—A servant or other dependent is not legally bound to report a death occurring in the house of his employer.[3] The section, of course, only applies to persons under a legal duty to report.

Furnishing false information.

177. Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations.

(*a*) *A*, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. *A* is guilty of the offence defined in this section.

(*b*) *A*, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of *Z*, a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section 7, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wiltully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here *A* is guilty of the offence defined in the latter part of this section.

Explanation.—**In section 176 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460; and the word "offended" includes any person who is alleged to have been guilty of any such act.**

[***Public servant***—s 21. ***Offence***—s. 40; s. 177, Expl. ***Legally bound***—s. 43.]

1756. Analogous Law.—Reference to the Bengal Regulation III of 1821 has become unnecessary by reason of the repeal of the Regulation by Act XVII of 1862. Similar liability has, however, been now cast by s. 45 of the Code of Criminal Procedure.

1757. The explanation is new, and was added by the Indian Criminal Laws Amendment Act, 1894.[4] This section deals with the giving of false information as the last section deals with the omission to give information. Under both the sections criminal liability depends upon legal obligation. If there is no legal obligation, there is no criminal liability, whatever may have been the information supplied or withheld and however false the informaton may have been.[5]

1758. Procedure and Practice.—Sanction is required to initiate a prosecution for an offence under this section.[6] It is non-cognizable, but summons

(1) *Manihar Singh*, 7 N. L. R. 101.
(2) *Luchman Pershad*, 18 W. R. 22.
(3) *Thakri*, 11 I. C. (L.) 609.
(4) Act III of 1894, s. 5.
(5) *Suraji*, (1873) B. U. C. 76; *Parmaya*, (1885) B. U. C. 210; *Appayya*, 14 M. 484, dissenting from *contra* in 6 M. H. C. R. (App.) 48; *Ganpot Subrao*, 58 B. 491: *Virasami*, 4 M. 144.
(6) S. 195, Cr. P. C.

should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Magistrate, first or second class. The offence falling under the first clause may be tried summarily.

1759. Proof.—The points requiring proof are :—

(1) That the accused was legaily bound to furnish the informatian.
(2) That it was to be furnished to a public servant.
(3) That in pursuance of such obligation he did furnish certain information.
(4) That it was false.
(5) That he furnished it as true, although he knew or had reason to believe that it was false.

To which may be proved the following facts in aggravation :—

(6) That such information was with respect to the commission of an offence.

1760. Charge.—The first paragraph deals with a summons case. A charge must be framed in the case of an offence described in the second paragraph and it should distinctly set forth the particular offence in respect of which the accused gave the information which he knew to be false ; and it should appear precisely what his duty was in the matter.[1] It should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——at——, being legally bound to furnish information on any subject to wit to——a public servant as such, furnished as true the information to wit——on the subject which you knew (*or* had reason to believe) to be false (*add if necessary*) and the information which you were legally bound to give respects commission of an offence, *or* was required for the purpose of preventing the commission of an offence, (*or* in order to the apprehension of an offender) and thereby committed an offence punishable under section 177 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1761. Principle.—Neither this section nor the last creates any obligation on the part of the public to supply any information to public servants. The latter have, in certain cases, the right to summon and examine persons likely to be cognizant with the subject-matter of their inquiry, but, in such case, the persons examined are not necessarily bound to speak the truth. That depends upon the legal obligation, otherwise created, and persons so bound to furnish information are, by the force of this section, bound to furnish true information, or at least, such information as they know or have reason to believe to be true. Otherwise, they incur the penalty provided by this section, the gravity of which depends upon whether it has, or has not to do with the commission or pevention of an offence, or the apprehension of an offender.

1762. Meaning of Words.—"*Legally bound to furnish information,*" *e.g.*, under ss. 44 and 45 of the Procedure Code. "*Furnishes as true—which he knows or has reason to believe to be false,*" that is, gives false information not necessarily with a view to defraud. It is enough that the information furnished as true was either known to be false, or not believed to be true, *e.g.*, an income-tax assessee, making a false return of his income.[2] "*Or is required for the purpose of preventing,*" not necessarily from the informant. In each case, "an offence" refers to some particular offence committed, and not to the commission of offences generally.

1763. Furnishing False Information.—Persons affected by this section are those who are under a legal obligation to assist public servants by furnishing them with information on stated subjects. Such obligation is cast on the public by section 44 of the Code of Criminal Procedure and certain persons are under the additional duty imposed on them by section 45 of the same Code. In both cases, the persons there mentioned are legally bound to furnish information on the subject therein specified to the police. They are then bound to furnish that information to them. But the obligation is not universal, for the public at large are under no obligation to keep the police informed of facts, the knowledge of which may be to their advantage. The public were, at one time, under an obligation to answer truly all questions relating to a case under investigation by the police,[3] but the only

(1) *Moosubroo*, 8 W. R. 37.
(2) *Patel* (*P. D.*), 146 I. C. (R.) 653.
(3) Act X of 1882, s. 161.

obligation the public are under now, since the passing of the present Procedure Code[1] is to answer questions relating to a case under investigation other than questions the answers to which would have a tendency to expose them to a criminal charge or to a penalty of forfeiture[2] This obligation of *answering* questions then does not imply the duty of *furnishing* information and it does not, therefore, expose one to the pealty of this section.[3]

1764. This section is not confined to village watchmen, landholders and others, but it extends to all persons legally bound to furnish information to public servants, though they may be themselves public servants. It is thus, the duty of every police-officer to "collect and communicate intelligence affecting the public peace."[4] It, then, follows by force of this section, that such intelligence must be true or believed to be true.[5] So where a police constable was employed on round duties, it being his duty to make his rounds by night, and to call at the houses of the notorious bad characters on his beat, who were under police surveillance, and to ascertain whether they were indoors or not, the accused falsely reported to his superior officers that some of these men had been inside their houses, when, as a matter of fact, they had not, he was held to have brought himself within the penalty of the first part of this section.[6] So police-officers are enjoined the duty of making a record of all informations relating to cognizable or non-cognizable cases given to them.[7] Such record must necessarily be correct, and its one object is to inform the Superintendents of Police and District Magistrates of the offences reported to the police. This is furnishing information to public servants within the meaning of this section.

1765. If, therefore, the police-officer suppressed the real report and entered a report of a cognizable offence as one of a non-cognizable offence so as to save himself the trouble of investigation, he was held to have committed an offence under this section.[8] In this case, one Banwari Lall had reported that he and his companion Balla had been set upon by robbers who had robbed him of Rs. 454 and made good their escape. The report entered by the accused was that a milkman had beaten Balla, which was not the report of Banwari Lall. The same view was taken by the Calcutta High Court in a case in which the Police Sub-Inspector had minimized a serious riot into a petty assault with the same motive.[9] These two cases show that false information may be as much conveyed by *suggestio falsi* as by *suppresio veri*. If a robbery or a riot is described as an assault, there is the suppression of truth as much as the suggestion of a falsehood, and it is furnishing, as true, information which is known or believed to be false. A mere omission to furnish true information may, then, amount to furnishing a false return for which the offender may be dealt with under this section. It is not necessary to constitute an offence under this section that the person furnishing the false information should intend to deceive any one. All that is necessary is that the information furnished should be either known to be false, or not believed to be true.[10]

1766. Not Legally Bound.—Of course, persons under no legal obligation to furnish information, cannot be dealt with under this section.[11] For instance, if a person who is not legally bound to furnish information of an offence falsely reports to the police that he had been robbed, he could not be punished under this section, or for that matter under section 182, if there is nothing in this report to shew that he intended to cause injury or annoyance to any person.[12] So the purchaser of a stamp paper giving a false name to the stamp-vendor could not be proceeded against under this section, as he is not bound to disclose his true name, though the stamp-vendors are compelled to make a true indorsement on the

(1) Act V of 1898, s. 161 (2).
(2) *Ib.*
(3) *Luckhee Singh*, (1869) 12 W. R. 23, when the law was as it is now.
(4) S. 23, Police Act (V of 1861).
(5) *Mahomed Wasil*, 4 I. C. (C.) 578.
(6) *Panatulla*, 15 C. 386.
(7) Ss. 154, 155, Cr. P. C.
(8) *Muhammad Ismail*, 20 A. 151.
(9) *Syed Futteh Mahomed*, 21 W. R. 30.
(10) *Mohamed Wasil*, 13 C. W. N. 191, 4 I. C. 578; Weir, 3rd Ed., 68.
(11) *Pavallimanakkal*, 27 I. C. (M.) 843. *Ganpat Subrao*, 58 B. 491.
(12) *Suraji*, (1873) B. U. C. 76.

stamp.[1] The vendors are by this rule only required to ascertain the real name of the purchaser who requires the stamp for use, whoever may come to purchase the stamp.[2] Where a person falsely stated to the Revenue Inspector that his father had died, and so got his own name entered on the land, held by his father, it was held that he could not be convicted of this offence as he was under no legal duty to speak the truth. So where under the rules of his department, the accused a deputy tahsildar, was bound to furnish a periodical return of land in his possession, and he submitted a false "*nil*" return; it was held that the information furnished was false, but that inasmuch as he was not legally bound to furnish a true return he could not be punished under this section, though he might be punished departmentally.[3] Of course, the term "legally bound" has, here, the same meaning as is defined in section 43 and the test of illegality is, as there stated, the same, namely, was the act of the accused an offence,[4] or was it prohibited by law; or does it furnish a ground for civil action.

1767. Now, as the furnishing of a false return was neither an offence, nor prohibited by law, nor furnished a ground for civil action, it follows that whatever else it might have been, it was not "illegal" within the meaning of that term, as given in the Code. So since the memorandums of appeals are not required to be verified, a false representation therein made, cannot be punished under this section,[5] or under section 182, even though the false statement was made with the object of inducing, and it did induce the appellate Court to send for the record of the case, as it cannot be said that the Court was thereby induced to do what it ought not to have done.[6] Of course, the liability of plaintiff and the defendant in a civil suit is in this respect different. For they are bound to verify the plaint and the written statement and if they verify statements which are false, they would be furnishing false information within the meaning of this section. The question whether a candidate for enlistment in the police-force making a false statement as to his place of residence, in order to facilitate his recruitment, is guilty of an offence under this section was answered in the negative by Tyrrell, J., in an Allahabad case.[7] But it does not hence follow as the learned Judge went on to hold that the accused in that case could not be convicted under section 182.[8] This case will again have to be adverted to under section 182.

178. Whoever refuses to bind himself by an oath [or affirmation][9] to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Refusing oath or affirmation when duly required by public servant to make it.

[*Public Servant*—s. 24. *Oath*—s. 51.]

1768. Analogous Law.—This section has been amended by the addition of the word "or affirmation."[10] The refusal to take an oath is regarded in law as contempt of Court for which the Code of Criminal Procedure, provides with the summary remedy of punishing the recusant witness on the spot.[11] But the sentence that can be thus passed is limited, and if the Court considers the passing of a condign sentence essential, all it has to do is to either complain to a Magistrate, or sanction the offender's prosecution as required by section 195 of the Code of Criminal Procedure.

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(1) Rule 312 under s. 55, Indian Stamp Act (I of 1879), now s. 74 Act II of 1899; *contra* in *Raghoji Kanoji*, 3 B. H. C. R. (Cr.) 42, decided under the Stamp Act of 1862.

(2) *Parmaya*, (1885) B. U. C. 210.

(3) *Appayya*, 14 M. 484; dissenting from *Virasami Mudali*, 4 M. 144, 6 M. H. C. R. (App.) 48, *Ganpat Subrao*, 58 B. 491.

(4) S. 40.

(5) *Ghanaya*, (1879) P. R. No. 17.

(6) *Sunt Lal*, (1881) P. R. No. 41; following *Gokal*, (1879) P. R. No. 34.

(7) *Dwarka Prasad*, 6 A. 97.

(8) See *Ganesh Khanderao*, 13 B. 506; *Muhammad Khalil*, (1887) A. W. N. 268.

(9) These words were inserted by the Indian Oaths Act, 1873 (X of 1873), s. 15.

(10) Indian Oaths Act (X of 1873), s. 15.

(11) S. 480, Cr. P. C.

1769. Procedure and Practice.—No prosecution can be instituted under this section without the previous sanction of the public servant concerned.[1] The offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court in which the offence is committed subject to the provisions of Chapter XXXV of the Procedure Code, and in any other case by a Magistrate, Presidency, first or second class, and may be tried summarily.

1770. Proof.—The points requiring proof are :—

(1) That the public servant was legally competent to require that the accused shall swear or affirm to state the truth.
(2) That he did so require.
(3) That the accused refused to bind himself as required.

1771. Refusing to Swear.—The liability of a person to take an oath depends upon the competency of the public servant to administer it. For it is not as a matter of course that a person is liable to swear or affirm to state the truth, nor is it in every case within the competency of a public servant to so require him to do. He may have the power to summon him, and even to compel him to make a statement. But the one power does not necessarily imply the other. For instance, in a civil suit, the Civil Courts unquestionably possess the power of summoning witnesses. But a witness so summoned is entitled to payment of his expenses before he gives evidence. If he is not prepaid, he is not bound to appear at all in answer to the summons, and it is no offence to refuse to give evidence on the ground of insufficient payment of expenses, before the Judge has decided that the payment made was sufficient.[2] But a witness appearing in a Criminal Court has not the same privilege. His first duty is to give evidence, which he cannot refuse on the ground of non-payment or insufficient payment of his expenses. Indeed, the payment of his expenses to him is entirely within the discretion of the Court summoning him.[3] This difference proceeds from the different standpoints from which witnesses in the two Courts are regarded. The one regards them as assisting in the determination of private rights, and they are therefore to be paid by the party citing them. The other, though they may be arrayed as witnesses for the prosecution or the defence, are really witnesses called to assist in the furtherance of public justice, in which case, as citizens of the State, it is their duty to assist. They are therefore bound to give evidence, and the payment of their expense is made to them out of the public chest, really on the ground of necessity. Executive officers are also empowered to summon persons to make statements in matters relating to the performance of their duties. But the question, whether they are legally competent to require the persons whom they have summoned to bind themselves by an oath or affirmation, depends upon the nature of their duties and the powers possessed by them in this respect.

1772. The Indian Oaths Act[4] empowers a non-Christian witness to affirm instead of taking an oath. The Court could not then compel such a witness to bind himself by an oath, much less dictate to him the form of the oath which he is to take.

1773. What constitutes a sufficient oath or affirmation has been already discussed under section 51 (§§ 352-353).

Refusing to answer public servant authorised to question.

179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Public servant*—s. 21.]

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(1) S. 195, Cr. P. C. (Act V of 1908).
(2) *Nga Pyo*, (1907) U. B. R. (Cr.) P. C. 9; s. c., 7 Cr. L. J. 208; Ord. XVI, r. 4, C. P. C.
(3) S. 544, Cr. P. C.
(4) Act X of 1873.

1774. Analogous Law.—This section is merely a continuation of the last section, and refers to what is a refusal to give evidence. A person may bind himself by an oath to state the truth, and he may thus escape the toils of the last section. But he may still refuse to state the truth or speak at all in which case he could only be punished under this section.

1775. His liability to state the truth has been, however, somewhat qualified by the Indian Evidence Act which lays down certain exemptions applicable to witnesses.[1] Within the limits so prescribed, witnesses are not bound to answer questions and their refusal to answer them is privileged and cannot be made punishable under this section. So, again, witnesses examined by the police are privileged against having to answer questions which have a tendency to expose them to a criminal charge or to a penalty or forfeiture.[2] In such case, their refusal could not constitute an offence under this section. Indeed, this section has only reference to persons who are legally bound to state the truth, and not those who are privileged.

1776. Procedure and Practice.—The sanction of the Court or public servant concerned is necessary to initiate a prosecution under this section. The offence is non-cognizable and summons must ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Code of Criminal Procedure, in any other case, by a Magistrate, Presidency, first or second class, and it may be tried summarily.

1777. Proof.—The points requiring proof are :—

(1) That the accused was legally bound to state the truth on the subject in question.[3]
(2) That he was so bound to the public servant questioning him.
(3) That he refused to answer such question.
(4) That the question was put in the exercise of the legal powers of such public servant.

1778. When is a Refusal to Answer an Offence.—As has been before observed (§ 1774), this section does not make it penal to refuse to answer any question put by a public servant. The obligation depends upon (*i*) the legal obligation, (*ii*) to state the truth, (*iii*) on any subject, (*iv*) to a public servant whose power is again confined to demand an answer only, (*v*) to such questions, and (*vi*) in the exercise of the legal powers of such public servant. It is not for the section to state what creates such a legal obligation for it has been created by a number of enactments concerned with the trial of questions in which the examination of parties and witnesses becomes necessary. The two Codes of Civil[4] and Criminal[5] Procedure confer such an obligation on all persons summoned to appear before, or called upon to make a statement to the Courts. Revenue Courts may be similarly empowered[6] and there are other public servants who possess the power to summon persons to make statements, but the liability to make a statement does not necessarily imply the liability to state the truth. Thus, for instance, a police-officer making an investigation under Chapter XIV of the Code of Criminal Procedure is entitled to examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person is bound to answer all questions relating to such case put to him by such officer other than the question the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.[7] Here then the only liability of the person questioned is merely to answer all questions, and it does not extend to answer those questions truly. In short, such a person is not "legally bound to state the truth," and he cannot, therefore, be prosecuted under this section if he refuses to make any statement to the police, for a mere

(1) Ch. X (ss. 121-132), Act I of 1872.
(2) S. 161 (2), Cr. P. C.
(3) *Moti Lal*, (1935) A 267
(4) Ord. XLI, C. P. C. (Act V of 1908).
(5) Chs. VI and XL, Cr. P. C. (Act V of 1898).
(6) S. 5 C. P. C,
(7) S. 161, Cr. P. C.

refusal to answer a question is not punishable under this section.[1] This was the view taken under the similar language of the Procedure Code of 1872,[2] but under the Procedure Code of 1882 such persons were bound to answer "truly" all such questions put to them which then created the legal obligation to state the truth.[3] In any case, the police officer investigating a case cannot order a person to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands. An answer to such a question would at least be an opinion which under no provision of law is a police-officer entitled to compel a man to give, except in the case of sudden and unnatural death, when a police-officer is allowed to summon persons to act as jurymen.[4] So a person in the position of a complainant cannot be compelled to answer all questions put to him by the Court—a question, for example, as to his motive in instituting the complaint.[5]

1779. Even as regards a witness, while the Court possesses plenty of power to ask questions to a witness, whether relevant or irrelevant, still that power does not empower the Court to ask any irrelevant question, whether it is or is not subservient to proof of relevant facts. Where, therefore, the Judge asked a witness questions not with the object of discovering proof of relevant facts, but with a view to criminal proceedings being taken against him, he was held not bound to answer them, and his refusal to answer them did not expose him to the penalty of this section.[6] In this case, the accused was the decree-holder in a civil suit, and had, as such, sued out an execution for recovery of money against the judgment-debtor who thereupon filed a receipt purporting to have been executed by the accused. The Subordinate Judge asked him whether he had executed it, but the accused persisted in refusing to answer the question, whereupon the Subordinate Judge convicted him under s. 480 of the Procedure Code. But it was held that the accused was not bound to incriminate himself by answering the question put to him.

1780. It will thus be seen that the Court has not the unlimited jurisdiction of putting any question to any witness on the pain of punishing him under this section, in case of his refusal to answer it. His power to question witnesses is limited by the subject of his inquiry, but this must not be scanned too narrowly, for it is not for the witness to say whether a question is or is not relevant to the inquiry on foot. But if he refuses to answer a question, it will be then for the prosecution to shew that the question put was such as was within the legal powers of the public servant, and that the accused was legally bound to answer it.

1781. This section only deals with the refusal to answer questions. If he does not refuse, but answers falsely, he does not commit an offence under this section, though he may then be guilty of giving false evidence under s. 191 of the Code. So where the accused was asked the name of his grandfather, and he replied that he did not remember it, he had not refused to answer the question and he could not, therefore, be convicted of this offence.[7] But in one case where the Court, wishing to know whether one Badri had given out the details of a story, questioned the witness what Badri said, to which he replied, "He named no one," he was convicted under s. 228, but the High Court on appeal altered the conviction to one under this section, holding that, in giving the reply he did, he refused to answer *the* question put to him.[8]

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(1) *Savani Virabayi*, (1899) 1 Weir 111; *Sankaralinga Kone*, 23 M. 544; *Appigadu*, 23 M. 544 *note*, followed in *Mauzangyi*, 8 R. 511.

(2) Ss. 118, 119 (Act X of 1872), *Lukhee Singh*, 12 W. R. 23; *Kasim Khan*, (1881) 7 C. 121, F. B.

(3) *Nathu Shekh*, (1884) 10 C. 405.

(4) *Fakira*, (1875) B. U. C. 92.

(5) *Ganesh Narayan Sathe*, 13 B. 600.

(6) *Hari Lakshman*, 10 B. 185; followed in *Ganesh Sathe*, 13 B. 600.

(7) *Kallu*, 92 I. C. 428, (1926) L. 240, *Bhardul Kurmi*, 149 I. C. (A.) 1061.

(8) *Har Narain*, (1925) A. 239.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Refusing to sign statement.

[***Public servant***—s. 21.]

1782. Analogous Law.—This provision of the law was enacted at a time when under the Regulations then in force, all witnesses were required to subscribe to their depositions.[1] This is now no longer required as a matter of legal necessity. There are, however, some statements which persons are still required to sign. For instance, an information relating to the commission of a cognizable offence given orally to an officer in charge of a police-station "shall be signed by the person giving it."[2] So statements made and confessions recorded under s. 164 of the Criminal Procedure Code are required to be signed by the person making them. The complainant making an oral complaint to a Magistrate is bound to sign the substance of his examination reduced to writing by a Magistrate.[3] The accused in a criminal case is similarly bound to sign his examination if it is made conformable to what he declares is the truth,"[4] and his refusal would be punishable under this section.[5]

1783. The only provision of law under which witnesses are now legally bound to sign their statements is s. 20 of the Coroners Act[6] under which witnesses refusing to sign their statements are deemed to have committed an offence under this section.

1784. Procedure and Practice.—No prosecution can be instituted under this section without the previous sanction of the Court or public servant concerned. The offence is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Code of Criminal Procedure, or, if not committed in a Court, then by a Magistrate, Presidency, first or second class.

1785. Proof.—The points requiring proof are :—

(1) That the accused made the statement.
(2) That he was required to sign such statement by a public servant.
(3) That such public servant was legally competent to require the accused to sign his statement.
(4) That the accused refused to sign that statement.

1786. Refusal to Sign Statement.—A person under the legal obligation to sign any statement made by him, commits an offence if he refuses to sign it.[7] The obligation to sign a statement depends upon his liability to sign it, and upon the legal competency of the public servant to require him to sign it. The question whether the accused in a case making a statement or a confession to a Magistrate can be compelled to sign his statement or confession, and whether his refusal to sign it amounts to an offence under this section has been decided in the negative by Westropp, C. J., who held that, since such confession must be voluntary, he must have a *locus pœnitentiæ* by refusing to sign, signifying his unwillingness to furnish evidence against himself.[8]

1787. So again, there is no law which obliges a witness in a civil[9] or a revenue case to subscribe to his statement.[10] And even in a civil or criminal case whenever a statement is required to be signed all the preliminaries such as the reading over of the deposition and the like must be strictly complied with.[11] So though section

(1) 2nd Rep. § 106.
(2) S. 154, Cr. P. C.
(3) S. 200, Cr. P. C.
(4) S. 364 (2), Cr. P. C.
(5) *Umar Khan*, 39 A. 399.
(6) Act IV of 1871. s. 20.
(7) *Fateh Ali*, (1912) P. R. No. 8, 16 I. C. 521.
(8) *Sirsapa*, 4 B. 15 ; following *Bai Ratan*, 10 B. H. C. R. 166, F. B.
(9) *Fateh Ali*, (1912) P. R. No. 8, 16 I. C. 521.
(10) 6 M. H. C. R. (App.) 14.
(11) *Mahali Ram*, (1881) A. W. N. 43.

69 of the Code of Criminal Procedure requires that a person accepting service of summons shall, if so required by the serving officer, sign a receipt therefor, still since the refusal to sign a receipt is not absolutely necessary to complete service, it has been held that the refusal to sign a receipt for a summons received, is not an offence under this or section 173[1] (§ 1711).

False statement on oath or affirmation to public servant or person authorised to administer an oath or affirmation.

181. Whoever, being legally bound by an oath [or affirmation][2] to state the truth on any subject to any public servant or other person authorized by law to administer such oath [or affirmation],[3] makes to such public servant or other person as aforesaid, touching that subject any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[***Public servant***—s. 21. ***Legally bound***—s. 43. ***Oath***—s. 51.]

1788. Analogous Law.—The provisions of this section are more general than those of section 193 of the Code which refer to the making of a false statement in a stage of a judicial proceeding. The difference between this section and s. 193 is substantial and of practical importance.

1789. Procedure and Practice.—No prosecution under this section can be initiated without the previous sanction of the Court or public servant concerned. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and it is triable by the Court of Sessions, or Magistrate, presidency or first class.

1790. Proof.—The points requiring proof are :—

(1) That the accused bound himself by oath or affirmation to state the truth.
(2) That he was legally bound to state the truth.
(3) That the oath or affirmation was administered by a public servant or by a person authorized by law to administer the same.
(4) That the accused whilst so bound made the statement in question to such persons.
(5) That such statement was made touching the subject on which the accused was thereby bound to state the truth.
(6) That the statement made by the accused was false.
(7) That he then knew that his statement was false or had reason to believe it was false, or did not believe it was true.

1791. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——at——being legally bound by an oath to state the truth, on a certain subject, to wit to——a public servant (*or* person) authorised by Law to administer such oath, did make to such public servant (*or* person) as aforesaid, touching that subject, a statement which was false, and which you knew (*or* believed to be) false, to wit——and thereby committed an offence punishable under s. 181 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court.)

"And I hereby direct that you be tried (*in case of committal* by the said Court) on the said charge."

1792. Principle.—The offences described in this section and in section 191 of the Code are the same, the only difference between the two being one of degree and not of kind. As the Law Commissioners explained it " when false information is given upon oath, the offender is punishable under this clause, with imprisonment not exceeding 3 years. When the false statement amounts to false evidence as

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(1) *Krishna Gobind Das*, 20 C. 358.
(2) The words " or affirmation " were inserted by the Indian Oaths Act, 1873 (Act X of 1873) s. 15.
(3) *Ib.*

defined in section 191, the offender is punishable more severely under section 193 of the Code."[1]

1793. Meaning of Words.—"*Authorised by law to administer such oath*": This qualifies the whole section. One who is not so empowered cannot bind any one to state the truth. "*Touching that subject*," that is, the public servant cannot generally question a person on any subject unconnected with his inquiry. "*Any statement which is false and which he either knows, etc.*," that is, the statement must not only be false, but it must have been known or believed to be false for making a false statement with no knowledge one way or other as to its truth, constitutes a false statement since the person making it does not believe it to be true.[2] "*And shall be liable to fine*": The sentence of imprisonment is compulsory though fine may be added to it.

1794. False Statement on Oath.—As has been before remarked (§ 1788) this section deals with the generic offence of perjury of which the aggravated form is presented by section 193, which prescribes the punishment for perjury in a stage of a judicial proceeding.

1795. An offence under the latter section may also be punished under this section, but it would be then like punishing an offender for hurt when he has committed a grievous hurt. It has, however, been held in some cases of the Calcutta[3] and Bombay[4] High Courts that this section must be held to apply to perjury committed in proceedings other than a judicial proceeding. So it was observed in a case that though the wording of the section is apparently large enough to admit false statements of every description, its action is restricted as regards those made under certain circumstances by the succeeding section 193. "Were it not so, the Magistrate of a district, acting under section 181, might try all cases of perjury himself instead of committing them as he is no doubt bound to do, to the Sessions."[5] The view of the Calcutta Court is in accordance with the accepted canon of interpretation that where an act constitutes a special offence it should be dealt with as such and not under the provisions of the more general law. False statements made in the course of judicial proceedings have been therefore, held by that Court to be only punishable under section 193,[6] and this view has been adopted in Bombay[7] though the contrary was laid down in a case of the Madras Court,[8] but this decision is in conflict with an earlier decision of its own,[9] and in neither are any reasons given for upholding one view, rather than the other, while the view taken in the Calcutta cases is in accordance with the expressed intention of the Law Commissioners, and is otherwise consonant with the established rules of construction of Statutes.

1796. Confining then the operation of this section to false statements made only in the course of non-judicial proceedings, the rest of the requirements of the section are expressed in the language used in defining the offence of giving false evidence. In the first place, the section requires that the statements must be made by a person legally bound by an oath, and it must be made to a person legally empowered to administer it. It has been said in a case that a Magistrate administering an oath to a person in a case exclusively triable by the Court of Session cannot hold him responsible for any false statement that he may then make before him.[10] The facts of this case are meagrely reported, and it is difficult to see on what principle the Court has based its decision. That the Magistrate was empowered to administer oath may be taken for granted. But it may have been that he was not empowered to administer *the* oath to state the truth *on the* subject he had before

(1) 2nd Rep., s. 102.
(2) *Echan Meeah*, 2 W. R. 47.
(3) *Buloram*, 7 W. R. 104; *Shama Churn Roy*, 8 W. R. 27; *Heeramun Singh*, 8 W. R. 30; *Nussurooddeen Shazwal*, 11 W. R. 24.
(4) *Dayalji Endarji*, 8 B. H. C. R. 21.
(5) *per* Kemp & Glover, JJ. in *Buloram*, 7 W. R. 104 (105).
(6) *Shama Churn Roy*, 8 W. R. 27; *Heeramun Singh*, 8 W. R. 30; *Nussurooddeen Shazwal*, 11 W. R. 24.
(7) *Dayalji Endarji*, 8 B. H. C. R. 21.
(8) 4 M. H. C. R. (App). 18.
(9) *Andy Chetty*, 2 M. H. C. R. 438. To the same effect *Kotha Subba Chetty*, 6 M. 252.
(10) *Andy Chetty*, 2 M. H. C. R. 438.

him. In other words the subject-matter of the inquiry was wholly beyond his jurisdiction. So where the Court (a District Munsiff) held an inquiry into the conduct of a pleader under the Legal Practitioners' Act, and examined him on affirmation, it was held that the Munsiff had no jurisdiction to administer him an oath in an inquiry under that Act, and that any false statement made by the pleader could not be punished under this section.[1]

1797. In another case the accused had in his petition of appeal from a conviction, falsely stated that the convicting Magistrate had refused to summon his witnesses. The appellate Court thereupon examined him on affirmation, and he reiterated his statement, whereupon he was convicted under this and the next section, but his conviction was set aside by the High Court who held that the accused could not have been legally examined by the Court, and that the Court examining him was not authorised by law to administer oath. "It was not the intention of the Legislature," observed Collins, C. J., and Parker, J., "that the accused should be called upon during the trial of a criminal case to make a statement on oath, or that he should be liable to punishment for giving false answers to questions put to him.[2] The Code does not require that the appeal petition should be verified; sections 428 and 540 do not seem to us to authorize the examination of the accused as a witness.[3] A criminal appeal is a continuation of the criminal case, and, except so far as there is provision to the contrary, the appellant has the privilege of the accused, and cannot be punished for making false statements."[4]

182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

False information with intent to cause public servant to use his lawful power to the injury of another person.

(*a*) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations.

(*a*) *A* informs a Magistrate that *Z*, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss *Z*. *A* has committed the offence defined in this section.

(*b*) *A* falsely informs a public servant that *Z* has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of *Z*'s premises, attended with annoyance to *Z*. *A* has committed the offence defined in this section.

(*c*) *A* falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. *A* has committed an offence under this section.

[***Public servant***—s. 21. ***Injury***—s. 44.]

1798. Analogous Law.—This section was substituted for the original s. 182 by the Indian Criminal Law Amendment Act.[5] This section, as originally stood, had led to a decision of the Calcutta High Court acquitting the accused who had made a false report of theft without implicating any one, which was held

(1) *Kotha Subba Chetty*, 6 M. 252.
(2) S. 342, Cr. P. C.
(3) *Ib.*
(4) *Subhayya*, 12 M. 451 (453).
(5) (Act III of 1895) s. 1.

to be of the essence of the offence.[1] As this was not the intention of the Legislature, the section was amended and illustration (*c*) added,[2] making it clear that the mere giving of false information was an offence, if the informant knew that on his information the public servant was likely to act, which he would not otherwise have done, or that he was then likely to cause injury or annoyance to any person.

1799. Section 211 is analogous to this section, the distinction between the two will be found set out under that section. (§§ 2257-2261 *post*).

1800. Procedure and Practice.—Where the false information amounts to an offence under this section, no prosecution can be instituted against the false informant without the previous complaint of the public servant concerned, or of some public servant to whom he is subordinate.[3] Such complaint once made, must be accepted as good by the trying Court till it is set aside by a Court of competent jurisdiction,[4] where a report is made against two persons *A* and *B*, and the police prosecute *A* but take no action against *B*, the fact that a previous complaint of the Court is required to try *A* does not imply that its complaint is equally required to try *B*.[5]

1801. An offence under this section is complete as soon as the information is given and not when upon enquiry it is found to be false, since its falsehood relates back to the information given.[6] Though the person injured on account of the false information given under this section may be a private person, the latter cannot prosecute under this section without the complaint of the public servant to whom the information was given or of some public servant to whom he is subordinate.[7] This is in consequence of a legal impediment placed in his way by section 195 of the Code of Criminal Procedure, but for which there would have been no objection to his prosecuting him without the privity of the public servant. As, however, there is no legal bar to his instituting a civil suit for damages, he may do so without the sanction of the public servant.[8] But criminal law regards this as primarily an offence against the public servant, and he has, therefore, the right of complaining without the sanction of his superior officer.[9] But before doing so he is bound to make some inquiry which satisfies him of the falsity of information given to him which he is moreover bound to place before the Court.[10] But if he complains without having made such inquiry the accused cannot, it is said, object to his prosecution on the ground that the prosecutor had not sufficiently inquired into the truth of his information or that he had not been given an opportunity of substantiating it. Nor can he claim an opportunity to substantiate his information in Court before he is prosecuted.[11] But such an opportunity is afforded to the accused if the charge is one under section 211,[12] and there are cases in which the same rule is held equally applicable to this section,[13] since no complainant can swear to the falsity of an information into the truth of which he has not even inquired.[14] The question is really one of judicial propriety, and if the accused complains betimes

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(1) (1887) *Gholam Ahmed Kazi*, 14 C. 314; to the same effect *Periannan*, 4 M. 241; *Suraji*, (1873) B. U. C. 76; contra *per* Straight, J., in *Budh Sen*, (1891) 13 A. 351, was affirmed by the Legislature; *Jonnalagadda*, 28 M. 565.

(2) Criminal Law Amendment Act (III of 1895), s. 1.

(3) S. 195 (1) (*a*), Cr. P. C.; *Hardwar Pal*, 34 A. 322; *Mg. Pe* v. *Mg. Chaw*, (1928) R. 243; *Kalicharan*, (1934) O. 186.

(4) *Iradalli*, 4 C. 869.

(5) *Muhammada*, 9 L. 408; *Kashi Ram*, 46 A. 906; contra *Hardwar Pal*, 34 A. 522 held erroneous, *pro tanto*.

(6) *Rathnam Pillai*, (1932) M. 427.

(7) S. 195 (1) (*a*), Cr. P. C.; *Moulvy Abdool Luteef*, 9 W. R. 31: *Huree Ram*, 3 N. W. P. H. C. R. 194; *Jugal Kishore*, 8 A. 382.

(8) *Moulvy Abdool Luteef*. 9 W. R. 31.

(9) *Moulvy Abdool Luteef*, 9 W. R. 31; *Madho Phat*, 13 C. 270.

(10) *Sunder*, 52 I. C. (Pat.) 282.

(11) *Raghu Tiwari*, 15 A. 336; *Gokal*, 3 S. L. R. 132; *Topan*, 3 S. L. R. 189; *Baharali*, 58 C. 1065; *Nishikanta Chatterji* v. *Behari*, 60 C. 656.

(12) *Gangoo Singh*, 2 C. L. R. 389; *Karimdad*, 6 C. 496; *Griss Chunder*, 7 C. 87; *Girdhari* v. *Uchit Jha*, 8 C. 435; *Shamlall* 14 C. 707, F. B.; *Mahadeo Singh*, 27 C. 921.

(13) *Isser*, 6 I. C. (C.) 415: *Rabbi Rout*, 28 I. C. (C.) 656; *Sheo Balock*, 59 I. C. (A.) 369; *Sunder*, 52 I. C. (Pat.) 282; *Baharali*, 58 C. 1065.

(14) *Brindabun*, 53 I. C. (O.) 695.

the Court is bound to inquire into his complaint before turning the tables upon him. A person might be convicted under s. 211 though the complaint was made only under s. 182,[1] and , it appears, *vice versa*.[2]

1802. Where the Court refuses to complain under s. 211 or this section, it would not take up the same matter at the instance of the same party under some other section which does not call for a similar pre-requisite.[3] If a false information has gone to the Court, and the Court does not complain, it does not prevent the police officer from complaining. Where a person gave false information to the police, the fact that his complaint had been the subject of judicial inquiry resulting in the discharge of the accused, was held to be no bar to a complaint by the police under s. 195 (1) of the Criminal Procedure Code.[4]

1803. Since s. 211 is a more serious offence than the one under this section, it is improper to prosecute under this section in preference to s. 211.[5] But the fact whether a discharge under s. 211, would prevent a fresh inquiry upon the initiation of proper proceedings depends upon the facts of each case and the language of s. 195 of the Code of Criminal Procedure. For example, if a case under s. 211 is started by the police and withdrawn by a competent authority, the case cannot be revived by another complaint lodged under this section.[6]

1804. The offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Magistrate, Presidency, first or second class, and may be tried summarily.

1805. Proof.—It is on the prosecution to prove that the information given was false and that the informer knew or believed it to be so.[7] The points requiring proof are :—

(1) That the accused gave some information ;[8]
(2) That the person to whom it was given was a public servant ;[9]
(3) That the information given was false,
(4) And that the accused when giving it knew or believed it to be false ;[10]
(5) That the accused intended or knew that his information will probably cause the public servant to act as in clauses (*a*) and (*b*).[11]

1806. Charge.—The charges, if necessary, should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day——at——gave to (*name of the public servant*), a public servant, the following information namely,——intending thereby to cause (*or* knowing it to be likely that you would thereby cause) such public servant (to do *or* omit) something to wit——which such public servant ought not to do (*or* omit) if the true state of facts were known by him (*or* to use the lawful power of such public servant, to the injury (*or* annoyance of——) and thereby committed an offence punishable under section 182 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

1807. Principle.—As stated before, this section belongs to the class of offences which relate to the swerving of public servants from the path of their legitimate duties. As such, law punishes both those who abuse their powers as well as those who mislead them to its exercise by false reports or evidence

1808. And the gravity of the offence varies with the degree of the threatened mischief. A false information given to a police-officer may result in inconvenience. But one given to a Court of Justice may lead to the forfeiture of one's life and liberty. Law, therefore, visits such informants with condign punishment, the

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(1) *Dilan Singh*, 40 C. 360.
(2) *Daroga Gope*, (1925) Pat. 717; *contra* in *Muthu Goundan*, (1925) M. 400.
(3) *Kohna Ram*, 46 A. 11 : *Mi Ngwe* v. *Mi Chit*, (1912) U. B. R., 1st Qr., 134, 15 I. C. 992.
(4 *Mula*, 49 I. C. (A.) 98 ; Cf. *Bakshi*, 21 A.L.J. 805; (1924) A. 187 ; *Ma Paw*, 8 R. 499.
(5) *Ram Bhrose*, 6 R. 578 ; *Ma Paw*, 8 R. 499.
(6) *Kantir Misser*, (1930) Pat. 98.
(7) *Gopal Kahar*, 61 I. C. (C.) 171; *Gaya* (1923) O. 4 ; *Ali Ahmad*, (1922) L. 318.
(8) It is not necessary that the information should have been taken down from dictation; *Ram Tiwan*, (1926) O. 448.
(9) A Magistrate having no jurisdiction to take cognizance under s. 211 for want of *sanction* (now *complaint*) cannot convict this section; *Daroga Gope*, 5 Pat. 33.
(10) *Chandra Kumar De*, (1927) C. 78. *Mg Bo Ni*, (1935) R. 97.
(11) *Debi*, 44 I. C. (A.) 113.

gravity of which varies with the issues which the false information may have given rise. In all such cases, the offence is one, though its names are many.

1809. Meaning of Words.—"*Gives any information*": This does not include the statement made by the accused for the purposes of his defence,[1] nor answers to questions put by a police-officer under section 161 of the Code of Criminal Procedure.[2] But otherwise, it includes any information whether given on request or otherwise.[3] "*Which he knows or believes to be false*": This means that the information was not only in fact false, but the accused also knew it or believed it to be false. "*To do or omit anything.....or to use the lawful power, etc.*": This must be only known to be likely. It is not required that the public servant should in fact do or omit anything, or in fact use his lawful power to the injury or annoyance of any person. As to the meaning of "injury," *see* section 44.

1810. Giving of False Information When an Offence.—The narrow meaning ascribed to this section, prior to its amendment in 1895 has been elsewhere discussed (§ 1789). Its present phraseology is much wider, and the only ingredients now required to constitute the offence are (*i*) the giving of false information (§ 1811), (*ii*) to a public servant (s. 21 comm.), (*iii*) which the informant knew or believed to be false (§ 1812), and (*iv*) which he had given to influence a public servant to act otherwise than he would have acted without it. (§ 1819).

1811. False Information.—In the first place, then there must have been the giving of false information. The term "information" is here used in its widest sense as denoting the communication of any intelligence or knowledge of facts whether it is or is not in the nature of an accusation. It, however, does not mean the mere filing of a paper by one on behalf of another, *e.g.*, a pleader filing his client's affidavit;[4] or the reporting by one of a rumour as a rumour, or the suggestion of a possible clue to the discovery of a fact unknown, as by declaring one's belief that one suspects a particular person of having committed the offence.[5] At the same time the form in which the information is conveyed is immaterial, if it was in substance a statement of facts so intended and understood. But an expression of opinion may be stated as a fact, as where a person petitioned the Collector that certain zemindars had usurped possession of a market-place which belonged to Government. Here the question of ownership was stated as a fact, though it was nothing more than an expression of the writer's belief for which he could not be visited with the penalties of this section.[6]

1812. The information given need not have been volunteered, for it may have been given in answer to questions put in the course of an inquiry made by a public servant[7] or in answer to questions put by a superior officer about his subordinate, *e.g.*, an information given to the Deputy Superintendent of Police that his subordinate a Sub-Inspector had taken a bribe,[8] but all such statements cannot, if false, be made punishable under this section. For instance, the statement made by an accused for the purpose of his defence may be a false statement, and may, moreover, satisfy all the other requirements of the section, but it cannot be made the basis of a charge under this section[9] since statements are privileged and are, indeed, in the nature of an explanation, rather than of information supplied to a Magistrate.[10]

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(1) A false information implicating two persons only constitutes one offence and not two offences, though it may have been directed to the injury of them; *Poonit Singh* v. *Madho Bhat*, 13 C. 270.

(2) *Daria Khan*, 2 N. W. P. H. C. R. 125; *Mangu*, 25 I. C. (L.) 978; *Nga Aung Po*, (1905) U. B. R. P. C. 13; *Sultan* v. *Wellborne*, 3 R. 577.

(3) *Ramji Sajabaro*, 10 B. 124; *Sultan* v. *Wellborne*, 3 R. 577.

(4) *Kimidi*, (1925) M. 1093.

(5) *Swaminatha*, 14 I. C. (M.) 767; followed in *Mallela*, 42 I. C. (M.) 998; *Ananga*, 44 I. C. (C.) 352.

(6) *Madho*, 4 A. 498.

(7) *Ramji Sajabarao*, 10 B. 124; *Bhikaiji*, (1877) B. U. C. 124 (126). The contrary was laid down by Irwin, J. C., Upper Burmah, in *Nga Aung Po*, (1905) U. B. R. 13, 2 Cr. L. J. 474, in which he said: "The plain ordinary meaning of the expression 'give information' is to volunteer information, and not to make statements in answer to questions put by the public servant."

(8) *Panna Lal*, 1 L. 410; Cf. *Phulal*, 18 I. C. (A.) 344.

(9) *Daria Khan*, 2 N. W. P. H. C. R. 128.

(10) S. 342, Cr. P. C.

But answers given to questions put by a police-officer in the course of investigation in a cognizable case are not comprised in the term "information" nor can the answering of such questions be correctly described as the "giving" of information. Under the Procedure Code of 1882 the public were no doubt bound to answer "truly" all questions put to them by the police while investigating a cognizable case. If, therefore, they answered falsely they could have been then prosecuted under s. 193 of the Code. But this obligation of answering "truly" no longer exists, and if this section had applied, it would have rendered nugatory the policy which dictated the amendment of the Procedure Code by removal of the word "truly" from section 162 of the Procedure Code. So Irwin, C. J., observed that as persons examined by the police can no longer be punished for giving false evidence, it would be a mere evasion of Law to hold them liable under this section.[1]

1813. So again, a false statement made in the plaint[2] or pleadings, or in the petition of appeal[3] cannot be held to be false information within the meaning of this section[4] as even though the information so conveyed be false, it cannot be said to have been given with the intention to cause the Court concerned to do or omit anything which he ought not otherwise to have done, or to use his lawful power to the injury or annoyance of any person. So although a person falsely verifying a petition may be punishable under section 177 of the Code[5] neither that section nor this applies to the verification of a document, for example, a memorandum of appeal not required by law to be verified.[6]

1814. The false information given to one person *A*, to be passed on to another *B*, which it was his duty to do, must be considered as false information given to *B* for the purpose of this section.[7]

1815. "Knows or believes to be false."—Secondly, the information given must be not only false, but it must be false to the knowledge or belief of the informant. Of course, the latter may believe that his information is false and as such he may convey it to a public servant, but if it turns out to be true, he could not be punished for giving out what he believed to be false information, but which, in fact, was true. To punish him in such a case would be to punish him for his bad intentions. If, however, the information given was false, that fact alone is not sufficient to condemn the informant, for, besides being false, he must have, at the time he gave it, known or believed it to be false. It is not sufficient that the accused has reason to believe it to be false, or that he does not believe it to be true; there must be positive knowledge or belief that it is false.[8] But how is this to be proved, except by showing that the circumstances were such that the accused could not have in all probability knowledge or belief in the truth of his information. The question is then one in which a greater degree of probability may be required, but the means of knowledge are still the same. The prosecution proves facts from which the Court draws an inference that the accused must have possessed the knowledge or belief that his information was false. The accused may rebut this inference by showing, that he had reasonable grounds for believing the information given to be true. He is not bound to show that it was in fact true.[9] The question in either case depends upon his own *bona fides*. If he was reckless but honest the section saves him, for it does not punish those who merely blunder into giving false information, but those who do it with an ulterior object in view, that object being to make a public servant to do or omit anything which such public servant ought not to do, or to use his lawful power to the injury of any person.

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(1) *Nga Aung Po*, (1905) U. B. R. 13, 2 Cr. L. J. 474, observing on *Miyan*, 1 L. B. R. 101, in which Copleston, C. J., appears to have inclined the other way. *Lachman Singh*, 7 Pat. 715.

(2) *Gokal*, (1879) P. R. No. 34.

(3) *Amir Ali* v. *Dukhan Momin*, (1928) Pat. 574.

(4) *Sunt Lal*, (1881) P. R. No. 41, following *Gokal*, (1879) P. R. No. 34.

(5) *Rup Singh*, (1905) P. R. No. 44.

(6) *Ghanaya*, (1879) P. R. No. 17.

(7) *Jonnalagadda*, 28 M. 565.

(8) *Hingan Khan*, (1884) P. R. No. 32; *Sardar Khan*, (1930) L. 54.

(9) *Fateh Khan*, (1890) P. R. No. 35.

1816. Ulterior Intention.—This leads to the next question as to the informant's intention or knowledge. 'Given false information' and belief in its falsehood, the offence is not complete unless it is accompanied by the particular intention or knowledge here described. As Straight, J., remarked in a case: "The criminality contemplated by section 182 does not depend upon what is done or omitted to be done by the public servant on such false information, but what was, from the facts, the reasonable intention to be inferred on the part of the person who gave the false information."[1] The section contemplates two intentions on the part of the person giving the false information which are described in the two clauses (*a*) and (*b*). The first intention may be accomplished as soon as the informant does an act with the intention or knowledge that the public servant will, acting on his information, do or omit anything which he "ought not to do or omit if the true state of facts respecting which such information is given were known by him."

1817. Under this caluse then it is unnecessary that the act or omission should affect or cause injury to some third person. As Sir John Edge remarked: "Suppose a man knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the district that a violent fire was raging in a city in the district of which he had charge. Now, if the Magistrate believed that statement, he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military if there were any in the neighbourhood. That would be a perfect example of a hoax, and, I have not a doubt that it would come within section 182, whether the Magistrate acted upon the information or not. To take another example of a case which, in my opinion, would come within the section, although the public servant was not induced to take action, or omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad, and that it was surmised that he would seek to escape at one of the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta being amongst the number. A person who, knowing that the man had not been arrested, and intending that the authorities at Calcutta should cease to watch the outward-bound shipping, telegraphed to the authorities at Calcutta, informing them that the absconder had been arrested elsewhere, would, in my opinion, have committed an offence under section 182 although the public servant at Calcutta had not acted on the telegram, but had persisted in his surveillance of the outward-bound shipping."[2] Compared to it the false report made by the accused that his horse had been stolen, which as a matter of fact he had sold it to his cousin is clearly within the rule, when the object of the accused was shown to be to implicate the person who had purchased the horse from his cousin.[3] But the case would have been different if the accused had rested content by alleging that his horse had disappeared, in which case there being no report of a cognizable offence and not in itself calling for any action by the police the accused could not have been convicted under this section.[4]

Consequential Action Unnecessary.

1818. The intention of the Legislature in drawing this section was that a public servant should not be falsely given information with the intent that he should be misled by a person who believed that information to be false, and was intending to mislead him.[5] It is not necessary that the public servant misinformed should have taken or omitted to take any action on the information given. The offence is complete, as soon as the false information is given with the knowledge that it will probably influence the public servant in the direction desired. The latter may be more circumspective and disbelieve the information without taking any action, or the only action he may take may be to inquire into the truth of the information, but in either case the offence is complete, and the criminality of the accused is just

(1) *Budh Sen*, 13 A. 351; followed in *Lachman Singh*, 7 Pat. 715.
(2) *Budh Sen*, 13 A. 351; *Ganesh Khanderao*, 13 B. 506.
(3) *Incha Ram*, 44 A. 647.
(4) So held in *Algoo Lal*, 57 I. C. (A.) 96.
(5) *Per* Edge, C. J., and Straight, J., in *Budh Sen*, 13 A. 351, followed in *Lachman Singh*, 7 Pat. 715 (giving a wrong name).

the same.[1] In short, the offence consists in the mischief threatened, and not necessarily in the mischief done. *A* personated *B* at an examination called the vernacular sixth standard examination. He passed it and obtained a certificate from the educational authorities in *B*'s name, who thereupon applied to the Assistant Collector to have his name registered in the list of candidates for service in the Revenue Department, and attached to his application the certificate issued in his name, as it was a rule of Government that only those who had passed the sixth standard examination were eligible for employment in the Revenue Department. On receipt of this application *B*'s name was registered as a candidate. It was held that *B* was guilty of an offence under this section,[2] and he would have been guilty of an offence under section 471 if he had made the certificate which he had filed with his petition.[3] As the section is newly worded, there can be no question as to the correctness of this view; for the false information was supplied by *B* in the false certificate he had filed. He knew that it was false, and he equally knew that its production was necessary to secure his enlistment as a candidate for employment in the Revenue Department of Government; that is, he knew that by producing the certificate he was likely to induce the Assistant Collector to enlist him, which otherwise he "ought not" to have done.

"Ought not to Do."

1819. The words "ought not to do" are important for they imply duty, and exclude personal choice[4] that is to say, they exclude consideration of what the public servant would actually have done or omitted in consequence of the information. They only direct attention to what he should not have done or omitted if he had not been misinformed. In other words, the test is that of a normal public servant doing his duty and not of one who was actually misinformed. Thus, suppose, in the case last cited the rule of the Revenue Department were that the Assistant Collector could exercise his discretion in enlisting candidates in exceptional cases. The fact that *B*'s case was exceptional would not exonerate him from liability under this section, for it is not open to him to plead that he might have been enlisted without the certificate. So where the accused sent a telegram to the District Magistrate in camp that the town had been attacked by 200 robbers and that though dispelled there was danger, and the Magistrate put no faith in the telegram and took no action thereupon, it was held that the offence had been committed because the sender believed that the Magistrate was likely to take action upon his telegram,—the fact whether in fact he did or not being immaterial.[5] A person who procured his enlistment in the police-force by misstating his caste as *Jat*, though he was in fact an *Ahir*, a caste whose enlistment was prohibited, was held to be guilty of an offence under this section.[6] The contrary was laid down by Tyrrell, J., in an Allahabad case,[7] but he gives no reason for holding this section inapplicable, and his view has no reason to commend it. So where the accused appeared before a village Registrar and falsely personated *W* and in such assumed character, expressed a desire to execute a lease in favour of *A* who was present and assented to have the lease. When the accused made some mistake in giving the area of the land, *A* corrected him, *E* identified *B* as *W* before the village Registrar, and he and *D* assured the attesting witnesses that *B* was *W*. It was held that *B*, *C*, *D* and *E* were all guilty of an offence under this section.[8]

1820. It will be observed that the section speaks of "*such* public servant" in connection with the likelihood of his doing or omitting to do anything, which means that the information must be given to the public servant intending that he was likely to do or omit as stated in the two clauses. This was necessary, for the

(1) *Raghu Tiwari*, 15 A. 336; followed in *Ma Paw*, 8 R. 499 (504).
(2) *Ganesh Khanderao*, 13 B. 506: *obiter* in *Manikham Pillai*, 19 M. L. J. 271.
(3) *Soshi Bhusan*, 15 A. 210.
(4) *Per* Jardine, J., in *Ganesh Kahnderao*, 13 B. 506.
(5) *Budh Sen*, 13 A. 351.
(6) *Buddha* (1880) P. R. No. 14.
(7) *Dwarka Prasad*, 6 A. 97.
(8) *Bala*, (1895) B. U. C. 761, following *Ganesh*, 13 B. 506; *Soshi Bhusan*, 15 A. 210.

giving of false information to *A* with the intention that *B* may do something thereupon, would not be an offence under this section, unless *A* was under a bounden duty to inform *B* which the informant knew. So where the accused charged one Rukminamura before the Village Magistrate of arson, the latter sent the report on to the police, as it was his duty. The police investigated the case and found that the information given was false, whereupon he was convicted under this section. He contended before the High Court that he had not given any information to the police, and that his statement recorded by them was presumably under section 162 of the Procedure Code, and that he could not, therefore, be convicted under this section. But it was held that the offence was complete as soon as the information was given to the Village Magistrate who was a public servant, but that the accused had, moreover, conveyed the information to the police through the agency of the Magistrate, since it was the bounden duty of the latter to pass the information on to the former, and that, therefore, the accused could not complain that he had made no communication to the police.[1]

1821. On the other hand, where in a resignation addressed to the Collector, as officer-in-charge of the Court of Wards, the accused gave a false account of an affray and defamed certain persons whereupon the Collector as District Magistrate ordered his prosecution of this offence, it was held that the accused had not invoked the authority of the District Magistrate to act upon his information and that he could not, therefore, be convicted under this section.[2]

1822. Abuse of Lawful Power.—The case where a person directs his information against some one in particular, presents no difficulty. It is then a clear case either under this section or section 211, and if the information be sworn testimony, it is then a case of perjury and, as such, punishable either under section 193 or section 194. A simple example of such information is a petition made by a person to the police falsely stating that the petitioner suspects another person of having committed an offence and praying for inquiry.[3] It is not of the essence of an offence under this section that it should be the primary aim or intention of the informant that the person informed against should be injured or annoyed. It is sufficient if he is aware of the likelihood of injury or annoyance being caused to him by the public servant in consequence of his information. This clause would then include not only malicious charges, but reckless statements made without regard to the feelings of another thereby implicated or affected. Such a case may arise where a person having suffered a loss of his property by theft names a number of persons to the police as thieves or receivers. So where *A* having lost some of his property by theft reported to the police that the houses of *B* and *C* might be searched as he had heard the bad characters of his village declare that they had committed the theft and screened the property with *B* and *C*, it was held that *A's* statement having been proved to be false, he was liable to conviction under this section, for his statement had been made to the injury of *B* and *C*. But in such a case the statement being one, the accused would be liable to conviction as for one offence, though two persons were affected by his statement.

Clause (*b*).

1823. No Offence.—This section does not punish a person for asking a public servant to do an illegal act, even if true facts were stated to him.[4] What it does punish is the giving of *false* information with intent to secure the use of his *legal* powers by a public servant. Since the intention and knowledge of likelihood that a public servant will take action is an essential ingredient of this offence, it has been held that whatever may be the ulterior motive of the informer, his criminality depends upon the probability of action taken upon his report, which, again,

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(1) *Jonnalagadda*, 28 M. 565 (567); *Gopal Bhikaji*, (1873) B. U. C. 72; cf. *Imandy*, 25 I. C. (M.) 1000.

(2) *Debi*, 44 I. C. (A.) 113; In *Sant Ram* v. *Diwan Chand*, 75 I. C. (O.) 289, it was said that want of authority was immaterial, but in that case the mere giving of false information would be penal, which is not the effect of the qualifying words in the section.

(3) *Poonit Singh* v. *Madho Bhat*, 13 C. 270.

(4) *Manohar*, 47 I. C. (A.) 91; *contra* in *Sant Ram* v. *Diwan Chand*, 75 I. C. (O.) 289.

depends upon the nature of information given. Where, for example, the accused who having sold his bullock to another, complained of its loss to the police, his intention being to implicate the purchaser, the Court held his report of itself insufficient to justifiy his conviction under this section.[1] In another case, where no such intention was disclosed, the same result followed, the court holding that as there was no complaint of a cognizable or non-cognizable offence it did not fall within the mischief of this section.[2]

Resistance to taking of property by lawful authority of public servant.

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[***Public servant***—s. 21. ***Property***—s. 22.]

1824. Analogous Law.—This section was clause 164 of the Bill, but it was condemned as "too wordy—too particular."[3] It was then recast and the present section is the outcome.

1825. Procedure and Practice.—No prosecution can be initiated under this section without the previous sanction of the public servant concerned.[4] In other respects the procedure is the same as under the last section.

1826. Proof.—The points requiring proof are :—

(1) That the accused offered resistance to the taking of any property.
(2) That the property was being taken by the authority of a public servant.
(3) That such authority was lawful.
(4) That at the time of offering resistance, he knew or had reason to believe that he was a public servant who had authorized the taking of the property.

1827. Principle.—Offering resistance to the seizure of property by the lawful authority of a public servant amounts to an overt act of defiance of his authority. As such, it is punishable as a contempt under this section.

1828. Meaning of Words.—"*Offers any resistance*" : Resistance is obstruction, and implies something more than a mere verbal opposition to seizure. It means the use of, or at least the threat to use force if necessary. "*By lawful authority of any public servant,*" which means that the order must be *prima facie* legal, though it may not be strictly justifiable by law.[5] "*Knowing or having reason to believe,*" which fact being a necessary part of the offence must be established by the prosecution.

1829. Unlawful Resistance to Seizure of Property.—The offence here described is unlawful resistance to seizure of property.

(1) There must be Resistance. The graveness of the offence lies in the fact that if the legal orders of public servants are defied with impunity, it will defeat the very purpose for which they are passed. The offence is not necessarily one of contempt, for the offence does not consist in the mere refusal to deliver up one's property on demand of a public servant. For in order to constitute an offence there must be not only a refusal but resistance. Where, therefore, a bailiff in execution of a warrant demanded money from the accused, which was alleged to be in his pocket, and which he refused to hand over, it was held that no offence under this section was committed, as the mere refusal of the accused to deliver up his property did not amount to resistance to the taking of property which was the first requirement of the section.[6] Of course, if in such a case the bailiff had after making the demand laid his hand on the accused to take his money, and the accused had prevented him from taking it, by, say, pushing him off or by running away from him, he would have been then guilty of an offence

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(1) *Musafir Singh*, 186 I. C. (Pat.) 447; *Ganga Dayal*, (1933) O. 374.
(2) *Algoo Lal*, 57 I. C. (A.) 96; followed in *Musafir Singh*, 136 I. C. (Pat.) 447.
(3) 2nd Rep., s. 107.
(4) S. 195, Cr. P. C.
(5) *Tiruchittambala*, 21 M. 78.
(6) *Alibhai*, (1888) B. U. C. 412.

under this section. No offence under this section can then be committed until the public servant, who is resisted, has begun to take the property.[1] Even then there must be resistance, which implies some thing more than a verbal protest or objection. Where, for instance, a bailiff went to attach the property of a carpenter who was also a maker of tongas, and he proceeded to attach two of the tonga-tops lying in front of his shop, whereupon the accused said that he would not allow him to attach them as they were his propeity. He did no more. It was held that his verbal direction not to remove the tonga-tops did not amount to illegal resistance within the meaning of the section.[2] But if such a protest had been accompanied by a threat of coming violence if the bailiff persisted in removing the property, the accused would then have been guilty of resistance. It was so held in a case in which on the accused refusing to deliver up the property, the attaching officer said that he would take it by force, whereupon the accused exclaimed that if force was used he would reduce the property (a pair of gold wristlets) to pieces and it would go hard against him. The accused had two other companions with him at the time and they both said : " Don't give the propety to the police. Let us see how he takes it." All the three were convicted both under this as well as section 186, and the Court upheld their conviction, though their conviction under this section was set aside as superfluous.[3]

(2) There must be Lawful Authority.

1830. Taking must be by Lawful Authority.—Secondly, the resistance must be to the taking of property by the lawful authority of a public servant. What these words mean in an ordinary case, it is not difficult to conjecture. They surely imply that the order in execution of which the property is seized must have been a legal one, and in force at the time of its execution. Where, for instance, a Deputy Collector issued a warrant under the Public Demands Recovery Act, 1880[4] returnable before the 3rd February, and it was sought to be put in force on the 4th February, it was held that the resistance offered was not punishable under this section, as the warrant was spent and no lawful order was in force on the day of execution.[5]

1831. The same view was taken in another case in which the warrant for attachment of the judgment-debtor's property was not signed by the Civil Court in whose name it had been issued. There was no inventory of the goods to be attached, but it authorized the attachment of the judgment-debtor's property, such as might be pointed out by the decree-holder, who was not present to point out the goods. The bailiff proceeded to attach the goods not in possession of the judgment-debtor but of the pawnee who refused to part with them. It was held that the bailiff had no legal authority to attach the goods.[6] And the same view has been reiterated in other cases.[7] So under the Bengal Chawkidari Act[8] the Chawkidar is empowered to attach the moveables of persons liable to pay the Chawkidari tax, but such attachment must be under the written authority of a collecting member of the Panchayat[9] which could only be given after the preparation and publication of the list of defaulters.[10] Where therefore without such publication or written authority, a Chawkidar proceeded to attach a drum of a tenant who resisted him, it was held that the resistance was lawful because the distraint was unlawful.[11]

1832. The bailiff has no right to enter into or break open the doors of the house of a third person in order to execute the process of the law upon the judgment-debtor or his property, unless he is sure that it was used to screen him or his property. The right of the sheriff to break doors was considered in a leading English case,[12] in which it was held that the rule that " every man's house is his castle " does not

(1) *Alibhai*, (1888) B. U. C. 412.
(2) *Hussain*, 15 B. 564.
(3) *Penlick*, (1904) 6 B. L. R. 254.
(4) Beng. Act VII of 1880.
(5) *Anand Lall Beera*, 10 C. 18; *Rama Gandan*, (1891) 1 Weir 134.
(6) *Prabh Dayal*, (1905) P. R. No. 49.
(7) *Abdul Gafar*, 23 C. 896; *Satish Chandra Rai* v. *Jadu Nundun*, 26 C. 748.
(8) Beng. Act VI of 1870.
(9) *Ib.*, s. 2.
(10) *Ib.*, s. 27.
(11) *Durga Charan Mali* v. *Nobin Chandra Sil*, 25 C. 274.
(12) *Semayne's case*, 1 S. L. C. (4th Ed.) 76. The five points decided in this case are set out *in extenso* in 1 Penal Law (4th Ed.) § 1804, p. 998.

prevent his door being forced open, if he has concealed the goods of the judgment-debtor, or is himself liable to deliver them; and that if he refuses to deliver them, the Sheriff has a right to break into the house.

1833. In India, the Code of Civil Procedure prescribes the conditions, subject to which the judgment-debtor's goods and moveables must be seized and his house broken open, which must be strictly complied with.[1] The Code of Criminal Procedure, also, contains provisions for the arrest of persons[2] and the attachment of property of absconders.[3]

1833-A. A Village Munsiff has been held to possess jurisdiction to distrain the property of a defaulter outside his jurisdiction, for arrears of revenue in respect of land within his jurisdiction, though in the demand notice authorizing him to distrain, he be not referred to by his name but by his office. Obstruction to such distraint outside the local limits of his jurisdiction is, therefore, punishable under this section.[4] But if the distraint is not *bona fide*, a conviction under this section will not lie.[5] In all such cases the provisions of law regulating the seizure of property must be strictly complied with. So it has been held that if a bailiff breaks the doors of the house of a third person in order to execute a decree against a judgment-debtor, he is a trespasser if it turns out that the person or goods of the debtor are not in the house; and under such circumstances the owner of the house does not by obstructing the bailiff, render himself punishable under this section.[6] These cases then support not only the proposition that the section only makes it a crime to offer resistance to the exercise of lawful authority in the manner there stated, and that conversely, if the authority was not lawful then the resistance to the taking of the property could not be deemed unlawful.

1834. Resistance to Seizure Not Strictly Justifiable.—The question whether this section is subject to the provisions of section 99 admits of no doubt, that it must be read with that section seems clear, and it has been so held.[7] But s. 99 itself lays down a limitation upon the measure of illegality which is condoned by that section. It excepts the right of private defence, when an act is done by the direction of a public servant "acting in good faith under colour of his office, though that direction may not be strictly justifiable by law." This implies an honest error on the part of the public servant and a very slight defect in his order. It excludes a perverse conscious order on his part or a patent illegality in his order, nor does it even intend to cover an irregularity in the process, or in the mode of its execution.

1835. The order of a public servant might be illegal because of several reasons, *first*, because the authority of the official was uncertain; *secondly*, because the order passed by him was defective; or *thirdly*, the mode of its execution was unwarranted by law. The words "in good faith under colour of his office" and "not strictly justifiable by law" are words of limitation and extension. The first limit the extent of the illegality, the other define the limit within which it would be condoned. But apart from the compass of protection afforded to him by s. 99 there remains the prerequisite of this offence, namely, that resistance must be to the taking of any property by the *lawful* authority of any public servant casting the burden of proving this fact on the prosecution, without which proof there can be no conviction of this offence. In other words, the resistance offered to an act may not be justified by the provisions of s. 99, and yet it will not be punishable, unless it contravenes the provisions of this section. Take, for instance, a case like the following: The Court passes a decree against the assets of a deceased debtor *A*, and in execution, process is issued to seize such property. The Amin seizes the property of *B*, who resists, whereupon he is convicted of this offence on the mere fact of his resistance, without

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(1) S. 55 and Order XXI, rr. 41-45, C. P. C. (Act V of 1908).
(2) S. 80, Cr. P. C.
(3) S. 88, Cr. P. C.
(4) *Iyyemperumall* v. *Naiken*, (1901) 21 M. 78. Weir 127.
(5) *Soosai Kannu Chetti*, (1897) Weir 126; (6) *Gazi Abba Dore*, 7 B. H. C. R. 83. *Anderson* v. *McQueen*, 7 W. R. 12.
(7) *Per* Shephard, J., in *Tiruchittambala*,

proof that the Amin's seizure was lawful *i.e.*, that the goods he attempted to seize were those of *A* and not of *B*. The Madras Court held the accused in such a case guilty holding that the Amin had lawful authority to seize, though he possessed no authority to seize *B's* goods.[1] It is submitted that, if the Amin had no authority to seize *B's* goods, resistance to his seizure could not be punished under this section. The words "lawful authority" here used cannot cover an act "not strictly justifiable by law."

1836. Apart from authority, there is no reason to hold that this section must be read as subject to section 99. In one sense all sections are subject to the provisions of the chapter in which section 99 occurs. But then that section was never intended to enlarge the criminal liability of the accused, as elsewhere defined, and even if so, it does not necessarily follow that if the resistance to unlawful seizure is an offence it is so under this section.

Seizure under Defective Warrant.

1837. It has been held in several cases that a resistance to seizure of one's property on a spent[2] or a defective warrant[3] is not punishable either under this or section 186. Where, therefore, a warrant did not bear the seal of the Court issuing it,[4] or was executed after the date noted for its return, any resistance offered to its execution, could not be punished, because the officer executing it had no "lawful authority" to make the seizure.[5] Such was held to be the case where the warrant for attachment was only signed by the Court clerk[6] though in another case where he had added "By order" it was held to be sufficient.[7] So again, where the warrant was addressed to the bailiff of the Court, it could not be legally executed by the Nazir, and any resistance offered to his seizure would not be resistance to the taking of any property by the *lawful* authority of the Nazir so as to be punishable under this section.[8] It is, however, submitted that in view of the provisions of Or. XXI, r. 25 of the Civil Procedure Code this view is untenable and the contrary has been held in other cases.[9] (§§ 871, 899, 1872).

(3) Belief in Authority Essential.

1838. Authority must be Known to the Accused.—There can be no offence under this section unless the accused knew or had reasons to believe that the resistance offered is to the taking of the property by the lawful authority of a public servant. In the case of superior Courts of plenary jurisdiction such authority may be presumed, but in the case of proceedings of an inferior Court of limited jurisdiction, it cannot be presumed, but must appear from the proceedings which must set forth the facts and orders not being general Statutes of which all Courts must take notice.[10] So where it did not appear on the face of the conviction that the Mamlatdar was an officer to whom under the provisions of section 129 of the Land Revenue Code[11] the powers of the Collector constituted by section 87 of the Code, had been delegated under any general or special order of the Government, nor that the Karkoon employed to distrain was an officer directed to perform that duty by the Commissioner, under the orders of Government, a person resisting such a Karkoon by force when the latter came to distrain some goods at his house, was held not to be guilty of an offence under this section.[12] In order to give notice to the accused of the sufficiency

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(1) *Tiruchittambala*, 21 M. 78, dissented from in *Sakharam*, (1935) B. 233. (234).

(2) Cf. *Sheikh Naseer*, 33 C. 122; *Adhar Midday*, 5 C. W. N. 391; *Shib Lal*, 55 A. 617.

(3) *Mohini Mohan Banerji*, 36 I. C. (Pat.) 871; *Karamatullah*, 55 I. C. (Pat.) 852.

(4) *Badri Gopi*, 5 Pat. 215; *Dasondhi*, 9 L. 424.

(5) *Sheikh Naseer*, 37 C. 122; *Sahed Ali*, 40 C. 849; *Adhar Midday*, 5 C. W. N. 391; *Tanuk Lal*, (1920) Pat. 285.

(6) *Karamatullah*, 55 I. C. (A.) 852.

(7) *Harish Chandra*, 75 I. C. (C.) 328; *Wali Mohamad*, 60 I. C. 796. *See* Ord. XXI, r. 24 (2), Civil Procedure Code (V of 1908).

(8) *Mohini Mohan Banerji*, 36 I. C. (Pat.) 871; contra *Wali Mohamad*, 60 I. C. 796

(9) *Dharam Chand Lal*, 22 C. 569, following *Abdul Karim* v. *Bullen*, 5 A. 385; *Wali Mohamed*, 60 I. C. 796; *D'Man Mahto*, 54 I. C. 977, *sed quere*: "Is a peon an "officer" within the meaning of Ord. XXI, r. 25 of the C. P. C.?"

(10) *Yeshwant*, (1887) B. U. C. 325.

(11) Bom. Act V of 1879.

(12) *Yeshwant*, (1887) B. U. C. 325.

of the authority of the public servant, it is necessary that the public servant should have with him his authority, which must be shown to the persons affected thereby. So it has been held that where a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful, and resistance to the taking is consequently, lawful.[1]

1839. No Offence.—In the foregoing discussion, several cases have been cited to show that non-compliance with the law contained in these sections vitiates the conviction. It is for the prosecution to prove whether the accused knew or had reason to believe that that person whom he resisted was acting under the lawful authority of the public servant. This failing the prosecution fails. (§ 1830). *Secondly*, the authority must be lawful, (§§ 1832, 1833). *Thirdly*, the authority must be known (§ 1838).

Obstructing sale of property offered for sale by authority of public servant.

184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

[***Public servant***—s. 21. ***Property***—s. 22.]

1840. Analogous Law.—This section was clause 168 in original Bill, and remains as it was then drafted. Its object is self-evident.

1841. Procedure and Practice.—The procedure applicable to an offence under this section is the same as for an offence under section 182.

1842. Proof.—The points requiring proof are:—

(1) That certain property was offered for sale.
(2) That such sale was by the authority of a public servant.
(3) That such authority was lawful.
(4) That the accused obstructed such sale.
(5) That he did so intentionally.

1843. Intentional Obstruction of Sale.—This section deals with the intentional obstruction of the sale of any property held by the lawful authority of a public servant. Like "resistance" the word "obstruction" implies some overt act done or physical means used to hinder the sale of property. The giving of notices by persons at such sales that they have a claim against the property may amount to obstruction, if the notices were not *bona fide* and were given merely for the purpose of injuring the sale. But if they were given in good faith for the protection of one's interest, then there would be no obstruction. So there can be no obstruction of sale if during the pendency of the execution-proceedings the judgment-debtor executes a sale-deed of the property in favour of another. Such a deed is *ipso facto* void as against execution-creditor, whatever may have been the intention of the parties, it is at any rate not an obstruction to sale.[2]

1844. The word "obstruction" implies an attempt to defeat or delay the sale of property already commenced. The shying off of intended bidders by creating a false alarm in their minds would be such an obstruction. In fact, any act detrimental to the steady progress of the sale and calculated to retard it, is obstruction, provided that it was done with that intention. The use of physical force will, of course, be obstruction, if it was intended to delay it. The picking up of a quarrel with likely bidders or the auctioneer, falsely accusing him of partiality or irregularity are other instances of such obstruction met with in practice.

1845. The next section instances another case of such an obstruction, though it is made a distinct offence, as it is an obstruction of an indirect kind.

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(1) *Amar Nath*, 5 A. 318; *Ganeshi Lal*, 27 A. 258; contra *Tribhuwan*, 5 O. L. J. 112, 258. 45 I. C. 833.

(2) *Amar Nath*, 5 A. 318; *Ganeshi Lal*, 27 A.

185. Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Illegal purchases or bid for property offered for sale by authority of public servant.

[***Public servant***—s. 21. ***Legal incapacity***—e.g., under s. 169.]

1846. Analogous Law.—This section codifies the pre-existing law as enacted in the regulation.[1] It deals with another case of obstruction to the public service.[2] It regards the bidding for property which the bidder knows will not end in sale, as a contempt and an imposition upon the public servant. Such an obstruction might have been dealt with under the last section; but as the bidding might be pleaded as the furtherance rather an obstruction of sale, this section defines what are the incriminating elements in such a case.

1847. Procedure and Practice.—The procedure applicable to this section is the same as for an offence under section 182.

1848. Proof.—The points requiring proof are:—

(1) That there was held a sale.
(2) That it was by the authority of public servant.
(3) That such authority was lawful.
(4) That the accused bid for or purchased such property, either for himself or for another.
(5) That the accused or the person for whom he bid was under a legal disability to purchase at the sale in question.
(6) That the accused then knew of it.

Or instead of (5) and (6), prove—

(7) That he bid for the property not intending to perform the contract so made.

1849. Principle.—This section penalizes delinquencies of two sorts: (*a*) where the accused bids for property without *intending* to purchase it, and (*b*) where he bids for it when he knows that he or the other person for whom he bids is *legally disqualified* from purchasing it. In the one case, the non-completion of the sale was due to his own volition; in the other, it was due to legal disability. In both cases the result is the same. The sale is infructuous, but in the former case, the failure of the sale was due to his direct omission, in the latter case there was no omission but incapacity of which he knew. In the former case the accused was guilty of breach of contract, but in the latter case, he may be anxious to complete the purchase by evading the law, but which he could not be permitted to do.

1850. *Benami*-bidders of public servants, who are disqualified from bidding at public sales, are thus within the rule. So are mock-bidders who bid only to put off the sale, by out-bidding a *bona fide* purchaser with no intention of completing it.

1851. Meaning of Words.—"*At any sale of property*": The term "property" here includes any property corporeal or incorporeal. In short, it is used here in its widest sense as signifying anything that may be the subject of ownership. So the word "sale" is here used to denote not only a transaction by which ownership is transferred to the purchaser, but a transfer by which a limited interest for a limited period is conveyed in favour of the transferee. The lease of a ferry is an example.[3]

1852. "The Lawful Authority of a Public Servant".—For the meaning of this phrase, *see* §§ 1863-1870. "*Whom he knows to be under a legal incapacity*": A minor is not such a person; for he may purchase property through his guardian.

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(1) *Badam Singh*, (1883) A. W. N. 197.
(2) 2nd Rep., s. 110.
(3) *Reazooddeen*, 3 W. R. 33.

The legal incapacity herespoken of means an incapacity which disqualified a person from becoming a purchaser either directly or indirectly. "*Not intending to perform the obligations*," such as, accpetance of the conditions of the sale, payment of the price, and the like.

1853. Mock-Bidders and Illegal Purchasers.—This section is intended to strike at two classes of bidders—those who bid with no intention to purchase, and those who bid to purchase in spite of the law. The former intend to obstruct the sale by their mock-bidding, the latter may intend to secure a bargain in defiance of the law. The section speaks of any sale of property, but it uses those terms in their largest sense as including a transfer of any property whether corporeal or incoporeal, and indeed, of any right which is recognized by law as a subject of ownership (§ 1851).

1854. The section was accordingly held to comprise the lease of a ferry sold at a public auction by a Magistrate.[1] So where the accused bid for the lease of a ferry and when the sale was knocked down to him, he failed to complete it, in the hope of securing it at a lower rate on a re-sale, it was held that he was guilty of an offence under this section.[2] In this case the Court inferred the accused's intention of not completing the sale from his subsequent failure to complete it. But this is not always evident, and the High Court before whom the case came up for revision, were not prepared to make such a presumption. The question in such a case is the bidder's intention, at the time of the bidding, and not what he did subsequently. Of course, his subsequent conduct may be an index of his original intention, but the question is one of fact to be decided upon the circumstances of each case.

1855. And this was the view of the Law Commissioners to whom was put the question, "Which is the criterion of bidding without the intention of performing all the obligation?" to which they replied: "We can only say that we see no need for any peculiar criterion." The fact that the bidder did not intend to complete the purchase must of course be proved by such evidence as is ordinarily admitted in similar cases.[3] Where, for example, the accused bid for the monopoly of a drug under a false name which was confirmed, whereupon he denied its purchase which was proved, he was held to have offended against this section.[4]

Benami Purchase.

1856. So in the case of legal incapacity to purchase the property the question is one of knowledge. If a public servant requests another to purchase for him property sold at a public auction, and he purchases it in ignorance of the incapacity under which the public servant laboured, he could not be convicted of this offence. But if, on the other hand, he was aware of his incapacity, his purchase was in reality an abetment of the evasion of law of which the public servant was guilty. So where *A* was the Sub-Inspector of Police in charge of a cattlepound, and, as such, he had to sell a pony as unclaimed property. He knew of the legal disability under which he lay in purchasing it. He therefore asked one *B* to buy it for him from whom he subsequently purchased it. If *B* was in such a case bidding for *A*, *B* would be guilty of an offence under this section, as *A* would be of an offence under section 169.[5] If, on the other hand, *B* had purchased the pony for himself and then sold it to *A*, neither *A* nor *B* would be guilty of any offence under the Code. The question such a case raises, is then often difficult of proof; for the secret lies with the benamidar and the beneficiary, and it is not to the interest of either to disclose. Nevertheless, there may be circumstances from which the Court would be justified in inferring that in bidding for property, one was only the spokesman of the other who was himself disqualified from purchasing it.

1857. The case in which the purchaser himself labours under a legal disability presents little difficulty. For then the only question that remains is whether

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(1) *Reazooddeen*, 3 W. R. 33.
(2) *Reazooddeen*, 3 W. R. 33.
(3) 2nd Rep., s. 110.
(4) *Bishan Prasad*, 37 A. 126.
(5) *Rajkristo Biswas*, 16 W. R. 52.

he was aware of it. And since every one is presumed to know law, the presumption will be that he was, though it will be open to him to show that he was not.

186. Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Obstructing public servant in discharge of public functions.

[***Public servant***—s. 21. ***Voluntarily***—s. 39.]

1858. Analogous Law.—This is a general section on obstruction of public servants in the discharge of their public functions. Where the public servant is a judicial officer, an obstruction in the discharge of his public functions amounts to contempt of Court, and is, as such, summarily punishable under section 480 of the Code of Criminal Procedure, and the offences may then be any of those punishable under sections 175, 178, 179, 180 or section 228 of the Code.

1859. Procedure and Practice.—The procedure applicable to an offence under this section is the same as for an offence under section 182.

1860. Proof.—The points requiring proof are :—

(1) That the accused obstructed.
(2) That he did so voluntarily.
(3) That the person obstructed was a public servant.
(4) That he was obstructed in the discharge of his public functions.

1861. Principle.—This section deals with the general offence of obstructing a public servant in the discharge of his public duties. The offence here made punishable is, of course, one not otherwise provided for (§ 1858). This section does not cast a halo of sanctity round all public servants, as such, irrespective of their duties. The gist of the offence lies in the interruption caused to a public servant whilst in the execution of his duties. It does not penalize obstruction at all times.

1862. Meaning of Words.—"*Voluntarily obstructs*": The word "voluntarily" in this context indicates the commission of some overt act of obstruction, as distinguished from mere passive conduct.[1] The word "obstruction" means interruption or hindrance to the progress of work. "*In the discharge of his public functions*": This necessarily means in the discharge of his *lawful* public functions, for functions which are not lawful cannot be designated public functions (§ 1867).

1863. Illegal Obstructions.—The three ingredients of an offence under this section are (*a*) that there should be an obstruction (§§ 1875-1876), (*b*) that it should be voluntary (§ 1876), and (*c*) that it should be in the discharge of the public functions by a public servant (§ 1870). This section is so generally worded, that if liberally construed, it would include many cases of obstruction specially dealt with in the other sections. Offences described in sections 183-185 would thus fall clearly within the ambit of this section. But, obviously, it was not the intention of the Legislature to include them in this offence, which must be understood to refer to other offences not elsewhere specially provided for. To what public functions must the section be then applied? The public functions, here spoken of, must, of course, mean legal or legitimately authorized public functions, and not any act that a public functionary might choose to take upon himself to perform.[2] The Police Inspector is entitled to make a search for cocaine; where therefore, the accused assaulted him and his constable while he was conducting such search he was held rightly convicted of this offence.[3] So was the accused in whose house the head-constable had found some

(1) What is a "public function"?

(1) *Somanna*, 15 M. 221; *Bhaga Mana*, 52 B. 286.

(2) *Per* Banerji and Sale, JJ., in *Lilla Singh*, 22 C. 286; following *Bhagtidas*, 5 B. H. C. R. 51; *Tulsiram*, 13 B. 168; *Jaswant Singh*, (1925) L. 139.

(3) *Thave Issaji*, 13 Bom. L. R. 635, 11 I C. 993; *Ippite*, 38 M. L. J. 27, 64 I. C. 241 (case of Salt Inspector).

stolen goods, whereupon he caused the door of the room to be closed and threatened to kill the head-constable if he removed the goods.[1]

1864. Where the Mamlatdar finding it difficult to execute a decree for possession of land referred the matter to the Collector who thereupon appointed a surveyor to execute the decree, and the latter was obstructed by the accused on the ground that neither he nor the Collector had authority to make a partition of the land. The accused was convicted of obstruction under this section, but Birdwood, J., quashed his conviction holding that the surveyor, acting under the Collector's orders, was not discharging a public function as the Mamlatdar could not legally refer his difficulty to the Collector, and the latter could not depute a surveyor to execute a decree. It was contended for the prosecution that section 99 protected the surveyor, and that the accused had no right to resist, but the Court held that section inapplicable on the ground that it did not protect an act which was altogether illegal.[2]

1865. The same view was taken in another case in which a partition *Amin*, in proceeding to measure certain lands, in the course of proceedings connected with the partition of an estate under the Bengal Partition Act,[3] was obstructed by certain persons who claimed the lands and objected to their being measured. The lands were stated in the report of the *Amin* to be the common land of estate No. 546, and of certain other estates. The persons who obstructed him were not co-sharers in that estate, and contended that the land ought to be measured had been divided amongst the *maliks* of the different estates and different portions of it had been held separately by them. The persons so obstructing the *Amin* were convicted of an offence under this section, but on revision the High Court quashed their conviction, holding that as there was no evidence of the community of interest, the accused were entitled to the benefit of the doubt, but for which, their case would have fallen under section 112 of the Partition Act under which the *Amin* would have had the jurisdiction he claimed. Otherwise, he could not measure the land without a special order from the Collector. As, however, the *Amin* persisted in measuring the land without such an order, he was not discharging his public functions. Here, again, the Court considered the applicability of section 99 and held that the only functions protected under this section were legal or legitimately authorized functions and not unauthorized functions however *bona fide*.[4]

1866. This view was reiterated by another Bench of the same Court in which the District Magistrate had issued a warrant for the appearance of a witness at an investigation by a police-officer, and the police charged with its execution were resisted, it being held that the only power which the District Magistrate possessed was to issue a warrant for the appearance of a person in his own Court, and that the warrant issued was *ultra vires*, and justified the obstruction offered to its execution.[5] So where the only right possessed by the District Board was to bridge a *khal*, they could not replace the bridge by a pipe even as a temporary measure, and the obstruction of the Local Board sircar, deputed for the purpose, could not therefore, be punished under this section.[6] So where a Magistrate issued a warrant of attachment to recover money paid to the accused as compensation on account of land, acquired under the provisions of the Land Acquisition Act, but afterwards given up, and the revenue peons sent to attach his property were resisted, it was held that as the issue of such warrant was justifiable under no law, the resistance offered could not be punished under this section, as the peon who went to execute an illegal warrant could not be said to have been discharging his public functions.[7]

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(1) *Gottumukkula*, (1924) M. W. N. 438.
(2) *Tulsiram*, 13 B. 168.
(3) Beng. Act VIII of 1876; since repealed and superseded by the Estates Partition Act (Beng. Act V of 1897).
(4) *Lilla Singh*, 22 C. 286; *Jogendra Nath Mukerji*, 24 C. 350.
(5) *Jogendra Nath Mukerji*, 24 C. 350.
(6) *Addaita Bhuia* v. *Kali Das De*, 12 C. W. N. 96, 6 Cr. L. J. 393.
(7) *Himayat Ali*, (1905) P. R. No. 10; 2 F. J. 64; *Gahar Mohamed*, 22 C. W. N. 814; 47 I. C. 868.

1867. These cases are then sufficient to establish the proposition of law that where an act sought to be done is not one which the person seeking to do it is legally authorized to do, an obstruction to the doing of the act is not an illegal obstruction,[1] though the person obstructed may believe in good faith that he was performing a public function, as where he is carrying out the orders of his superior officer,[2] for the question is not one of intention, but of the legal execution of public duty.[3] So a public servant executing a warrant of arrest bearing only the initials of a Magistrate and not his signature as required by section 75 of the Procedure Code, could not plead *good faith* to an obstruction met by him from the accused, nor could the latter be convicted of it under this section.[4] Moreover, even if the warrant had been duly signed and the serving officer did not "notify the substance thereof to the person to be arrested"[5] the latter could not be punished for obstruction, because the due formalities of law had not been complied with.[6] In such cases, Law says to its ministers: "I will protect you if you obey my behests; if you do not, you act at your own peril."

1868. The accused had owned a shop abutting on a public road vested in the Municipality. He had for forty years exhibited some of his wares on a strip of land in front of his shop which the Municipality claimed as their own. They first prosecuted him for an encroachment under the Municipal Act, but having failed, deputed one of their officers to remove the goods from the disputed land. The accused resisted and was then prosecuted under this section, but the Court held it to be a case of civil dispute and that in any case this section was inapplicable because it depended not upon the intention of the public servant but upon the discharge of his public functions which had to be found as a matter of fact and not as a matter of law: "His intentions may have been perfectly honest, but if in fact and in law, the functions in the discharge of which he was obstructed were not public functions, then no offence can be committed under this section. It is plain that the functions would not be public functions, if they fell wholly outside the jurisdiction of authority which he, as a public servant, possessed."[7]

1869. It was at one time held that resistance of process of a Civil Court was not punishable under this section or otherwise criminally. But there was no justification for such a view which has long since been overruled.[8]

1870. Public Function Not Strictly Legal.—There are, however, some cases in which the trend of the Courts has been to hold obstruction punishable, even though the act of the public servant was not strictly justifiable by law. This view proceeds upon the construction of this section in conjunction with section 99, the effect of which has been the subject of some discussion elsewhere (§ 1834). The cases in which this view has been countenanced, so far as they relate to this section, may, however, be here set out. In one case a subordinate police-officer had entered a house in search of property, without a warrant from an officer in charge of the police station. Such a subordinate could not legally enter a house in search of property without a warrant, unless he was in search of a person charged with the commission of a cognizable offence. The Court found that the subordinate had entered the house as much in search of such person as of property. If so, he was performing his normal public functions, and resistance to him would then be, of course, punishable.[9] No doubt Melville, J., went beyond the facts of the case in discussing the applicability of section 99 on the assumption that the entry of the

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(1) *Komati Ramannah*, (1882) 1 Weir 131; *Murugappa*, 87 I.C. (M.) 286; *Gahar Mahomed*, 47 I. C. (C.) 868; *Shivdas Onkar*, 15 Bom. L. R. 315, following *Sagan*, (1888) B.U.C. 366.

(2) *Barada Kant Paramanik*, 1 C. W. N. 75.

(3) *Shivdas Onkar*, 15 Bom. L. R. 315.

(4) *Abdul Gafur*, 23 C. 896; contra *Madhava*, 36 I. C. (M.) 161.

(5) S. 80, Cr. P. C.

(6) *Per* Peacock, C.J., in *Bhagai Duffadar*, 10 W. R. 43, F. B. overruling *Chander Kant Chuckerbutty*, 10 W. R. 14.

(7) *Shivdas Onkar*, 15 Bom. L. R. 315, following *Sagan*, (1888) B. U. C. 366.

(8) *Abdul Gafur*, 23 C. 896; followed in *Durga Charan Mali* v. *Nobin Chandra Sil*, 25 C. 274.

(9) *Yankabran*, 1 B. H. C. R. 50.

policeman was not strictly legal and he held that "even though they (police subordinates) were not strictly justified in searching a house without a search-warrant, yet the prisoner cannot set up the illegality of their proceeding as a justification of the obstruction which he offered to the search." It is submitted that the dictum, so stated, is unsound. For, if it is once conceded that the words "public functions" must necessarily mean lawful public functions, the conclusion appears to be inevitable that the section cannot visit, with its penalties, persons who do not offend against its provisions, whatever section 99 might lay down. That section may make the conduct of the accused culpable, but if so, it may be punishable under some other section, but not under this, or those to which it is allied.

1871. In a Madras case a landlord had not tendered a proper *patta* to his tenants. Nevertheless, he distrained their cattle for arrears of rent and obtained the assistance of the police for the purpose. The tenants obstructed but were convicted for it, the Court holding that the distraint was carried out under s. 19 of the Rent Recovery Act. If so, there was no illegality to vitiate the landlord's procedure.[1] But another case of the same Court was decided upon facts which clearly bring that decision in conflict with the decided cases of the other Courts. In that case a Sub-Inspector of Salt and Abkari had attempted to enter a house in search of property without a search warrant, and it was held that though his entry was not strictly justifiable, still the person obstructing him could not set up the illegality of his proceeding as a justification of his obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.[2] Such was held to be the case of a surveyor who being authorized to survey land entered a wrong estate with a view to measure land and to fix demarcation stones thereon. He was resisted and the resisters were held rightly convicted of this offence.[3] In another case of the same Court the tools of a potter had been attached in execution of a warrant for non-payment of the house-tax, and obstruction by the potter was held to be unjustifiable, though the tools attached were exempt from attachment, and the warrant had been issued after service of the notice of demand by affixing it to his house instead of serving on him personally, which was practicable and required by law. The Court held that as the provisions of the Local Boards Act[4] had been, in substance and effect, complied with, the accused was rightly convicted of obstruction.[5] These cases have been sufficiently passed in review elsewhere[6] and reference must be made to that discussion for the purpose.

1872. Of course, though the legality of the public function should, ordinarily, be obvious, still the person obstructed is entitled to show that so far as regards the legality of his act, he was legally and sufficiently empowered. Where, for instance, a warrant of attachment of a Civil Court was addressed to the *Nazir* for execution who indorsed it over to a peon for execution, it was held that the Code of Civil Procedure empowered such delegation,[7] for it only required that the warrant shall be delivered to the proper officer for execution, but it did not say that the proper officer should execute it himself, but that the delegation might well have been conferred in more clear and explicit terms. Nevertheless, the peon could not be said to have had no authority to execute the process and that the obstruction of the accused to him was therefore punishable under this section.[8] The same view was taken in another case in which it was held that the Nazir had authority to delegate the execution of warrant of arrest (§ 1837).

1873. Illegal Authority.—Where the exercise of authority is wholly illegal, there can be of course no lawful discharge of his public function by a public servant,

(1) *Ramayya*, 13 M. 148.
(2) *Purkob Kotu*, 19 M. 349.
(3) *Madhava*, 31 M. L. J. 305, 35 I. C. 161.
(4) Mad. Act V of 1884, s. 163.
(5) *Poomalai*, 21 M. 296; following *Tiruchittambala*, 21 M. 78; *Pukob Kotu*, 19 M. 349; *Ramayya*, 13 M. 148.
(6) S. 99, comm.
(7) S. 251, C. P. C.; now *see* Ord. XXI, C. P. C.
(8) *Dharam Chand Lal*, 22 C. 596; following *Abdul Karim* v. *Bullen*, 6 A. 385; *Bhaga Mana*, 52 B. 286; *Wali Mohamed*, 60 I C. 796; *Moreshwar Janardan*, (1928) B. 497; *Limba Tatya*, 31 Bom. L. R. 800; *Pochit Lal Misser*, (1929) A. 917 *contra* in *Mohini Mohan Banerji*, 7 Pat. L. J. 350, 36 I. C. 871.

for it is what the section implies.[1] Where, therefore, a warrant was issued against a minor for whom no guardian had been appointed, resistance to its execution is not punishable under this section.[2] So where the Munsiff who was proceeding to make a local inspection desirous of using a waterway to the locality, was obstructed by the accused who were no parties to the suit in which the inspection was sought, they were held to have committed no offence even though it was proved that their waterway was used by others, at least, by the residents of the locality.[3] So where there was a dispute between the accused and the Municipality as to the ownership of a plot of land, resistance by the accused to the entry of the Municipal Officer upon the plot was held to constitute no resistance.[4] The accused assaulted the Lambardars who had been invited by the Income-Tax officer to assist him in his inquiry ; it was held to amount to no obstruction of the officer.[5]

1874. In a suit for accounts the Court passed a preliminary decree ordering the defendant to render and furnish accounts within one month from its date. On his failure, the Court purporting to act under Ord. XXI, r. 32 of the Civil Procedure Code ordered his arrest. He resisted. It was held that the Court had no power to order the arrest, since the decree was not one for "injunction" but only for accounts, in execution of which no arrest was legal.[6] So where the Munsiff issued a process for the attachment of moveables outside his jurisdiction, resistance to the execution was held to constitute no offence under this section.[7] Such was held to be the case or the accused who rescued his cattle from the custody of a Civil Court peon who had seized them in execution of a writ of attachment made in his absence, which did not bear the seal of the Court.[8] In another case, the Court having found that the judgment-debtor had removed his goods to the house of a third party (*A*) ordered their seizure by sealing up *A's* house which was contrary to Ord. XXI, r. 46 of the Civil Procedure Code. *A* resisted and his resistance was held justified.[9]

1875. Voluntary Obstruction.—The first question that arises in such case is : Was there an obstruction, and was it voluntary?

(1) What is an Obstruction? The term "obstruction" occurs in several sections of this and the next chapters,[10] and it is used there as meaning actual hindrance, resistance, or obstacle put in the way of a public servant by the doing of some overt act, and not merely the offer of passive resistance, opposition or evasion not accompanied by the use of criminal force.[11] Any hindrance, whether by the use of actual force or otherwise, is not an obstruction in the eye of the Law though the use of actual force is not necessary to constitute obstruction. But the use of threats or threatening language would seem to be insufficient,[12] unless it was accompanied by an act such as brandishing of some kind of weapon[13] when the two taken together may have that effect. So if the accused stands in the way and prevents the bailiff from executing the process, or closes his door to prevent him from searching his house, and threatens to kill him, if he removes his goods, his act would amount to obstruction.[14] (§ 1877). So where a head-constable visited a police lock-up and objected to one prisoner giving his food to another and thereupon

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(1) *Shivdas*, 15 Bom. L. R. 315, 19 I. C. 507 ; *Kadarbhai*, 51 B. 896; *Tohfa*, (1933) A. 759.

(2) *Tanuk Lal*, (1920) Pat. 285, 60 I. C. 343.

(3) *Nish Kant Pat*, 20 C. W. N. 857, 37 I. C. 46.

(4) *Shivdas*, 15 Bom. L. R. 315, 19 I. C. 507, *Nagarmal*, 11 Pat. 493.

(5) *Matu Ram*, 73 I. C. (P.) 338.

(6) *Arjun Sute*, 3 Pat. L. J. 106, 44 I. C. 737 ; *contra* in *Degamber* v. *Kallynath*, 7 C. 654 ; *Raghunath* v. *Ganpati*, 27 A. 374, held overruled by amendment of s. 276, now Ord. XXI, r. 32 of the C. P. C.

(7) *Sarbeswar*, 39 C. L. J. 33, (1924) C. 501.

(8) *Badri Gopi*, 5 Pat. 216 ; *Puna Mahton*, 11 Pat. 743.

(9) *Nagarmal*, 11 Pat. 493.

(10) *E.g.*, ss. 184, 224, 225, 225-B.

(11) *Gajadhar*, 7 A. L. J. 1174, 8 I. C. 823; *Aijaz Husain*, 38 A. 506; *Jaswant Singh*, (1925) L. 139; *Ah Chong*, 9 R. 601 ; *Nagarmal Marwadi*, 11 Pat. 493 ; *Birdi Chand* v. *Darbari Jayswal*, (1932) P. 276.

(12) *Aijaz Husain*, 38 A. 506; *Gajadhar*, 8 I. C. (A.) 823 ; *Darkan* (*Mt.*), (1928) L. 27.

(13) *Nafur Sardar*, 60 C. 149, followed in *Tohfa*, (1933) A. 759.

(14) *Gottumukkula*, 83 I. C. 657, (1924) M. 760.

all the prisoners surrounded him in threatening attitude and gave insubordinate answers, they were held to have been guilty of obstruction under this section.[1] The same view was taken in another case in which a son of the accused Chedilal had strayed away from his house and was being escorted by the Chowkidar to the police station house. Chedilal intercepted him on the way and objected to his son being taken inside the police thana saying that he was not a thief. He snatched his son from the Chowkidar and the police moharir and used bad language. He was held to have committed an offence under this section, but the judgment does not disclose what "police function" the police were then performing, in which they were obstructed.[2]

(2) What is Not an Obstruction.?

1876. The fact that the conduct of the accused caused some annoyance to the public servant, does not of itself constitute obstruction. So where a Commissioner, appointed by the Civil Court to search the house of the accused for certain property, went to the house, but found himself face to face with a crowd, upon which he felt it unsafe to proceed to execute his mission, and thereupon the accused was convicted of obstruction under this section, the High Court quashed his conviction on the ground that the crowd collected was orderly and that the accused on hearing the order read out entered his house and closed its doors. "We do not think," the Court observed, "that mere failure to comply with the request of the Commissioner amounts to such obstruction as is contemplated in section 186. The use of the word 'voluntarily' seems to us to indicate that the Legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct."[3] (§ 1879).

1877. A person who chains from within, the doors of his house on the approach of a bailiff charged with the execution of a warrant issued by the Mamlatdar for the attachment of his moveable property, is acting within his rights, and cannot be charged with obstruction under this section;[4] though the case would be different if he threatened to kill him if he seized the goods.[5] There is no obstruction where a person merely objects to his arrest stating that it would result in a fight,[6] or if he objects to his house being searched, without using force or threatening language[7] or where he runs away to avoid his arrest.[8] Indeed, passive resistance, unless it is accompanied by menaces and threats, can seldom amount to obstruction.[9] So where a surveyor wanted to enter the accused's house for the purpose of measuring it, and the accused replied that he did not wish his house then measured and refused to accompany the surveyor as desired by him, it was held that his refusal was not an obstruction for which he could be held guilty under this section.[10] So there was no obstruction where the petitioners, the servants of a claimant, persuaded the tenants of an estate, not to pay their rents to a Receiver appointed by a Commissioner.[11] In this case the persuasion was adressed to the tenants in the absence of the Receiver, and it was therefore rightly held not to constitute obstruction. But it would probably have been very different if the same thing had been done in the presence of the Receiver and while he was collecting rents. But even then mere persuasion without something more would hardly have been sufficient.

1878. It was so held in the case of a vaccinator, against whom, while he was at work, the accused spread a report that the children vaccinated would go mad, hearing which the mothers who were in attendance with their children ran away, whereupon Shephard, J., said "To prevent by physical means persons willing to be vaccinated from being vaccinated might be obstruction of the vaccinator within the meaning of the section. But merely to dissuade a person from submitting to

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(1) *Padaratti*, (1882) A. W. N. 233.
(2) *Chedilal*, (1883) A. W. N. 170.
(3) *Somanna*, 15 M. 221.
(4) *Mania*, (1888) B. U. C. 407; *Gajadhar*, 7 A. L. J. 1174.
(5) *Gottamukkula*, 83 I. C. 657, (1924) M. 760.
(6) *Aijaz Husain*, 38 A. 506.
(7) *Gangappa*, 2 Bom. L. R. 541.
(8) *Peeru Muhammad*, 32 I. C. (M.) 663.
(9) *Ram Ghulam Singh*, 47 A. 579.
(10) *Bhaktidas*, 5 B. H. C. R. 51.
(11) *Ebrahim Sarkar*, 29 C. 236.

vaccination is another matter. That is not obstruction, for it is only with regard to willing patients that the vaccinator has any duty."[1]

1879. So where the tenants forbade a survey-measure from measuring land in a particular manner, without using or threatening to use force to prevent him from doing so, it was held not to amount to culpable obstruction under this section.[2] The same view was taken of a person falsely informing a vaccinator that he would get no children to vaccinate in the village.[3] It has been held in the Punjab that the obstruction here contemplated must be personal. So where during the sale of some *nazul* land by an Assistant Commissioner, the accused posted up placards asserting his own title to the land and warning bidders not to purchase it, it was held that the conduct of the accused in asserting his own title did not amount to obstruction ; "on the contrary, a claimant is well advised in doing so, otherwise he might be told that he stood by and made no protest."[4]

1880. So a person preventing a vaccinator from taking lymph from the arm of his child could not be convicted of obstruction, because the vaccinator has no right to extract lymph without the consent of the parent.[5] And so, of course, the refusal of a cart-owner to give his cart on hire to a Government officer does not constitute the offence of obstructing a public servant in the discharge of his public functions."[6] So the refusal of a merchant to deliver goods held by him as factor of the ward upon the assumption of the management of his estate by the Court of Wards till the general balance of his account is paid does not convert his refusal into a resistance or obstruction punishable under this section.[7] In this case the accused had claimed the factor's lien which took his case out of the section.

1881. An assertion of a *bona fide* claim is not an offence. So where the accused obstructed a Sanitary Inspector in fixing a door way in a temple wall and pulled out the brick foundation because he claimed the site as his own supporting it by evidence equally balanced he was acquitted of this offence.[8] There was, of course, no obstruction in the sense of this section, where the Patwari refused to show his accounts to the Kanungo which, though an act of insubordination, falls far short of penal obstruction.[9]

1882. Voluntary Obstruction.—These cases lead to the consideration of the question, what is a "voluntary" obstruction. This necessarily raises the question of intention. For there can be no voluntary obstruction, unless it was so intended. Where, therefore, a person obstructs a public servant in the honest belief that he was thereby protecting his rights, he could not be convicted of obstruction, whatever may have been the consequence of his act. So where a Magistrate in the discharge of his official duties directed certain persons to perform certain work on certain land from which they were ejected by the accused who believed that the men had been trespassing on the land of his friend, it was held that as the ejectment by the accused was to prevent what he *bona fide* considered to be trespass, he could not be said to have voluntarily obstructed them.[10] But while *bona fide* belief in one's own right will *repeal* the charge of voluntariness, proof of *mala fides* of the person obstructing the public servant is not necessary to sustain a conviction under this section.[11] In order to fix the accused with knowledge of the fact that the public servant was discharging his public function, it is necessary that he must disclose his authority. He must at least be ready to show it even though the accused may decline to see it.[12]

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(1) *Lingha*, (1883) 1 Weir 130.
(2) *Ravji*, (1888) B. U. C. 377.
(3) *Anandappa Nadan*, (1884) 1 Weir 130.
(4) *Gopal Rai*, (1905) P. R. No. 7, 2 Cr. L. J. 44.
(5) *Komati Ramannah*, (1882) 1 Weir 131 ; *Chitta Kanaiya*, (1884) 1 Weir 132.
(6) *Dhori Kullan*, 9 B. H. C. R. 165.
(7) *Parakh*, E.H., 92 I.C. 744; (1926) O. 202.
(8) *Shanthearajiah*, 4 My. L. J. 29.
(9) *Kishori Lal*, 85 I. C. 821 ; (1925) A. 409.
(10) *Todd*, (1882) A. W. N. 52.
(11) *Karuman*, (1894) 1 Weir 134.
(12) *Amar Nath*, 5 A.318, followed in *Ganeshi Lal*, 27 A. 258 ; contra *Tribhawan*, 5 O. L. J. 112, 45 I. C .833.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both ;

Omission to assist public servant when bound by law to give assistance.

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of supressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

[***Court of Justice***—s. 20. ***Public servant***—s. 21. ***Offence***—s. 40. ***Riot***—s. 146. ***Affray***—s. 159.]

1883. Analogous Law.—Persons bound to furnish information to public servants are punishable under ss. 176 and 177. Persons bound to *assist* them are dealt with here. The section provides, *first*, in general terms, for the punishment when a person being bound by law to render assitance to a public servant in the execution of his public duty intentionally omits to assist ; *secondly*, it provides for the punishment when the assistance is demanded for certain specified purposes.[1]

1884. The insertion of this section was objected to on the ground that its inclusion in the Code might lead to much abuse. The Law Commissioners, however, justified it on the ground that it was in consonance with the English Law,[2] and they quoted the following observations of the English Law Commissioners as applicable to this section : " This is an enactment which is essential for the enforcing of general laws in the absence of any particular penalties annexed to disobedience. The penalties may be incurred, although the offender is not appraised by what acts and omissions he will incur them. This is an inconvenience, but a necessary one, for some means are absolutely essential for compelling obedience to the direct and peremptory precepts of the law, and one who is wilfully guilty of disobedience may be regarded as having acted criminally."[3]

1885. The section was only generally worded to the time when these words were written. It only prescribed a penalty for intentional omission to give assistance to any public servant in the execution of the public duty of such public servants.[4] The section has since been greatly improved, and the enactment of sections 42, 77 and 128 of the Code of Criminal Procedure, further define the duties of the public in their relation to public servants, so that there is not now the same inconvenience which the English Law Commissioners deplored as a necessary concomitant of their legislation.

1886. Procedure and Practice.—No prosecution can be initiated under this section without the previous complaint of the public servant concerned.[5] The procedure is, in fact, the same as in the case of an offence under s. 182.

1887. Proof.—The points requiring proof are :—

Clause (1) :—

(*i*) That the accused was bound by law to assist.
(*ii*) That the person to be assisted was a public servant.
(*iii*) That he was then in the execution of his public duty.
(*iv*) That he omitted to give such assistance.
(*v*) That he did so intentionally.

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(1) *Ramaya Naika*, 26 M. 419, F. B.
(2) Eng. Digest, Cr. L., Ch. IV, s. 2, art. 12
(3) 7th Rep., cited in 2nd Rep., s. 117.
(4) Cl. 181.
(5) S. 195, Cr. P. C.

Clause (2):—

Prove (*i*), (*ii*) and (*iii*) as above, and further—

(*iv*) That the assistance required was demanded—
  (*a*) for the purpose of executing a legal process of a Court of Justice; or
  (*b*) for preventing the commission of an offence, or of suppressing a riot or affray; or
  (*c*) of apprehending an offender.
(*v*) That the public servant demanding the assistance of accused was competent to make the demand.
(*vi*) That the accused omitted to give assistance.
(*vii*) That he omitted to do so intentionally.

1888. Principle.—This section deals with persons under a legal obligation to *assist* a public servant, as sections 176 and 177 deal with those who are similarly liable to furnish information. The liability to assist postulates the liability to punishment in case of wanton refusal. Such punishment need not necessarily be as on a conviction for an offence. But both under English law as well as under the continental systems, such a breach of duty is regarded as a misdemeanour punishable by a summary process, and it is also the object of this section.

1889. Meaning of Words.—"*Bound by law to render or furnish assistance*"; Rendering implies personal service, furnishing implies procuring service of another. The word "assistance" here referred to is *ejusdem generis* with the various assistance specified in the second paragraph. The word implies that the party who assists is doing something which, in the ordinary circumstances, the party assisted could do for himself.[1] "*In the execution of his public duty*," which must, of course, be lawful duty. "*Intentionally omits to give such assistance*": But such assistance need not be volunteered. It need only be given whenever called for. This is clear from paragraph 2. "*Legally competent to make such demand*": Here not only the duty but the demand must be legal.

1890. Criminal Omission to Assist Public Servants.—The criminal liability of a person to an offence under this section depends upon his legal liability to assist a public servant. Such liability must then be established by the prosecution. For it is not implied, and cannot be presumed. Such liability may, however, be imposed on the public generally or any specified class of the public, or on a person under certain circumstances. For instance, under s. 78 of the Forest Act,[2] persons who exercise any right in a reserved or protected forest are bound to furnish information respecting the commission of a forest offence. Such a person, therefore, cannot be convicted for refusing to serve as a *panch* for the purpose of drawing up a *panchnama* with reference to certain wood alleged to have been illegally cut in a reserved forest, for the section does not oblige him to assist a forest-officer in this matter.[3] So while landholders are obliged by s. 45 of the Code of Criminal Procedure to give any information which they may obtain respecting the commission or intention to commit a non-bailable offence, it does not cast on them the duty to embark on an inquisition. Consequently, where the magistrate ordered them to get a clue of a case which they did not, they could not be convicted under this section.[4] But S. 42 of the Code of Criminal Procedure casts a duty on every person to assist the police in the arrest of persons and their prevention from escape; consequently where the police had lawfully arrested a person who lay down, and the police asked the accused for help to secure him, which he refused, the Court held him technically guilty under this section, but let him off with a warning.[5]

1891. So s. 103 (*i*) of the Code of Criminal Procedure empowers an officer making a search under Chapter VII of that Code to call upon two or more respectable inhabitants of the locality in which the place to be searched is situate, to attend and witness the search. It does not oblige them to do more, as, for example, to

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(1) *Ramaya Naika*, 26 M. 419, F. B.
(2) Act VII of 1878.
(3) *Babaji*, 22 B. 769.
(4) *Bakshi Ram*, 3 A. 201, decided with reference to ss. 90 and 91, Cr. P. C. of 1872 (Act X of 1872), corresponding now to ss. 44 and 45, Cr. P. C. (Act V of 1898).
(5) *Ambika Prasad*, 139 I. C. (A.) 106, (1932) A. 566.

attest the search-list, and their refusal to do so does not expose them to the penalties of this section,[1] though if a person without a reasonable excuse failed to attend such a search he will be deemed to have intentionally omitted to assist a public servant so that he may be punished under this section.[2] The word "assistance" referred to in the first part is, observed the Court, "*ejusdem generis* with the various forms of assistance specified in the latter half. The assistance must have some direct personal relation to the execution of the duty by the public officer. The signing of the search-list required by s. 103 is an independent duty imposed on the witness. The word 'assistance' as used in the section, implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself."[3]

1892. Intentional Omission.—Further, the mere failure to give assistance under this section is not penal, unless it amounts to intentional omission. In order to render a person liable for such omission it must be shown that (*a*) the accused was legally bound to assist, (*b*) that he had been called upon to render or furnish assistance, and (*c*) that there was a reasonable necessity for calling upon him to do so. The accused may then show that he was not legally bound, that there was no reasonable necessity, or that he had lawful excuse for not assisting in the manner required. So it has been similarly held in England, that in order to support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: *First*, that the constable actually saw a breach of the peace committed by two or more persons; *secondly*, that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and *lastly*, that the defendant was only called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it; and whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question or criterion.[4] Again, the section applies only to a direct refusal or omission to assist a public servant. It does not apply to a mere negligence to perform a lawful duty, as for example, to nominate a watchman on a vacancy occurring as required by law.[5]

1893. This section will apply equally whether the person bound to assist was or was not a public servant. If he was a public servant he may be otherwise and additionally liable; but he is, in any case, liable under this section. It is apprehended that it is not for the accused to say that his assistance was wrongly demanded, if the demand itself was legal. For the measure of his liability to assist is the "legal competency" of the public servant, and not the ropriety of his demand. For, if suppose that, in the case before cited, the fact that the search was improper and made on insufficient grounds would not absolve a person from assisting a public servant, unless the search was illegal, in which case it would affect his competency, so that the withholding of assistance would be not only right but proper.

Disobedience to order duly promulgated by public servant.

188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend

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(1) *Ramaya Naika*, 26 M. 419, F. B.
(2) *Nga Hat*, (1898) P. J. L. B. 406.
(3) *Ramaya Naika*, 26 M. 419, F. B.
(4) *Brown*, C. & M. 314, *Sherlock*, 35 L. J. M. C. 92.
(5) *Kali Prosunno Ghose*, 7 C. L. R. 575.

to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—**It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.**

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. *A* knowingly disobeys the order, and thereby causes danger of riot. *A* has committed the offence defined in this section.

[***Public servant***—s. 21. ***Act***—s. 33.]

1894. Analogous Law.—The provisions of this section were explained by the authors to forbid acts which may endanger the public tranquillity, health, safety or convenience. The offence is subject to the provisions of clauses 2 and 3. A person cannot be punished "merely for disobeying a local order, unless it be made to appear that the disobedience is attended with evil, or risk of evil." Thus no person can be punished for disobedying an idle and vexatious order.

1895. As instances of an order promulgated by a public servant may be mentioned those under sections 133, 136 and 144 of the Code of Criminal Procedure,[1] and Orders under section 237 of the Indian Succession Act,[2] and under section 473 of the City of Bombay Municipality Act.[3]

1896. Procedure and Practice.—No prosecution can be instituted under this section without the previous sanction of the public servant concerned,[4] which cannot be dispensed with even where the Government issue an ordinance making the offence both cognizable and non-bailable.[5] But it has been held in Madras that since section 195 of the Code of Criminal Procedure only speaks of the necessity of requiring a complaint of the public servant concerned, or of some public servant to whom he is subordinate, that section is no bar to a prosecution for disobedience of the order of Government as an order issued by Government is not an order issued by a public servant, within the meaning of that section.[6]

1897. For the rest, the procedure applicable is the same as for an offence under section 182 of the Code. That is to say, the offence is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or Magistrate of the first or second class, and may be tried summarily.

1898. A Magistrate is not competent to try and convict a person under this section of disobedience to his own order though issued in a different capacity. The offence being one issued in contempt of his own authority, the Magistrate is precluded from trying the offender himself.[7] He is, of course, the complainant and as such, he may either complain or sanction the prosecution as required by s. 195 of the Procedure Code. Indeed the Magistrate inquiring into such a case has not to assume the legality of the order the disobedience of which is complained. It is his duty to consider whether the order was properly made or not.[8] But so long as he has not to adjudicate upon the criminality of the accused under this section it is not for him to question the propriety or legality of such order where, however, it is the subject-matter of appeal or revision, it is only right that the Magistrate inquiring into the case should stay his hand, or otherwise, he may find himself overruled and his jurisdiction gone while he is proceeding with the case.[9]

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(1) Act V of 1898.
(2) Act X of 1865.
(3) Bom. Act III of 1888.
(4) S. 195, Cr. P. C.; *Ram Singh*, 155 I. C. (Pat.) 421 S. B.; *Ganesh Wasudev Mavlanker*, 55 B. 322 (331) following *Subrahmania Ayyar*, 25 M. 61. It is not an irregularity which can be cured,—*Mahim Chandra Nath Bhoumick*, 56 C. 824 (830).
(5) *Lachmi Devi*, 58 C. 971.
(6) *South*, 24 M. 70.
(7) *Langadaya*, (1897) B. U. C. 904.
(8) *Surajnarain Dass*, 6 C. 88.
(9) *Dalsukram*, 2 B. H. C. R. 384 (case of magisterial oppression).

1899. As regards the sentence that may be legally inflicted under this section, the distinction between the offences under the second and third paragraphs is noteworthy. For the only sentence that can be legally passed in a case falling under paragraph 2 is simple, while that falling under the next paragraph may be either simple or rigorous.

1900. Proof.—The points requiring proof are :—

(1) That there was promulgation of an order.
(2) That it was by a public servant.
(3) Who was lawfully empowered to promulgate the same.
(4) That the order was directed to the accused.[1]
(5) That the accused knew of the direction, which must be proved by positive evidence.[2]
(6) That the order directed the accused to abstain from a certain act, or to take certain order with a certain property in his possession or management.[3]
(7) That he disobeyed the direction.
(8) That such disobedience—
  (*a*) caused or tended to cause obstruction, annoyance or injury, or risk of the same to any person lawfully employed ;
  (*b*) or caused danger to human life, health or safety, or caused or tended to cause riot or affray.[4]

1901. Charge.—The charge, if necessary, should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That you——, on or about the——day of——, at——knowing that by a certain order, to wit——, promulgated by a public servant, lawfully empowered to promulgate such order, to wit——you were directed to abstain from (*specify the act*) (*or* to take certain order, with——with certain property, to wit——in your possession or under your management), disobeyed such direction, and thereby committed an offence under section 188 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

In one case it was said that the omission to specify the unlawful object or proof of quite another object are defects curable under s. 537, Cr. P. C.[5] *sed qœre.*

1902. Principle.—Sometimes disobedience of the lawful orders of public servants carries with it its own penalty, for the law which sanctions the issue of the order also takes care to see that it is made duly enforceable. And when it is so, the public servant concerned has two strings to his bow : he may proceed under the special provisions which give him the power to enforce his mandate, or he may make him over to a Criminal Court to be dealt with under the section.

1903. Meaning of Words.—"*Order promulgated by a public servant*" : The word "promulgated" implies the publication of an order relating to safety, health or convenience of the public.[6] It does not include decrees, and orders of Civil Courts, *e.g.*, one of injunctions.[7] The promulgation of the order by a public servant should not merely be general, but must directly affect the accused. That is to say, it must be directed to the accused, so that the accused may know that he is thereby placed under a legal compulsion, to take certain order with certain property in his possession. "*Lawfully empowered*" : A person may be legally justified, though not lawfully empowered. For instance, a Police Inspector may stop the playing of music if he apprehends a breach of peace, but he is not "lawfully empowered" to do so within the meaning of the section, which is limited to specifically authorized acts.[8] "*He is directed to abstain from a certain act*" : The order should not be merely general. It must be personally addressed to the accused, otherwise the accused, though aware of it, is not bound. "*If such disobedience*

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(1) *Mulraj*, (1905) P. R. No. 36.
(2) *Abdullah*, 63 I. C. (L.) 865 ; *Ram Das Singh*, 54 C. 152.
(3) *Khodabaksha Shah*, 60 C. 1336 (order under s. 133 of the Cr. P. C.)
(4) *Lachmi Devi* 58 C. 971 (984) ; *Kumud Nath*, 57 I. C. (C.) 915.
(5) *Ramendera, Chandra* 58 C. 1303 (1309).
(6) *Chandrakanta*, 6 C. 445 ; *Mallapa*, 17 Bom. L. R. 676, 30 I. C. 652 ; *Hiralal*, 24 O. C. 18 ; 61 I. C. 237 ; *Raghubir*, 14 C. P. L. R. 174 ; *Hira Singh*, 17 N. L. R. 88 ; *Raghunath*, 47 A. 205.
(7) *Pommanichintakath*, 39 M. 543; *Mallapa*, 17 Bom. L. R. 676. 30 I. C. 652.
(8) *Raghunath*, 47 A. 205 (212).

causes or tends to cause obstruction, etc." : This must be read in the light of the explanation. Intention to cause obstruction is immaterial, if there was knowledge of the likelihood. "*If such disobedience causes or tends to cause danger to human life,*" that is to say, disobedience of the direction spoken of in the first paragraph.

1904. Disobedience of Order.—This section is again general, and deals with the disobedience of an order promulgated by a public servant lawfully empowered to promulgate such order. The essential ingredients of this offence are (*i*) promulgation of a legal order, (*ii*) its communication to the accused, (*iii*) its disobedience by him ; and (*iv*) the injurious consequence as described in the section.[1]

1905. What is a Legal Order.—In the first place, then, there must be an order, and that order must have been passed by a public servant.[2] It must be a legal order, that is to say, if it purports to be an order under some law it must comply with all the provisions of that law.[3] For instance, if it purports to be an order under section 144 of the Procedure Code, it must necessarily be in writing and duly served or promulgated to the public as required by that section.[4] Such was held to be an order passed by the District Magistrate as head of the District Police prohibiting particular kinds of traffic on a road liable to obstruction during the day time.[5] So where a Magistrate having received a report of an accident to workmen employed in quarrying stones from a hill issued, presumably, a verbal order through some clerk to stop the work, and on receiving a report of its continuance summoned the accused and fined him, the Chief Court reversed the conviction holding both the order issued and the trial held by the Magistrate himself to be wholly illegal.[6]

1906. But apart from the provisions of the law under which an order is issued there is nothing in this section to require that it should be in writing, or, indeed, that it should be personally addressed to or served on the accused. Indeed, in the case of an order issued under section 144 of the Procedure Code such a service is neither always necessary nor possible.[7] A general order, though recorded in a proceeding to which the accused was not a party, if known to the accused, will bind him, if it falls within the terms of this section, and if no further formalities were required for its validity. An order passed under section 145 of the Procedure Code directing a person to abstain from the possession of another, would bind him though he was not a party to the proceedings.[8]

1907. Irregular Orders When Legal.—The question whether an order is legal or illegal must depend upon reference to the law or regulation under which it was purported to be passed. Here, again, the question depends upon whether the provisions complied with or departed from were mandatory or directory. If the former, non-compliance with it would be fatal to the validity of the order. If the latter, the order would be valid in spite of the irregularity.[9] So in an order under section 144 of the Procedure Code service of a written copy is directed to be made in the manner provided by section 134, which again provides, that the order shall, if practicable, be served on the person against whom it is made in the manner provided for service of a summons. Here then personal service is merely directory, and it does not go absolutely to the validity of the order. If, therefore, such an order was passed without personal service, that fact alone would not vitiate it so as to render disobedience penal under this section.[10]

1908. So under the corresponding section, it was held by the Full Bench in 1872, that a Magistrate may legally issue an order prohibiting a landholder from

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(1) *Sukar Bhudia*, (1870) B. U. C. 30.
(2) *Mulraj*, (1905) P. R. No. 36.
(3) *Jiaratdin*, 34 C. L. J. 678, 67 I. C. 200.
(4) *Mulraj*, (1905) P. R. No. 36. The headnote of this case in the report is wholly misleading, for it says that an order under s. 188 must be in writing and directed to the accused, which is incorrect.
(5) *Abdulla*, 63 I. C. (L.) 865.
(6) *Mulraj*, (1905) P. R. No. 36.
(7) S. 144 (3), Cr. P. C ; *Kunund Narain Bhoop*, 4 C. 650.
(8) *Goluck Chandra Pal* v. *Kali Charn De*, 13 C. 175 (the notice need not be addressed to any individual).
(9) *Parbatty Charan Aich*, 16 C. 9.
(10) *Ib.*

holding a *haut* on any particular spot on his estate on particular days, on the ground that such an order is likely to prevent a riot or an affray.[1] " A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done, or the property enjoyed in that particular mode, under circumstances calculated to lead to a serious breach of the peace attended with loss of human life ; and it would be by no means proper or desirable to hold that, even in such case, the chief peace-officer of the district has no power to issue an order such as that contemplated by section 62 (now s. 144)."[2] The same view was taken by the Bombay High Court and under the same section.[3] So where a Magistrate issued an order to the owner of a temple to widen and heighten the door to prevent danger to human life, the order issued was held to be right even though it related to the private property to which the public had the right of access on payment of the customary offerings.

1909. But there is no law which enables a Magistrate to pass an order prohibiting the rival disputants to refrain from collecting rents until such time as the right and title of both parties should have been established by order of a competent Court,[4] though in such a case the Court would presumably have the power to attach the property pending settlement of the dispute. But an order directing a person to pay his rent to a certain individual is illegal, unless the latter person is a legally appointed Receiver.[5] In these cases, the property, though private, nevertheless affected the public generally. Such orders would then be justified on the ground that they relate to the protection of public rights, which would be regarded by the law of England as falling under the definition *commune nocumentum*.[6] But the case would be otherwise where the property did not affect the public generally. So an order calling upon the accused to make certain repairs to his well[7] or to prune the hedges of his compound[8] could not be legally passed under what is now section 144 of the Code of Criminal Procedure.

1910. Illegal Orders under s. 144, Cr. P. C.— So, it is not competent to the Magistrate under that section to prohibit the public generally from giving caste-dinners in a city during the prevalence of cholera.[9] So section 133 of the Procedure Code does not empower a Magistrate to order the owner of a house, standing apart from any public road, in its own compound, to repair such a house.[10] So an order issued by a Magistrate warning owners of cattle to take proper care of them, and not to allow them to run at large on the public roads,[11] or an order preventing a house-holder from building a wall in his own house, because it might result in a breach of the peace, are illegal, as they involve unnecessary interference with the rights of private property. So s. 62 of the Procedure Code of 1861 (now section 144) was held not to justify the passing of a summary order directing the owner of a tank in the deep bed of a river to destroy the banks on the ground that they were obstructions to the public in the lawful enjoyment of the river, and that the stopping of the water interfered with the health of the public.[12] Nor did that section empower the passing of any order which was, from its very nature, irrevocable. It did not, for example, empower the Magistrate to pass an *ex parte* order to cut down a large number of trees.[13] Here, the illegality was, however, more due to the order being *ex parte* than to its being an order to cut down trees. An order not to put stake-nets in a river is similarly illegal.[14]

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(1) *Bykuntram Shaha Roy*, 18 W. R. 47.
(2) *Bykuntram Shaha Roy*, 18 W. R. 47 (52).
(3) *Ram Chandra*, 6 B. H. C. R. 36.
(4) *Prosunno Coomer Chatterjee*, 8 C. L. R. 231 ; *Prem Chand Singh* v. *Dharamdas Singh*, 9 C. W. N. 392.
(5) *Jasoda Nand*, 20 A. 501.
(6) *Ramchandra*, (1848) 1 Weir 139.
(7) *Taya*, (1871) B. U. C. 50.
(8) *Bapuji Bechar*, (1874) B. U. C. 81.
(9) *Lakhmidas*, 14 B. 165 ; *Hari Lal*, 14 B. 180.
(10) *Jasoda Nand*, 20 A. 501.
(11) *Ameeruddeen*, 12 W. R. 36.
(12) *Gholam Durbesh*, 10 W. R. 36.
(13) *Uttam Chunder* v. *Ram Chunder*, 13 W. R. 72.
(14) (1878) 1 Weir 138.

1911. So no order could be legally passed under section 146 or section 147 of the Procedure Code directing a person to remove a fence so as to allow the use of an alleged right of way.[1] So the order passed by a Deputy Magistrate prohibiting persons from leavingtheir homes between 9 p.m. and sunrise and frequenting any public road or place whatever, was set aside as illegal.[2] So where certain inhabitants of the village *A* complained to a Magistrate that the inhabitants of *B* were extending their cultivation towards *A*, to the detriment of their pasturage, and thereupon the Magistrate issued an order forbidding the inhabitants of *B* from extending their cultivation in the direction of *A*, it was held that the order passed was illegal and its disobedience could not be held to constitute an offence under this section.[3] So an order forbidding the slaughter of cattle or sale of meat within a radius of three miles of a licensed slaughter-house can be supported by reference to no known law, and is therefore illegal.[4]

Orders Otherwise Illegal.

1912. An order may be *intra vires*; but it may be that the disobedience complained of does not contravene that order. Such was the case of the accused who were ordered not to make any disturbance over a certain person's rights of a ferry. They were convicted of plying another ferry at the site in question though they had caused no disturbance. The order for prosecution was quashed as infructuous.[5] An order under s. 518 of the Criminal Procedure Code being intended to provide for cases where a speedy remedy was desirable, it cannot have more than a temporary operation. Where, therefore, the District Magistrate had, by an order dated 7th February 1873, prohibited the passing of a religious procession with music except along a certain route, that order was no bar to the procession using other routes several years after.[6]

1913. So it was held to be illegal of a Burma Revenue Officer to order persons other than the grantees of land under the Burma Land and Revenue Act to take certain order with building on land, and the disobedience of such order is not punishable under this section.[7] Such was also held to be the case where the Sub-Inspector suspecting certain logs which were lying on trucks at a Railway Station to be stolen property ordered the Station Master to detain the same. The Station Master acting under the orders of his Superior Officer sent them on. It was held that, if the Police Officer suspected the logs to be stolen, his proper course was to attach them as provided in s. 550 of the Criminal Procedure Code. He had no right to detain them and his order being illegal the Station Master could not be convicted of this offence.[8]

1914. A verbal order to remove an obstruction has not the effect of a final order under s. 137 of the Criminal Procedure Code, and is not lawful, and a person disobeying such an order cannot be convicted under this section.[9] An injunction issued by the Civil Court under the Code of Civil Procedure is not an order "promulgated" by a public servant. Consequently, its disobedience is not punishable under this section.[10]

1915. Justifiable Interference with Private Rights.—All these were cases of interference with enjoyment of a private right or right of property, which law discourages except in cases of extreme necessity. Whenever it sanctions interference, it does so in clear and unequivocal terms and under circumstances which must clearly appear.

1916. So where the establishment of a new warrant close to an old one has caused unlawful assemblies, and raised apprehension of a breach of the peace,

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(1) *Nagoji*, (1898) 1 Weir 143; *Lutchmiah*, (1893) 1 Weir 143.
(2) *Komul Kisto Bonick*, 12 C. L. R. 231.
(3) *Kalian Singh*, (1904) A. W. N. 233, 1 Cr. L. J. 916; *Dhan Singh*, 1 A. L. J. R. 615, 1 Cr. L. J. 987.
(4) *Nga Po Naing*, (1892-1896) 1 U. B. R. 179.
(5) *Sujal Biswas*, 22 C.W.N. 599, 46 I.C. 515.
(6) *Ramdas*, 18 A. L. J. 857, 59 I. C. 34.
(7) *Ba Nyun*, 7 L. B. R. 75, 22 I. C. 166.
(8) *Bithal Nath*, 16 O. C. 371, 22 I. C. 753.
(9) *Janaki Nath (Thakur)* v. *Jnanendra*, 26 I. C. (C.) 328.
(10) *Pommanichintakalli*, 39 M. 543; *Mallapa*, 17 Bom. L. R. 676, 30 I. C. 652.

a Magistrate may justifiably issue an order closing it.[1] So an order issued to the priests of a temple to heighten and widen the doorway so as to obviate the dangers from overcrowding and improve the ventilation was justified on the ground of public safety and convenience, and in accordance with what is now s. 144 of the Procedure Code.[2] So the plying of a boat for hire at a distance of three miles from a public ferry being prohibited by the Ferry Act, a Magistrate is empowered to pass an order prohibiting it, and its disobedience would be punishable under this section.[3] So a superior police-officer in charge of a police station is empowered to order an unlawful assembly of five or more persons likely to cause a disturbance of the public peace to disperse, the disobedience of which would be here punishable.[4]

1917. Notice or Declaration for an Order.—As regards orders affecting rights unconnected with the enjoyment of property, the question depends upon the right possessed by a person and the legality of official interference with it. The section only deals with orders passed by public servants. A notice issued by the President of a Local Board under the Madras Local Boards Act,[5] calling upon a person to remove certain encroachment on a public road within a certain time is only a notice, and not an order within the meaning of this section, so that a person neglecting to obey it could not be convicted under it.[6] So an order which is no more than a declaration that, as between the parties to a contention, certain land in dispute does not belong to the public but belongs to one of them, is not one the contravention of which can be visited by a penalty under this section.[7] A mere declaration of a right as between parties is not an order within the meaning of this section.[8] So an order under this section applies to orders made by public functionaries for public purposes, *e.g.*, an order under s. 145, Criminal Procedure Code,[9] and not to an order made in a civil suit between party and party. The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt, and not a prosecution under this section.[10]

1918. Rights of Procession.—As regards the right of procession the Madras High Court has, in a well considered judgment, held that, in affording protection to persons assembled for religious worship or religious ceremonies, the Law points to congregational rather than private worship, and it may fairly be required of congregation that they should inform the authorities of the hours at which they customarily assemble for worship, in order that the rights of other persons may not be unduly curtailed. No sect is entitled to deprive others for ever of the right to use the public streets for processions, on the plea of the sanctity of their place of worship, or on the plea that worship is carried on there in day and night. Nor can such right be interfered with on the ground of custom for as Innes, J., remarked: "To constitute a valid custom it must be reasonable as well as certain and ancient, and it is not probable that any Court would hold that, to be a reasonable custom it requires the members of one section of the community to restrict themselves in their ordinary rights in recognition of the reverence due to a religion to which they do not belong."[11] Of course, where reasonable doubt exists as to the existence of a right, it is no doubt the proper course for the Magistrate to have regard to usage, although its existence may not depend on usage.

1919. On the other hand, if the Magistrate is satisfied of the existence of an emergency which falls for the exercise of the power conferred on him by section 144 of the Code of Criminal Procedure he is justified in suspending the exercise of

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(1) *Bykuntram*, 10 B. L. R. 434.
(2) *Per* Couch, C.J., in *Ramchandra*, 6 B. H. C. R. 36.
(3) *Jawahir*, 1 A. 527.
(4) *Tucker*, 7 B. 42.
(5) Mad. Act V of 1884.
(6) *Subramanian*, 20 M. 1; *Shunmugam Pillay*, (1902) 1 Weir 140.
(7) *Unnoda Prosad* v. *Ranee Shama*, 24 W. R. 20.
(8) *Ib.*
(9) *Satya Charan De*, 35 C. W. N. 1002; *Bhalchandra Randive*, 31 Bom. L. R. 1151; [Order under s. 23 of the Bom. City Police Act.]
(10) *Chandra Kanta* De, 6 C. 445; followed in *Ulwapgavda*, (1896) B. U. C. 864; *contra* in *Krishnashet*, 5 B. H. C. R. 46, gives no reason for holding otherwise.
(11) *Sundaram Chetti*, 6 M. 203, F. B.

rights, however well ascertained.[1] But an order of a Magistrate directing that al music should cease when any procession is passing a certain place of worship is *ultra vires*.[2] Of course, if persons passing in procession attended by a music pass a place in which others are assembled and engaged in public worship, which the music would tend to disturb, it is the duty of persons composing the procession to refrain from such disturbance; but assemblies for purposes of worship are held scarcely anywhere at all hours, but only at appointed hours, and then it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognized place of worship if attended by music. If, indeed, the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognized place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous sect might close every highway to the procession of a sect to which they are opposed, by erecting in the neighbourhood of each highway a place of worship.[3]

1920. Persons Not in Possession.—The disobedience of an order under this section is only punishable if it was passed in respect of property in the possession or under the management of persons against whom the order was directed. It will, therefore, be a sufficient answer to a charge under this section, if it is shown that the accused was not in possession of the property, though the order was passed against him. The possession here spoken of is actual possession, so that a proprietor of a theatre not in actual possession or management of a theatre at the time when a lawful order promulgated by a public servant was disobeyed, could not be convicted under this section.[4]

1921. Disobedience without Obstruction, Annoyance or Injury.—A mere disobedience of an order promulgated by a public servant is insufficient to warrant a conviction under this section. It must, as required by paragraphs 2 and 3 cause either obstruction, annoyance or injury to any person lawfully employed, or the disobedience must cause or tend to cause danger to human life, health or safety, or it must cause or tend to cause a riot or affray. But as regards "obstruction, annoyance or injury" or "danger to human life, health or safety" the "section only applies when the disobedience of an order causes those injurious results to people in the ordinary course of lawful employment to persons who, in the exercise of their rights as ordinary citizens may incur such evil consequences on account of any act or omission of the accused, which act or omission occurs in disobedience of a lawful order. The case of a riot or affray stands perhaps on a somewhat different footing."[5] These observations were made in a case which a Magistrate had ordered the accused, an inn-keeper, to repair the gate of the inn to prevent thefts of traveller's property; and on his failing to comply with the order he was convicted. But this conviction was set aside on revision by the Court which held the section inapplicable to such disobedience.[6] In order to make the disobedience penal all that the section requires is that—

(*a*) It had either caused or tended to cause obstruction, etc.,' to persons lawfully employed;[7] or

(*b*) It had either caused or tended to cause danger to human life, health or safety; or

(*c*) It had caused or tended to cause a riot or affray.

1922. It is only in case (*a*) that the order must injuriously affect persons lawfully employed. In the other two cases the requirements of the section will

(1) *Sundaram Chetti*, 6 M. 208, F. B.
(2) *Muthialu* v. *Bapu Saib*, 2 M. 140.
(3) *Ib.*, 142.
(4) *Krishna Shet*, (1890) B. U. C. 527.
(5) *Per* Mahmud, J., in *Habibullah*, (1886) A. W. N. 251 (252); *Bhure Mal*, 45 A. 526.
(6) *Per* Mahmud, J., in *Habibullah*, (1886) A. W. N. 251 (255); *Bhure Mal*, 45 A. 526.
(7) *Parama Siva Moopan*, 109 I. C. (M.) 606.

be complied with if the order is likely to cause danger to human life, health or safety, or if it had caused or tended to cause a riot or affray.[1] So where a Magistrate issued a notification that all persons desirous of carrying arms should take out a license, enabling them to do so, and the accused who were found carrying arms without a license were prosecuted under this section, it was held that assuming that the prolamation issued by the Magistrate under the orders of the Government to be a proper one, the accused could not be convicted for disobedience, for it was not shown that the carrying of arms tended to cause obstruction, annoyance or injury to any one.[2] In another case, during the outbreak of cholera, the Municipality were vested with legal powers to cope with the emergency. At that time, caste feasts were prevalent and the Magistrate ascertained that several deaths had followed from the eating of greasy and unwholesome food in insanitary lanes. The Municipality thereupon forbade the holding of caste-feasts exceeding 50 guests, and the accused was convicted of the disobedience of the order, but the conviction was set aside on the ground that the holding of the feasts had not been shown to entail the consequences specified in the section.[3] So an order issued by a Magistrate at the instance of one party against another, to remove the roof-drains on the eastern side of his house, was held to be unenforceable under this section, as it was not shown that the disobedience had caused injury to any one.[4]

1923. It has even been held that though the establishment of a *haut* in the proximity of an old *haut* and held on the same day may lead to a breach of the peace, still that alone would not justify the Magistrate in passing an order under s. 144 of the Procedure Code, nor will its disobedience be penalized under this section.[5] A Magistrate has, under section 144 of the Procedure Code, power to prohibit a person from holding a *haut* on a certain specified day, but he has no power to direct that it shall be held upon certain days leaving the party no option to hold his *haut* upon some other days than those on which his rival holds his *haut*. An order so worded is illegal, and its disobedience cannot be punished under this section. But apart from disobedience the Court set aside the conviction on the ground that there was no evidence that the disobedience was likely to lead to a breach of the peace.[6] Evidence on this point must be definite, and the fact that the dispute between two rival zemindars concerning two *hauts* close to each other was obviously likely to lead to a breach of the peace is insufficient, and does not dispense with the necessity of proof.[7] There is, of course, nothing to offend against this section where a man sells *arrack* in contravention of an order by the District Collector prohibiting its sales, unless its sale is attended by the consequence mentioned therein.[8]

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant shall be punished with imprisonment of either description for a term which may extend to two years. or with fine, or with both.

Threat of injury to public servant.

[*Public servant*—s. 21. *Injury*—s. 44.]

1924. Analogous Law.—Both this and the next section deal with criminal threats affecting public servants. In the one case the threat is directed towards him, in the other it is directed against a person seeking his protection. This section applies to judicial officers as well as other public servants. The language of this section may be compared with that of section 503 of the Code which defines criminal

(1) 4 M. H. C. R. (App.) 25; *Ebrahim Sarkar*, 6 C. W. N. 141: *Mallapa*, 17 Bom. L. R. 676. 30 I. C. 652.
(2) *Nand Kumar Bose*, 3 B. L. R. (App.) 149.
(3) *Harilal*, (1889) B. U. C. 433, following 4 M. H. C. R. (App.) 5.
(4) *Shabuckram*, 2 W. R. 32.
(5) *Brojo Nath Ghose*, 4 C. W. N. 227.
(6) *Shyamanand Das*, 31 C. 990.
(7) *Ram Gopal Daw*, 32 C. 793.
(8) *Yarlagadda*, 48 M. L. J. 605, (1925) M. 856.

intimidation. The offence here described is really criminal intimidation from which it is scarcely distinguishable.

1925. Procedure and Practice.—In all respects, including sanction, the procedure applicable to an offence under this section is the same as for all the preceding offences commencing with section 182.

1926. Proof.—The points requiring proof are :—

(1) That the accused held out the threat.[1]
(2) That the threat was directed against a public servant, or a person in whom the accused believes that the public servant to be interested.
(3) That the threat was of injury.
(4) That the object of the threat was to induce the public servant to do or forbear, or delay doing an act connected with the exercise of his public functions.

1927. Principle.—This section deals with the offence of criminal intimidation of a public servant, and it is intended to protect public servants from threats of injury, for which, however, the offender may be no less liable under the general section applicable to such offence.[2] The word "threat" should not be narrowly construed as meaning a mere effusion of passion unattended with any fixed purpose of doing harm. Such threats may technically bring the offender within the purview of this section, but then it may be a case in which the Court would have to consider the propriety of applying the provisions of section 95. Only threats uttered with the ulterior object of inducing public servants to do or forbear are here punishable. Other threats as for a past wrong, real or fancied, may be punishable as insult, if they conform to the requirements of that offence,[3] but they are not punishable under this section.

1928. Meaning of Words.—"*Threats of injury*" : *See* s. 44 Injury implies an illegal harm. A threat to complain is not an injury,[4] nor an institution of suit.[5]

1929. Criminal Threats to a Public Servant.—In order to constitute an offence under this section, there must be a threat of injury either to the public servant, or to any one in whom the accused believes the public servant to be interested. What the section deals with are menaces, which would have a tendency to induce the public servant to alter his action because of some possible injury to himself, or to some one in whom he is or believed to be interested.[6] It is of the essence of the offence that the threat should be uttered in order to influence the public servant against whom it is uttered. But what is a threat ? Obviously it is a declaration of an intention to inflict injury, loss or pain on another. It is not a warning,[7] or a remonstrance, but an expression of the determination of one's mind to punish another in some way stated or understood. It is a threat, if it was meant to be so, whatever may have been the form of expression. Indeed, it is not the commission of the offence against the public order so much as the threat and corresponding apprehension of personal injury which are supposed to be inducements to the public servant to alter his course. "If a man went to a Magistrate in his Court, or to a police officer at the thanna and said, 'Unless you stop the Hindu procession I will commit a theft,' or 'I will commit a riot,' the mere fact that such offences often result in injury to persons, would not, I think, bring the language within this section. If, however, instead of merely stating an intention to commit the offence, he added words threatening personal injury, such as, 'Unless you stop the Hindu procession, I will commit theft of your property,' or 'I will cause a riot and attack you or your police force,' the words of the section would be satisfied."[8] So in a case where the accused was ordered not to interfere with the passage of the Hindu procession, the accused exclaimed that he and others would obstruct the carrying of a Hindu God along the road, even though they might lose their lives, and

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(1) *Yar Mhd.*, 58 C. 392.
(2) S. 506.
(3) S. 504.
(4) *Shahdad Khan*, 6 L. 558.
(5) *Mulai Bai*. 24 A. L. J. 314, (1926) A. 277.
(6) *Amir Khan*, (1886) B. U. C. 273.
(7) *Ib.*, 277.
(8) *Per* Jardine, J., in *Amir Khan*, (1886) B. U. C. 273 (274).

even though a riot might take place, it was held that it was a threat against the Hindus in whom the Magistrate and Police were interested, or that they were concerned in seeing that the Hindus carried their procession without molestation on the part of the accused. He was, therefore, held guilty of the offence here described.[1]

1930. The "threat" here punishable must be the threat of coming injury. It must be such as is likely to operate on the mind of the accused. A mere exclamation that the accused had suffered great injustice, or that he had been ruined by the order passed by the public servant, or that he and his children must poison themselves, for they knew not how to support themselves after the iniquitous order, may amount to anything, but it is not a threat of injury under this section. So again, since the word "injury" implies "illegal harm" caused to any person in body, mind, reputation or property, the term is large enough to embrace threats of any kind affecting one in body, mind, reputation or property.[2]

1931. Again, the threat must be directed either against the public servant himself, or some one in whom he is "interested." This word has been used here as connoting interest of any kind, whether private, personal or official. So where a Magistrate passed an order allowing the Hindus to carry their gods in procession before a mosque, and the accused thereupon howled out "We will not allow it. If the god is carried in a procession we will obstruct, and it matters not if in this affair my life and the lives of our people are lost," he was convicted under this section, the Court holding that the threat was used against the Hindus in whose favour the Magistrate had passed an order and in whom the accused consequently believed the Magistrate and the police were "interested."[3] So an official superior is interested in his subordinate and the "interest" which one person may feel in another may thus be of the widest kind.

1932. Lastly, the intention of uttering the threat must be to induce the public servant to do or forbear. This is necessarily a question of fact depending upon the construction of words used by the accused, about which, of course, there should be no uncertainty.[4] Where the threats are a part of obstruction, the accused can only be convicted of s. 186 and not for threats separately under this section.[5]

Threat of injury to induce person to refrain from applying for protection to public servant.

190. Whoever holds out any threat of injury to any person or the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered, as such, to give such protection, or to cause such protection to be given shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[*Public servant*—s. 21. *Injury*—s. 44. *Threat*—s. 189.]

1933. Analogous Law.—This section makes it a crime to threaten a man to prevent him seeking protection from a public servant empowered, as such, to give him protection.[6] The object of the rule is to prevent persons from lurking inquiry into their own crimes.

1934. Procedure and Practice.—The procedure applicable to an offence under this section is the same as for an offence under section 182.

1935. Proof.—The points requiring proof are:—

(1) That the accused held out the threat.
(2) That it was the threat of an injury.
(3) That it was intended to induce the person threatened to refrain or desist from making a legal application to a public servant against any injury (not necessarily suffered by him).

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(1) *Per* Jardine, J., in *Amir Khan*, (1886) 278). B. U. C. 274, 275.
(2) S. 44, *ante*.
(3) *Amir Khan*, (1886) B. U. C. 273 (274,
(4) *Maheshri Baksh Singh*, 8 A. 380.
(5) *Jagarnath*, (1925) Pat. 183.
(6) 2nd Rep., s. 123.

(4) That such public servant was legally empowered, as such, to give the protection, or cause the same to be given.

1936. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That you——on or about the——day of——at——, held out a threat of injury to——(*name the person threatened*) by stating——(*quote the words used*) which words you uttered for the purpose of inducing the said——to refrain or desist from making a legal application for protection against any injury to wit——to——a public servant legally empowered as such to give such protection, (*or* to cause such protection to be given), and thereby committed an offence within my cognizance.

"And I hereby direct that you be tried on the said charge."

1937. Principle.—The section protects complainants against being threatened into inaction and thereby prevent the public servants from dealing with crime and wrongs which it is their duty to suppress and punish. But whatever may have been the intention of the threatener, the mere uttering of a threat is an offence, if it was intended to prevent a person from resorting to his legal remedy. So it will be an offence under this section if a Bishop were to say to a member of his congregation that he would excommunicate him if he persisted in defending a civil suit filed against him.[1] But in order to enable the Court to hold that the offence had been committed it will have to consider (*i*) whether the acts prohibited by the threat were such as the complainant was legally entitled to do, (*ii*) whether the ecclesiastical authorities had or had not jurisdiction to pronounce on their legality, (*iii*) whether or not the same authority had, under the circumstances, jurisdiction to pronounce a sentence of excommunication, and (*iv*) whether, if it did not possess that jurisdiction, but had exercised it in good faith and under misapprehension of law, such an exercise of jurisdiction would amount to an offence. As these questions, except the first, raised nice questions of civil right involving the consideration of the ordinances and practice of a particular ecclesiastical body, the Court postponed the exercise of its jurisdiction till the complainant had proved in a Civil Court the incompetency of the ecclesiastical authority to exercise the powers it had assumed either generally or in the particular case, and the legality of the rights they severally assert. The proceedings were consequently stayed, pending decision of the Civil Court.[2]

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(1) *Paul De Cruz*, 8 M. 140. (2) *Ib.*

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

1938. Topical Introduction.—This chapter includes many offences unknown to the English law, which does not penalize false pleadings, which the Law Commissioners thought was a blot on the English law which should not be followed in this enactment. They have, therefore, included plaints, written statements, and pleadings, which generally, are required by law to be verified. If false, the verifier would be liable for making a false declaration and punishable under s. 193.[1]

1939. As regards the distinction between the making of a false statement and the giving of false evidence, the Code follows the recommendation of the English Law Commissioners, who observed that the great objection to the two being classed as one was " that they confound the aggravated offence of judicial perjury with the inferior crime of false swearing.'' They had accordingly drafted a separate clause to punish this minor offence, and this has been done in the Code.[2]

1940. Turning next to the last branch of the subject, that relating to the giving of false evidence, the Code again makes a noticeable departure from the English Law. Under the latter system the giving and the fabricating of false evidence are distinct, and treated as offences of varying degrees of gravity. The difference is justified by the authors on the ground of the difference in the standard of morality between the two countries. In England, direct evidence counts for much, and there is, therefore, no incentive to fabricate circumstantial evidence. In India where the credibility of witnesses is low, direct evidence, however great, is not regarded as of the same value as circumstantial evidence. Therefore, there is the more temptation to fabricate such evidence, and thus " a lie is often conveyed to a Court not by means of witnesses, but by means of circumstances, precisely because circumstances are less likely to lie than witnesses. These two modes of imposing on the tribunals appear to us to be equally wicked, and equally mischievous. It will, indeed, be harder to bring home to an offender the fabricating of false evidence, than the giving of false evidence. But wherever the former offence is brought home, we would punish it as severely as the latter. If *A* puts a purse in *Z's* bag with the intention of causing *Z* to be convicted as a thief, we would deal with *A* as if he had sworn that he saw *Z* take a purse. If *A* conceals in *Z's* house a paper written in imitation of *Z's* hand, and purporting to be a plan of a treasonable conspiracy, we would deal with *A* as if he had sworn that he was present at a meeting of conspirators at which *Z* presided.''[3]

1941. These points of divergence necessitate other differences between the two systems, which will have to be presently considered.

Giving false evidence.

191. Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

***Explanation* 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.**

***Explanation* 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.**

Illustrations.

(*a*) *A*, in support of a just claim which *B* has against *Z* for one thousand rupees, falsely swears on a trial that he heard *Z* admit the justice of *B's* claim. *A* has given false evidence.

(*b*) *A*, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of *Z*, when he does not believe it to be the handwriting of *Z*. Here *A* states that which he knows to be false, and therefore gives false evidence.

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(1) *Cf.* Note G; 2nd Rep., s. 165.
(2) S. 182.
(3) Note G.

(*c*) *A*, knowing the general character of *Z's* handwriting, states that he believes a certain signature to be the handwriting of *Z*, *A* in good faith believing it to be so. Here *A's* statement is merely as to his belief, and is true as to his belief and therefore, although the signature may not be the handwriting of *Z*, *A* has not given false evidence.

(*d*) *A*, being bound by an oath to state the truth, states that he knows, that *Z* was at a particular place on a particular day, not knowing anything upon the subject. *A* gives false evidence whether *Z* was at that place on the day named or not.

(*e*) *A*, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. *A* has given false evidence.

[***Oath***—s. 51.]

1942. Analogous Law.—This section defines the giving of false evidence, an offence which is designated "perjury" under English Law, but it is a term which has been advisedly eschewed by the Code, as reminiscent of the English Law, from which the Code differs on material points.

1943. The offence, as understood in the Code, comprises (*i*) a false statement made by a person, (*a*) bound by an oath, or (*b*) by any express provision of law; or (*ii*) a declaration which a person is bound by law to make on any subject; and (*iii*) which statement or declaration is false and which he either knows or believes to be false, or does not believe to be true.

English Law of Perjury.

1944. Under English Law, perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose to the truth in any proceeding in a Court of Justice, swears absolutely, in a matter of some consequence to the point in question, whether he believed or not.[1] Under English Law, to support an indictment for perjury it is on the prosecution to prove (*i*) the authority to administer an oath, (*ii*) the occasion of administering it, (*iii*) the taking of the oath, (*iv*) the substance of the oath, (*v*) the materiality of the matter sworn, (*vi*) the introductory averments, (*vii*) the falsity of the matter sworn, and (*viii*) the corrupt intention of the accused,[2] to which must be added (*ix*) proof by the testimony of at least two witnesses.[3]

1945. Now, in this respect the Indian rule is less rigid and does not require compliance with points (*iii*), (*iv*), (*v*), (*vi*) and (*ix*). In other words, while under English Law, the offence of giving false evidence requires strict compliance with all the necessary ingredients above enumerated, in an offence under the Code, neither the administration nor form of oath nor the materiality of the subject-matter of evidence averred to be false, the introductory averments or the number of witnesses are essential to constitute the offence.

Perjury and False Evidence.

1946. The comprehensive definition of false evidence given in this section follows a line of its own. It does not follow the English Law, but closely proceeds upon the lines of the *Code Penal* of France, regarding the law of "*faux temoiguage.*" Indeed, the offence here described admittedly differed in such important particulars from the English Law of perjury that the authors even eschewed that word coining a term of their own, which they could not be prevailed upon to adopt because they had so materially departed from its substance.[4] That word had, however, found currency in the Regulations,[5] but, nevertheless, as the offence described was in its nature and incidents different from that commonly comprised in that term, the codifiers did not suggest a false analogy by borrowing a term from law, which they had advisedly departed from.

1947. Principle.—The salient features of the offence of giving false evidence are the intentional making of a false statement or declaration by a person who was under legal obligation to speak the truth. The test of the falsehood is his belief,

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(1) 1 Hawk, P. C. C. 69, s. 1.
(2) 2 Starkie's Ev. (2nd Ed.) 621.
(3) 4 Black,, 358; 1 Hawk, P. C. C. 69.
(4) 2nd Rep., s. 130.
(5) Beng. Reg. II of 1807, s. 3, cl. 1; Mad. Reg. VI of 1811, s. 3, cl. 1.

and not the intrinsic truthfulness of the statement. The giving of false evidence is thus the practising of fraud upon Court by making it believe as true that which the deponent does not believe to be true. As such, the offence belongs to the genus of offences concerned with the due discharge of their duties by public servants. The offence is thus a contempt of the Court, and the Procedure Code, therefore, requires that it must sanction a prosecution of the accused.[1]

1948. Three Essentials of False Evidence.—The offence of "giving false evidence," as here described, comprises, at least, three essential factors; (*i*) Legal obligation to state the truth (§§ 1948-1979); (*ii*) the making of a false statement; (§§ 1983-1988) and (*iii*) belief in its falsity (§§ 1984-1988). The first ingredient is most important, and differentiates this offence from what may only amount to a minor offence, or no offence at all. The legal obligation to speak the truth may arise, as the section declares it, from either (*a*) the binding nature of an oath, or (*b*) an express provision of law to state the truth, or (*c*) a formal declaration required to be made by law. The first ingredient again postulates the competency of a person to bind one under the sanction of oath. And this is obvious. For no one is bound to take an oath unless it is administered by a person competent to administer it. And even if he takes an oath before a person not so competent, he cannot be subjected to the penalties of the offence described in this section, for the oath, though given and taken, was not binding on him. The sole criterion of this element is, however, the competency to administer an oath to the person who made the false statement. Its actual administration is under this law immaterial, though it is, of course, otherwise under English Law. For it requires that before a person could be convicted of perjury the officer must have the power not only to administer oath, but he must have in fact administered it, and the person accused of the offence must have taken the oath. If there was any omission in giving or taking the oath, it is sufficient to vitiate a conviction for perjury under English Law.[2] But under the Code the sole test is the competency of the authority before whom a statement complained of is made to administer it.[3] And the fact that the deponent was not intentionally[4] or inadvertently[5] not sworn does not affect his liability to speak the truth, and if he deposes falsely, he is liable to a prosecution for giving false evidence.

1949. This view has been combated by Mahumd, J., in a case in which, however, the same question did not directly present itself. For, there one Maru was convicted of kidnapping on the sole testimony of a girl by name Thakuri, aged eight or nine years, about whom the lower Court had remarked that, though she did not understand the obligation of an oath, she had been cautioned to speak the truth and "was a competent witness, as far as intelligence is concerned." On appeal, the question was whether her evidence was admissible in view of her acknowledged incompetency to affirm, and Mahmud, J., held that it was not, since section 7 required that a witness shall affirm, and its provisions could not be neutralized by those of section 13, which provided against the inadmissibility of evidence on the sole ground of the deponent having omitted to take an oath. "How," he argued, "a person who, by reason of tender years is unable to comprehend either the spiritual or the legal obligations of an oath or solemn affirmation can be regarded as competent to give evidence legally admissible, and to be understood to be liable to such penalties under the law, is a matter the reasons whereof I find myself unable to conceive."[6]

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(1) S. 195, Cr. P. C.

(2) *McArthur* v. *Peake*, N.P.C. 155; *Morris*, 1 Leach. 50; *Benson*, 2 Camp. 507.

(3) S. 13, Oaths Act (X of 1873).

(4) *Anunto*, 14 B. L. R. 295, note; *Sewa Bhogta*, 14 B. L. R. 294 F. B.; followed in *Shava*, 16 B. 359; dissented from *per* Mahmud, J., in *Maru*, 10 A. 207.

(5) *Gobind Chandra Seal*, 19 C. 355; *Rakhal Chandra Laha*, 13 C. W. N. 942 (947).

(6) *Maru*, 10 A. 207; dissented from *per* Straight, J., in *Lal Sahai*, 11 A. 183; *per* Jardine and Parsons, JJ., in *Shava*, 16 B. 359; *per* Mutuswami Aiyar and Wilkinson, JJ., in *Perumal*, 16 M. 105, note; *per* Collins, C.J., and Parker, J., in *Viraperumal*, 16 M. 105.

1950. Curiously, however, this and the other cases[1] in which the question came up for consideration were all cases of infant witnesses in which the question whether the failure to administer an oath would render the witness liable to a prosecution for perjury was collateral to the main question about the admissibility of their evidence. But the two questions are necessarily identical and their determination depends upon the same principle, for if swearing is a *sine qua non* to the admissibility of evidence, then a person unsworn is under no legal obligation to state the truth, and his statement is neither admissible in evidence, nor can it be made the basis of a prosecution for perjury. On this point, but for the dissentient view of the Allahabad Court, the Courts are unanimous, and the combined effect of the two sections of the Oaths Act appears to be that, while the one section lays down the general rule, the other section lays down the effect of its non-observance. As Collins, C.J., observed in a case: "It maintains the legal obligation of a witness to speak the truth, while, at the same time, it provides against the possible failure of justice through a technical irregularity."[2] In this view there is a sharp conflict between the Indian and the English rule. As regards the persons authorized to administer oath, the Indian Oaths Act empowers (*a*) all Courts and persons having by law or consent of parties authority to receive evidence, and (*b*) the Commanding Officer of any Military station occupied by troops in the service of His Majesty. In the latter case, the oath or affirmation must be administered within the limits of the station, and must be such as a Justice of the Peace is competent to administer in British India.[3]

Person administering Oath must be competent.

1951. The same Act provides that oaths and affirmations shall be made by persons such as (*a*) all witnesses, required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence; (*b*) interpreters of questions to, and evidence given by witnesses; and (*c*) jurors. But it excepts a person accused in a case from his examination on oath.[4]

1952. In the case of an accused, his statements made, as such, cannot then be the subject of a prosecution for perjury. But an official interpreter, by the oath taken on assumption of the duties of his office, makes himself legally bound to interpret truly, and he may, consequently, be prosecuted for periury, though he was not sworn in the case.

1953. As to persons competent to administer oath, the Oaths Act is generally worded, but it is clear that, as regards Courts having by law or consent of parties authority to receive evidence, the Act makes the competency to administer oath subject to the authority to receive evidence. Again, such authority is declared to depend upon law or consent of parties. Now under law, a Court of Justice is empowered to administer oath to parties and witnesses appearing before it in a judicial proceeding. But the power to administer oath is confined to the Courts whilst so acting. If, therefore, the Court was acting in some other capacity, it could not arrogate to itself the powers which the law had conferred upon it in a different capacity.

Effect of the Oaths Act.

1954. Where, for instance the accused presented a document said to have been executed by his mother for registration before a Sub-Registrar. The latter having refused its registration, the accused appealed to the District Registrar, who was also the District Magistrate. The latter ordered his subordinate, a Deputy Magistrate and Deputy Collector, to hold an enquiry concerning matters raised in

(1) *Lal Sahai*, 11 A. 183; *Perumal*, 16 M. 105, note; *Viraperumal*, 16 M. 105; *Shava*, 16 B. 359.

(2) *Viraperumal*, 16 M. 105. The contrary held in *Vedamuttu*, (1868) 4 M. H. C. R. 185, was under the old Act of 1840, in which no provision similar to s. 13 of Act X of 1873 existed. The enactment of s. 13 as a part of that Act was thus probably intended to overrule this case.

(3) S. 4, Indian Oaths Act (X of 1873).

(4) S. 5, Indian Oaths Act (X of 1873); S. 342 (4), Cr. P. C.

the appeal. In the course of that enquiry the Deputy Magistrate examined the accused on oath as a witness, on which his prosecution for perjury was sanctioned, and the question was whether he was empowered to administer oath to the accused. The only Act under which such an inquiry could be legally held was the Indian Registration Act, and it was contended that the Deputy Magistrate holding the inquiry was an "officer acting in execution of the Act in a proceeding or inquiry under the Act" within the meaning of s. 82 (*a*). But it was held that that clause obviously meant an officer legally empowered to act in execution of the Act, and as the Deputy Magistrate had no powers whatever under the Act, and as he had not been given the registering powers by the Registrar under s. 11 of the Act his proceedings were in no sense in legal execution of the Act, and he was therefore legally incompetent to bind the accused by an oath.[1] Of course, the fact that a person had some powers under an Act would not legalize his proceedings in a matter unconnected with the exercise of those powers. If, for instance, in the case last supposed the District Registrar had referred the matter under appeal to the Sub-Registrar for inquiry, the result so far as the accused was concerned, would have been the same, for the functions prescribed by s. 74 of the Act were entirely in the Registrar himself, and he could not delegate them to the Sub-Registrar, and the latter's proceeding would thus be not legal execution of the Act.[2]

1955. The same principle runs through other cases which establish the illegality of the vicarious discharge of public duties. So under the Indian Stamp Act, the Collector is empowered to make allowance for spoilt stamps,[3] for which purpose he is empowered to require the claimant to make an oral declaration on oath.[4] Where, therefore, on receiving such a claim, the Collector made it over for inquiry to a Deputy Collector who examined him on oath and recommended his prosecution for perjury to the Collector who sanctioned it, it was held that as there was nothing in the Stamp Act to empower the Collector to delegate his functions (in this matter to the Deputy Collector), the latter was not legally empowered to administer oath, and that the accused could not be proceeded against either under s. 181 or s. 193.[5]

1956. The same view has been taken in a case arising under the Income Tax Act.[6] That case proceeded upon the wording of s. 19 of the old Act,[7] but it illustrates a principle which has a wider application. There the accused had filed a verified petition to the Tahsildar under s. 19 of the Act of 1869, objecting to his assessment. The terms of that section provided for the filing of a verified petition to the Collector, and added that false verification of such a petition shall be deemed to be an offence under this section.[8] It was held that, as the petition was filed before the Tahsildar and not before the Collector, it was not a petition to the officer empowered to receive it. The petitioner could not, therefore, be prosecuted for perjury.[9]

1957. So there is no power in a Magistrate to administer an oath to a person making an affidavit in a criminal case.[10] So a Court calling upon a pleader to explain his conduct under the Legal Practitioners Act has no power to make a statement on solemn affirmation. Consequently, where it administers to him an oath and examines him, he could not be prosecuted for perjury, as the administration of an oath being unauthorized, it does not "legally bind" the person to whom it is administered to state the truth.[11] But in such a case, though the Court has no power to swear the pleader concerned, the proceedings against him being judicial, it has authority to administer oath to those examined therein as witnesses. They would then be liable for perjury if they depose falsely.[12]

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(1) *Radhika Mohun Kuri* v. *Lal Mohun Sha*, 20 C. 719.
(2) *Mata Dayal*, 24 C. 755.
(3) S. 51, Indian Stamp Act (I of 1879) now S. 52, Indian Stamp Act, 1899 (II of 1899).
(4) S. 75, Indian Stamp Act, 1899.
(5) *Niaz Ali*, 5 A. 17.
(6) *Mooneappa*, 5 M. H. C. R. 326.
(7) Income Tax Act (IX of 1869).
(8) *Cf.* now s. 22 (2), Act XI of 1922.
(9) *Monneappa*, 5 M. H. C. R. 326.
(10) *Iswar Chunder Guha*, 14 C. 653.
(11) *Kotha Subba Chetti*, 6 M. 252.
(12) *Ib.*

Necessity of a judicial proceeding.

1958. The Court has doubtless power to examine witnesses in a judicial proceeding. But then it must be a judicial proceeding. A Magistrate holding an inquiry into the conduct of a village headman[1] or to discover and bring to punishment the writer of a scandalous petition against a former Magistrate is not conducting a judicial proceeding, so that it has no authority to administer oaths to persons examined by him.[2] So where a plaintiff filed a miscellaneous petition to the Judge of a district, complaining of the Munsiff having dismissed his case without examining his witnesses who were in attendance, and the Judge thereupon examined the petitioner and finding his statement untrue prosecuted him for perjury, his order was set aside on the ground that the Judge had no authority to administer oath in the proceeding which was authorized by no law, and that the evidence given being *coram non judice*, the accused could not be prosecuted for giving false evidence.[3]

1959. *A fortiori* an inquiry held by a Magistrate without jurisdiction is not a judicial proceeding in which he is competent to administer an oath. So it was held, under the Procedure Code of 1861, that a subordinate Magistrate conducting an inquiry in a case of murder and riot, not being so empowered under section 273 of that Code, was not competent to legally bind persons examined by it by an oath, and such persons could not be prosecuted for giving false evidence.[4] Such would be the case under the present Procedure Code if Magistrates of the second or third class inquired into a case exclusively triable by a Court of Session.[5] Nor could such a Court take cognizance of a case without committal, and any statement before it would be *coram non judice*.[6]

No judicial proceeding.

1960. In all such cases, the question is not whether the Court concerned had jurisdiction, but whether it had jurisdiction in the case or proceeding in which the incriminating statement was made. So where a Magistrate instituted proceedings, purporting to be under section 202 of the Procedure Code, against the accused on receipt of information from the Secretariat, in the course of which he put him on oath, it was held that section 202 only contemplated the holding of a preliminary inquiry on a complaint, and that as the Secretariat information did not amount to a complaint, the proceedings taken were illegal, for, though taken by a Magistrate, they were not magisterial proceedings taken in pursuance of any anthority given by the Code of Criminal Procedure.[7] So where an employee in the Telegraph Department of Government died leaving some money payable to him, one Pitam applied to the Department for its payment to him as the sole heir of the deceased. The latter was sent to the District Judge "for verification and orders". The Judge examined certain witnesses, including the accused as to Pitam's relationship with the deceased, and he was then prosecuted for giving false evidence. But it was held that the Judge's inquiry did not constitute a judicial proceeding and he had, therefore, no power to administer an oath to the accused.[8]

1961. So under section 164 of the Procedure Code as it stood in the Code of 1882, it was held by the Full Bench of the Bombay High Court that any Magistrate not empowered to make the preliminary inquiry in a case exclusively triable by the Court of Session, was not competent to record the statement of a witness under that section, and any statement so recorded could not form the basis of a prosecution

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(1) *Daya Ram*, 57 A. 407.
(2) *Jibhai Vaja*, 11 B. H. C. R. 11.
(3) *Chota Jadub Chunder Biswas*, (1864) W. R. 11.
(4) *Khushi Khan*, (1870) P. R. No. 24. S. 273 of the Procedure Code of 1861 runs thus: "Nothing in the last preceding section shall be held to prevent the subordinate Magistrate in any such case as is therein described, if such Magistrate is empowered to hold the preliminary enquiry into cases triable by the Court of Session, etc.—S. 273, Cr. P. C. (Act XXV of 1861).
(5) *Bharma*, 11 B. 702, F. B.
(6) *Boota*, (1870) P. R. No. 11; *Narain Jan Das* v. *Ram Kishen*, (1879) P. R. No. 32.
(7) *Fateh Ali*, (1894) P. R. No. 15.
(8) *Chait Ram*, 6 A. 103.

for perjury.[1] Under the section as it then stood "every Magistrate" was empowered to record "any statement or confession," which certainly could not be construed to mean as held by the Full Bench. However, any doubt that there may have been on the subject has now been cleared up by the addition of an explanation to that section, which has the effect of overruling the view taken in Bombay. All the same the question of jurisdiction is always material, and as it is one upon which the prosecution must satisfy the Court, it must be established by clear and irrefragable evidence.

1962. "Bound by any Express Provision of Law."—Besides persons bound by an oath, there are those who are "legally bound by any express provision of law to state the truth" in which case the sanction of an oath is not necessary to place a person under a legal obligation to state the truth, for such obligation is created by an express provision of law. The provision of law must be "express," that is to say, it must be a provision which must state that a person making a declaration shall declare therein nothing but what he knows or believes to be true, and nothing that he does not believe to be true. This would be necessarily implied where a document is directed to be "verified," for the verification of a document implies a declaration that it contains a statement of facts which is true. Pleadings in a civil suit are thus required to be verified,[2] and it is provided by the present Code of Civil Procedure that for the purpose of verification the person verifying "shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge, and what he verifies upon information received and believed to be true."[3]

1963. Under the old Code the provis on as to verification was not expressly so stringent, though it was intended to lay down the same rule. But under that Code a practice had grown up to verify pleading in a stereotyped formula to the effect that the contents of the plaint were correct, or that the statements therein made were true except, as to matters stated on information and belief, and that as to those also the verifier believed them to be true. It is impossible to hold a person criminally responsible upon such vague verifications; for the former form may amount to no more than a mere certificate that the writing correctly represented the plaintiff's claim, and the latter is obviously too non-committal, for it says nothing as to what facts were sworn to by the verifier and what were merely stated on information and belief, and unless the Court can lay its finger upon a statement of the accused and say that it was false and knowingly so made by a person, he could not be convicted of giving false evidence.

1964. But where a verification is specific and deliberately false there is nothing in law to prevent a person from being prosecuted for giving false evidence, though it is not evidence in the ordinary sense of the term so as to justify the passing of a decree upon its basis. In other words, the term "evidence" as used here is used in a narrow and special sense and does not coincide with its definition in the Indian Evidence Act.[4] So in a case decided under the old Code of Civil Procedure, the provisions of which have been reproduced in the present Code,[5] a person filing a plaint[6] or a written statement in a suit was held bound by law to state the truth, and he was liable to be prosecuted under this section for a false statement made and known or believed to be false. "For it must be remembered that the very essence of crimes of this kind is not how they may injure this or that party to the litigation, but how they may deceive and mislead the Courts, and thus produce the most mischievous consequences to the administration of civil and criminal justice."[7] But in order to expose a person to the liability of a prosecution for

(1) *Bharma Bin Ningappa*, 11 B. 702.
(2) Ord. VI, r. 15, C. P. C. (Act V of 1908); *Trailokyanath Radharanjan*, 25 C.W.N. 886, 67 I. C. 204.
(3) Ord. VI, r. 15 (2), C. P. C., 1908.
(4) *Ross & Co.* v. *Scriven*, 43 C. 1001; *Baroda Kant*, 30 I. C. (C.) 444.
(5) S. 115, read with s. 51, C. P. C., 1882; now Ord. VI, r. 15, C. P. C. (Act V of 1908), the terms of which are even more explicit. Pleadings include a plaint, *ib.*, r. 1.
(6) *Luxumandas*, (1869) B. U. C. 25.
(7) *Mehran Singh*, 6 A. 626; *Murughendi*, (1891) 1 Weir 154; *Pandu Namaji*, 19 Bom. L. R. 61; *Muthiah Chetty*, 36 M. 392.

giving false evidence, there must be a false statement of fact and not a mere pleading made for the purpose of putting a plaintiff to proof of his case, or denying a document or fact for the same purpose. Where a document is not required by law to be verified, its false verification cannot be made the subject of perjury.[1]

1965. The rule is, of course, only applicable to allegations as to material and substantial facts tending to prove one's case or to disprove the case set up by one's adversary. This view was taken by the Courts at Bombay and Madras in the case of an application for execution which was then[2] as it is now required to be verified,[3] in which it was held[4] that the omission to specify an adjustment of a decree by the decree-holder, though uncertified and made out of Court, and though it could not be taken into consideration by the Court executing the decree under the prohibition enacted in section 258 of the Code (now Order XXI, Rule 2) [5] was still an omission, under section 235, [now Order XXI, Rule 11 (*e*)] of the Code of Civil Procedure which requires the decree-holder to state in his application for execution " whether any, and (if any), what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree." [6]

1966. These were cases of pleadings in a civil suit, but it is not necessary that in order to sustain a conviction for giving false evidence, the statement or declaration should be made in a matter necessarily judicial,[7] for the offence may be equally committed if a false statement or declaration is made before a Criminal or Revenue Court, only in each case it must be proved that there was an express provision of law under which the accused was bound to speak the truth.[8] So a petition of objection to the assessment of income-tax, filed before the Collector, under section 25 of the Income Tax Act is required by law to be verified, and a person subscribing a false verification to such an objection would be guilty of having acted contrary to the express provision of law to state the truth within the meaning of this section (§ 1978.)

1967. Affidavits.—Persons are frequently in the habit of filing affidavits, but such affidavits cannot be the basis of perjury, because in order to constitute evidence the filing of an affidavit must be authorized by any law for the time being in force. An affidavit otherwise filed has not the effect of a statement in which a person is legally bound to state the truth.

1968. Where, for instance, a District Judge had, acting under s. 95 of the Bengal Tenancy Act,[9] appointed a common manager, to whom the Judge ordered the accused to deliver certain accounts and papers, which he refused stating on oath an affidavit that he had no such papers, which he had, and were recovered from his house, whereupon he was prosecuted under ss. 193 and 199, the Court acquitted him on the ground that the Judge, acting under the Bengal Tenancy Act, had no authority to examine him and his affidavit was gratuitous, as there was no law or rule having the force of law permitting the use of affidavits in such proceedings.[10]

1969. So where a person applied to a Magistrate for the stay of proceedings on the ground that he had moved the High Court for transfer of the case, and that the Magistrate was prejudiced against him, because he had instigated the prosecution, whereupon he was prosecuted, the High Court quashed the proceedings holding that the Criminal Procedure Code, contained no provision empowering

(1) *Purendar Jha* v. *Nanulal*, 6 Pat. 184 ; *Janki Rai*, 49 A. 482 (application for substitution of names) ; *contra* in *Kundan*, 99 I. C. 600, (1927) s. 128 (submitted unsound).
(2) S. 235, Cr. P. C., 1882.
(3) Ord. XXI, r. 11, C. P. C. (Act V of 1908).
(4) *Bapuji Dayaram*, 10 B. 288 ; *Panpayya* v. *Narasannah*, 2 M. 216.
(5) Ord. XXI, r. II (*e*), C. P. C. (Act V of 1908).
(6) *Audheen Roy*, 14 W. R. 24.
(7) *Audheen Roy*, 14 W. R. 24 ; *Hori Charan Singh*, 27 C. 455.
(8) S. 161, Cr. P. C.
(9) Act VIII of 1885.
(10) *Abdul Majid* v. *Krishna Lal Nagi* 20 C. 724.

a Deputy Magistrate to administer an oath to a person making a declaration in the shape of an affidavit.[1]

1970. The provision of Law creating legal obligation to state the truth must be strictly construed. For instance, s. 174 of the Criminal Procedure Code empowers a police officer to inquire and report on cases of suicide and for this purpose the next section empowers it to summon and examine witnesses, the section directing that "every person so summoned shall be bound to attend and to answer truly all questions"; consequently, where a person was not summoned but voluntarily appeared before a police officer holding such inquiry and falsely accused, and that of murder, it was held that his evidence did not amount to false evidence since the obligation to speak the truth only rested with persons who had been summoned and not upon those who had appeared without a summons.[2]

1971. In such cases the three material questions that arise are: (*i*) Under the express provision of what law was the accused bound to speak the truth; (*ii*) was his statement false; (*iii*) if so, did he make it knowing or believing it to be false.

1972. Venial Falsehoods.—As it is the first essential of criminality under this clause that there should be an express provision to state the truth it must be clearly established by the prosecution, and the accused may, on the other hand, show that he was under no such obligation which will be a sufficient answer.

(1) Legal Obligation.

1973. The words that one "shall be bound to answer all questions"[3] do not amount to an express provision of law to state the truth,[4] and a person refusing to answer questions put to him by the police does not therefore incur the penalties of s. 193, or of s. 176, or of s. 187.[5] The express provision must not, only create an obligation to speak, but also to speak truthfully, and it is only then that a refusal or a false statement is made obnoxious to the penalties of law. A verified statement or petition denying an alleged compromise filed in Court did not, under the Code of 1859,[6] and does not now[7] require to be verified, and a person falsely denying a compromise cannot be proceeded against on the strength of this section, for false verification.[8] So while a plaint and pleadings require to be verified, a memorandum of appeal does not, and an appellant cannot be prosecuted for making statements knowingly false therein. So an application for the restoration of a case disposed of or dismissed in default, does not require to be verified, and a defendant applying by a verified petition for the rehearing of his case cannot be proceeded against for making a false statement in his petition.[9] So a petition for an order absolute presented under Regulation XVII of 1806 did not require to be verified, and a person verifying it gratuitously was held not liable to conviction for giving false evidence.[10]

1974. The accused in a criminal case is protected from the ordeal of examination as a witness in his own case, and he could not therefore be punished for the making of false statement upon oath or otherwise, so long as his case is *sub judice*, and his exemption continues whether his case is pending in the original Court, or in the Court of Appeal. He could not, therefore, be convicted of filing a false affidavit alleging that the Magistrate had convicted him without examining his witnesses[11] though, it is said, he may be convicted of perjury if he files a false affidavit in support of his application for transfer.[12] An accused illegally pardoned,

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(1) *Iswar Chunder Guho*, 14 C. 653; followed in *Dital Safar*, 5 S. L. R. 102, 12 I. C. 51; *Ram Pershad*, 35 A. 53.

(2) *Mhd. Hayat*, (1922) P. W. R. 6, 65 I. C. 434, (1922) L. 133.

(3) *Kassim Khan*, 7 C. 121, F. B.; *Sankaralinga*, 23 M. 544.

(4) *Sankaralinga*, 23 M. 544; *Luckee Singh*, 12 W. R. 23, followed.

(5) *Lakhu Shah*, (1894) P. R. No. 27; *Nga Po Yin*, 9 Bur. L. R. 203.

(6) S. 120, Act VIII of 1859.

(7) Ord. VIII, r. 9, C. P. C. (Act V of 1908).

(8) *Kartic Chunder Haldar*, 9 W. R. 58.

(9) *Haran Mundul*, 10 W. R. 31.

(10) *Kasi Chunder*, 6 C. 440.

(11) *Barkat*, 19 A. 200; *Subhayya*, 12 M. 451.

(12) *Pir Qadir Baksh*, 6 L. 34.

as in a case not exclusively triable by the Court of Session, stands in the same advantageous position, for his examination on oath being illegal, he was not legally bound by an oath.[1] A statement recorded by a Magistrate under section 164 of the Code of Criminal Procedure[2] has been held to be such as the law requires to be truthful, and as such even though it may be in the nature of a confession the deponent might be convicted of perjury if it is proved to be false.[3] This view is supported on the ground that the accused in the case had not made the previous statement under s. 164 *qua* accused but *qua* complainant. It was said that if the statement had been made *qua* accused then the Magistrate would have followed the procedure prescribed in section 364.

1975. There can be no doubt that s. 164 empowers the Magistrate to record (*i*) a statement "in such of the manners hereinafter prescribed for recording evidence," and (*ii*) a confession to be recorded and signed in the manner provided in section 364, so that while the former may be evidence the latter is not so for the purpose of this section. The legal obligation to tell the truth only arises if the accused was bound by an oath or by an *express* provision of law to state the truth. Now, since the former implies an authority to administer an oath, it follows that in each case the foundation of the offence is laid in the law which either empowers its officer to administer an oath or enjoins one to make a truthful statement. The fact that a Magistrate is generally empowered to administer an oath does not make all statements made to him subject to the offence, for it must depend upon the nature of the proceedings, since there is no law which compels a man to speak the truth at all times, even before a judicial officer. Bhagwandasa's case,[4] already cited, (§ 1959) illustrates the rule that even a judicial officer has no authority to administer an oath, when he is not properly seized of the judicial proceedings before him.

1976. Similarly, as there is nothing in the Indian Railways Act empowering a Magistrate to make an enquiry as to the true heir of a deceased railway servant, a person giving false evidence on oath in such proceeding cannot be legally convicted for an offence under section 193.[5] These were cases of judicial officers performing non-judicial acts. But an executive officer may at times possess the authority to administer an oath. Such power is conferred by s. 63 of the Registration Act[6] on a Sub-Registrar. A person, so examined and making a fasle statement, would then be liable to punishment both under s. 82 (*a*) of the Registration Act[7] as well as s. 193 of the Code.[8]

1977. These cases, therefore, merely illustrate the rule that the question whether a false statement is punishable under the Code depends upon a reference to the law creating a legal obligation to state the truth.

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(1) *Hanmanta*, 1 B. 610; *Dala Jiva*, 10 B. 190.

(2) Act V of 1898.

(3) *Maddala Ramanujamma*, 39 M. 977, but such statement recorded by a Magistrate of third class in a case exclusively triable by a Court of Sessions is not evidence and consequently the deponent could not be punished for perjury; *Bharma*, 11 B. 702, F. B., followed in *Shettappa*, (1912) 14 Bom. L. R. 753, holding that the explanation added to s. 164, Cr. P. C. did not affect that decision.

(4) *Chaitram*, 6 A. 103.

(5) In Burmah a Revenue Surveyor was held not to be a revenue officer empowered to administer an oath, and therefore, a false statement made to him could not be punished under s. 193 though it might be under s. 182; *Ismail*, 8 Bur. L. R. 82, 25 I. C. 515. On the other hand, since an application for registration of his name under the Bengal Land Registration Act has, under the rule, having the force of law, to be verified a person may be punished under this section for making a false verification —*Naloo*, 38 C. 368.

Of course, a person may have perjured himself and yet be not liable to a prosecution if the law which creates an obligation also requires the sanction of an officer named as a condition precedent to a prosecution. Such is the Income Tax Act under which no such prosecution can be had without the sanction of the Collector and the Act bein a special Act, the Court considers it in favou of the subject.—*Jafdeo*, 15 A. L. J. 163; *Allahwarayo*, 10 S. L. R. 64, 35 I. C. 672 following *Chait Ram*, 6 A. 103.

(6) Act XVI of 1908.

(7) *Ib.*

(8) *Narayanaswamy*, (1912) M. W. N. 1107 18 I. C. 662.

1978. False Declaration.—The third clause provides against a false declaration made by a person "bound by law to make a declaration upon any subject." A false verification in a pleading is a false declaration within the meaning of this clause.[1] There is, however, a difference between a false statement and a false declaration. The former may be verbal or in writing, but the latter is a formal statement made in writing and required by law to be so made. A false statement when it amounts to a declaration is punishable, though there may be no express provision of law under which it must have been true. But a false verbal statement is not so punishable unless it was expressly required by law to be true. A declaration as to one's income under the Income-Tax Act,[2] or as to possession of a certain fire-arm under the Arms Act, or as to possession of contraband goods under the Customs Duties Act, or indeed, under any law whether general, special or local, would be a declaration made under the sanction of law, and as such, the declarant would be under the penalty for making a false declaration as here provided. A declaration may be required under the departmental rules of Government, but in such a case a false declarant does not expose himself to a criminal prosecution merely because a declaration was false, for the clause penalizes only those declarations which are made under the sanction of law, and not all declarations whatsoever. Of course, the declaration here intended does not comprise a statement which, though required to be in writing may, nevertheless, be false. A confession by an accused, in his statement made under section 342 of the Procedure Code are, for example, declarations which must be in writing, though they may as well be false.

1979. Again, the declaration must be made on "any subject" which presumably means that the declaration must be made on a subject specified in law. A declaration which goes beyond the specific subject upon which it must be made under law is not then a declaration to which would attach the penalty provided by this section. In other words, in order to be penal a declaration must be false on a point material to the object for which the declaration is made or used[3]; but the same limitation does not extend to a verbal statement which must be truthful whether on a point material or immaterial to the object for which it is required. This distinction though sound appears, however, to have been obliterated by the words "makes *any* statement which is false," and which would, if strictly construed, include anything stated in a declaration though it may have nothing whatever to do with it. In other words, a false statement whether it amounts to a declaration or not would then be penal if it was made by a person who was bound as in the three opening clauses of the section, its materiality being immaterial. That this is so in the case of false evidence is clear from the section, and is supported by precedents;[4] that it is not so in the case of a declaration is equally manifest from the cognate sections which prescribe a penalty for making a false declaration.[5]

1980. The Statement must be False.—Another requisite of the offence of giving false evidence is that the statement made must be false, that is to say, it must be proved to be false by the prosecution. But should its falsehood be established by direct proof, or is it sufficient if it is improbable, indeed, so improbable that a prudent man ought under the circumstances of the particular case act upon the supposition that it was false? The former view has been maintained in some cases,[6] but it is opposed to the provisions of the Indian Evidence Act.[7] Of course, direct proof of the falsity of the statement on which the offence is based, is essential. But as to legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement, and the contradictory statement of the person charged, although not made on oath. Such a statement, when satisfactorily proved, is quite as good evidence in proof of the

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(1) *Lakhu Shah*, (1894) P. R. No. 27; *Padam Singh*, (1930) A. 490.
(2) Act II of 1886, ss. 10, 11, 18 (2).
(3) *Cf.* ss. 197, 198, 199 and 200.
(4) *Aidrus Saheb*, 1 M. H. C. R. 38.
(5) *E.g.*; ss. 197-199, 200.
(6) *Ross*, 6 M. H. C. R. 342; *Niaz Ali*, 5 A. 17, overruled in *Ghulet*, 7 A. 44; *Hira Nand Ojha*, 10 C. W. N. 1099.
(7) S. 4, Act I of 1872.

charge as the incriminatory statement of a person charged with any other offence, and on precisely the same ground that it is an admission of the accused person inconsistent with his innocence.[1]

1981. Of course, in the case of a witness making contradictory statements the Court is justified in convicting the accused, without finding as to which of the statements made by him is false.[2] But such a finding is only unnecessary in cases in which the two statements are so contradictory that one of them must be necessarily false. If, for instance, a witness were to depose that he saw *A* at a certain place and afterwards he were to swear that he did not see him there, the two statements are so contradictory that one of them must be necessarily false, and both of them cannot be possibly true. But if, suppose a witness were to swear that he saw *A* riding a grey pony and then he were to say that he was riding a black pony, the two statements are undoubtedly contradictory, but they are not necessarily both false, nor is even one of them necessarily so. In such a case the accused could not be convicted on the strength of the contradictory statements. The Code of Criminal Procedure only could contemplate a case of such direct contradictions. Indeed, the illustration given certainly presents such a case. *A* stated before the Magistrate that he had seen *B* hit *C* with a club. Before the Sessions Court, he stated that *B* never hit *C*.[3] Here one of the two statements must be necessarily false, for both of them cannot be possibly true.

1982. It may not be possible to establish the falsehood of any one of the two statements, but it is quite apparent that one of them is necessarily false. As such it was not necessary for *A's* conviction to establish which of the contradictory statements was false. The Procedure Code does not lay down a general rule, nor indeed could it do so, for the question is not one of procedure but sufficiency of evidence, upon which no general rule can be formulated. The contrary held by Straight, J., that in such a case "the charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence, independent of the other contradictory statement to establish the falsity of that which is impeached as untrue,"[4] was based upon no sound principle and has been since overruled.[5] But, of course, as Holroyd, J., remarked: "Although you may believe that on one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously believe and swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time being convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. Again, if a person swears one thing at one time and another at another, you cannot convict, where it is not possible to tell which is the true, and which is the false."[6] This is only possible where the two statements are so irreconcilably contradictory that if the one statement is true, the other statement must be necessarily false, "for unless the two contradictory statements are so absolutely opposed as to exclude the possibility of any other hypothesis than that of the prisoner's guilt, there can be no conviction upon an alternative charge."[7] In such a case, it may be that both the statements were false, but it must be shown that both of them could not be possibly true." "It is possible, indeed, that the first statement may have been false through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime."[8] In such a case the two statements, though

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(1) *Ross*, 6 M. H. C. R. 342.

(2) S. 236 (*h*), Cr. P. C., Form No. 28 (4), Sch. 2, Cr. P. C.; *Bharma Ningappa*, 11 B. 702 F. B.; *Mir Afzal*, (1883) P. R. No. 20; *Sohan Singh*, (1888) P. R. No. 32; *Harnam Singh*, (1890) P. R. No. 27; *Santa Singh*, (1899) P. R. No. 3; *Dad*, (1901) P. R. No. 21; and cases cited under s. 193.

(3) S. 236 (*h*) Cr. P. C.

(4) *Niaz Ali*, 5 A. 17; overruled in *Ghulet*, 7 A. 44.

(5) *Ghulet*, 7 A. 44.

(6) *Jackson*, 1 Lewis C. C. 270.

(7) *Ghulet*, 7 A. 44; *Nathu Sheikh*, 10 C. 405.

(8) *Ib.*

contradictory, are not "intentionally" so, and a conviction under section 193 of the Code may not then be possible, having regard to the terms of that section (s. 193).

1983. The falsity of a statement must then be established, but it may be established directly or indirectly, as much by the evidence of witnesses, as by the contradictory statements of the accused. In each case it must be considered whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony.[1]

1984. Falsehood must be Intentional.—Knowledge and belief by a party in the falsity of his statement is essential.[2] Indeed, such knowledge and belief is the very essence of criminality. For if a person did not know the truth, and made a statement respecting matters which he believed to be true, he could not be convicted, for that may at most amount to mistake due to ignorance or defective observation. This raises the question of intention. For a person knowingly making false statement does so "intentionally." And the question of intention raises the question of materiality, for though "materiality may not be essential to the offence, but it must be taken into consideration in arriving at the intention with which the false statement was made."[3] So Scotland, C.J., observed that though materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence, still "in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as, if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner."[4]

1985. This subject will be found further discussed under section 192 (§§ 2000, 2010-2015).

1986. Three Degrees of Knowledge.—The section deals with three degrees of knowledge : (*a*) a statement *known* to be false, (*b*) a statement *believed* to be false, and (*c*) a statement *not believed to be true*. A statement false to the knowledge of the maker requires no comment. It is the most flagrant instance of perjury which could be attributed to no other intention than the perversion of Justice. The question whether a certain statement was known to be false to the maker is one of fact, which nust be decided on the proved circumstances of each case. The falsity must be known to the maker at the time of the making of the statement, for otherwise it may be that he believed in his statement at the time he made it, its falsehood being revealed to him afterwards when it was past recall. Knowledge is cognition and cognition implies conscious knowledge of facts. Such consciousness may arise from observation, or inference, but in either case it is knowledge if the consciousness was of the phenomenon called a fact. Where the representation of the phenomenon is not complete, there may be still consciousness of its existence, but it is a consciousness not directly arising from it, but one which arises from other facts contributing to the completion of cognition.

1987. These facts are in this connection spoken of as human experience A person *A* may know that *B* hit *C*, but he may not know the weapon he struck him with. But he knows that *A* was in the habit of carrying a stick, and he knows that it is a handy weapon. He is asked with what weapon the assault was made and he replies, with a stick. Here the speaker did not know that *B* had hit *C* with a stick, for he had not seen him striking with a stick. The knowledge of a stick in such case implies visual perception of the stick, and so in many cases knowledge is synonymous with sensual perception. But it is not invariably so. For suppose *B* was seen getting into a room till then vacant, and *C* then entered it and then struck *B*. *A* saw both *B* and *C* enter the house after which *B* returned with a broken skull. Here *A* may truthfully say that he knew that *C* had hit *B*, though he had not

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(1) *Ross*, 6 M. H. C. R. 342.

(2) *Muhammad Ishaq*, 36 A. 362 ; *Azibulla* v. *Udoy Southal*, 13 C. W. N. 422, 1 I. C. 287 ; *Baroda Kanta Sarkar*, 30 I. C. (C.) 444 ; *Lachmi Narain*, 16 O. C. 81, 19 I. C. 712.

(3) *Tukaram*, (1862) 12 B. H. C. R. 234.

(4) *Aidrus*, 1 M. H. C. R. 38 ; *Muhammed Ishaq*, 36 A. 362.

seen him hitting the latter. But his knowledge though inferential is knowledge, though it may have been mistaken. For *D* may have entered the room by the back-door unobserved by *A* and hit *B*. In such a case, *A's* statement though false does not constitute false evidence, for it lacks the element of criminality, namely, knowledge or belief in its falsehood. But for the purpose of judging this, law has to look into his mind. It has to see what was passing therein at the time he made the incriminating statement—could it be deception or delusion. Did he believe in his words or were they spoken with no faith in them? Such a case may present some difficulty for it may be a matter of double inference; inference on the part of the Judge or the jury as to what was then in the mind of the accused, inference by the accused upon which his knowledge or belief was based.

1988. But such inference is in both cases capable of analysis and judicial determination. It must, however, be based not upon the standard of a hypothetically prudent or reasonable man, but upon the standard of the accused. In short, the question is not what under the circumstances the accused as a reasonable man should have believed, but what he, as a reasonable or unreasonable man, did actually believe. If he was hasty in drawing conclusions, reckless in thought, the Court could not punish him for his haste or recklessness for he is to be tried for perjury and not for blundering reason. But there is a limit to such blundering beyond which the tendency of the Court is to hold blundering highly improbable. Perjury then begins and blundering ends. So it has been held that the making of a false statement, without knowledge as to whether the subject-matter of the statement is false or not, is legally a giving of false evidence.[1] Where, therefore, the prisoner Echan Miah who had had a long feud with the complainant, one day reported to the police that the latter had committed theft of his cloth, two cups and a pair of jars. The police searched the complainant's house and recovered a cloth, two cups and a pair of jars which Echan Miah and his witness swore to as being his stolen property. It was proved that the cloth bore the dhobi mark of the complainant, and the cups and jars were similarly proved to belong to him. It was held that Echan Miah had intentionally given false evidence in falsely swearing to the identity of the property, and as to his witnesses "they made the false statement, having in all probability, no knowledge whatever on the subject, one way or the other." Their offence was nevertheless, held to be of giving false evidence under the law, as they could not have believed what they deposed to be true.[2]

1989. Abetment of Giving False Evidence.—One person instigating another to make a false statement may not be guilty of giving false evidence, but he will be guilty of the abetment of that offence. But in order to hold a man liable for abetment, it must be shown not merely that he instigated the making of a statement, but also that it should be made falsely.[3] It is abetment equally whether the abettor instigates another to make a false statement or to suppress a true statement. A person asking a witness to suppress certain facts in giving his evidence would thus be guilty of abetment under this section.[4] So another who had instigated a witness to say that a certain person when arrested was found standing in a certain place which was not true, was held to have abetted an offence under this section.[5] So where a person falsely personated another witness, the scribe of a document and swore having as such written it, persons who set him up as the true scribe and thus cause him to give evidence as such. are guilty of abetment.[6]

Fabricating false evidence.

192. Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear n evidence in a judicial proceeding, or in a proceeding taken by law before

(1) *Echan Miah*, 2 W. R. 47.
(2) *Echan Miah*, 2 W. R. 47. To the same effect, 1 Hawk, P. C. c. 69, s. 6; *Mawbey*, 6 T. R. 619 (637); *Schlessinger*, 17 L. J. (M. C.) 29.
(3) *Nim Chand Mookerjee*, 20 W. R. 41.
(4) *Andy Chetty*, 2 M. H. C. R. 438.
(5) *Rawji*, (1893) B. U. C. 632.
(6) *Chundi Churn Nath*, 8 W. R. 5.

a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations.

(*a*) *A* puts jewels into a box belonging to *Z*, with the intention that they may be found in that box, and that this circumstance may cause *Z* to be convicted of theft. *A* has fabricated false evidence.

(*b*) *A* makes a false entry in his shop-book for the purpose of using it as corroborative evidence in the court of justice. *A* has fabricated false evidence.

(*c*) *A*, with the intention of causing *Z* to be convicted of a criminal conspiracy, writes a letter in imitation of *Z's* handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. *A* has fabricated false evidence.

[***Public servant***—s. 21. ***Document***—s. 29.
Judicial Proceeding—s. 4 (m), Cr. P. C.]

1990. Analogous Law.—This section has been extended since it was first drafted by the Law Commissoners,[1] by the addition of the words "or makes any false entry in any book or record or makes any document containing a false statement," after the words "any circumstance to exist." The section has been drawn in the light of observations of the English Law Commissioners who approved the language of the Code and had adopted it in framing their own draft Code.[2] As to this section the Commissioners remarked that the essence of the offence may be the deceit put upon the Court without any intention of injustice to another as in the illustration (*c*).[3] But the authors remarked: "We do not propose to punish a person for fabricating evidence with the view of escaping punishment, unless he also contemplated some injury to others as likely to be produced by the evidence so fabricated. If *A* stabs *Z* and in order to escape detection, disposes *Z's* body in such a manner as is likely to lead a jury to think the death accidental, we do not propose to punish *A* as the fabricator of false evidence."[4] But this is not the view taken of the section which has been held to apply to a fabrication apart from the question of injury, dishonesty or fraud as those concepts are understood in the Code.[5]

1991. Principle.—This section is generally worded, and applies to any "circumstances" whether it is caused by forgery or fraud, if its object was to supply false data upon which the Court might be misled into giving an erroneous decision, touching any point material to the result of the proceeding. The object of all these sections is the same—to purge the Courts of all extraneous influences, and to assure the proper administration of justice. The offence does not depend upon the question of injury, nor does it require the presence of dishonesty or fraud, apart from the fraud involved in imposing on the Court.

1992. Meaning of Words.—"*Whoever causes any circumstance to exist*": "*Whoever*" would include an accused person in a case. If, therefore, he is charged for selling adulterated *ghee* and he produces a false sample as passed by the health officer, he would be guilty under this section.[6] The words "*causes any circumstances to exist*" are not so general as the doing of anything. The words imply an effect produced due to the agency of the accused. "*Or makes any entry, etc.*": These words were only added to make the meaning of "any circumstance" more explicit. "*Intending that such circumstance.....may appear in evidence,*" which means that the circumstance must be intended and not innocuous, and the result intended must be to injure some one through the innocent agency of the Court. "*Judicial proceeding or in a proceeding taken.....before a public servant*":

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(1) Cl. 189.
(2) Art. 119, page 62, 5th Rep; *Cf.* 2nd Rep. on the Code, s. 136.
(3) 2nd Rep., s. 136.
(4) Note G.
(5) *Mazhar Husain*, 5 A. 553; *Mir Ekbar Ali* 6 C. 482.
(6) *Bhagirath*, 57 A. 403; following *Rama*, 46 B. 317 contra *Ram Khilawan*, 28 A. 705 dissented from.

"Judicial proceeding" has been defined in section 4 (*m*) of the Code of Criminal Procedure and "public servant," by section 21 of the Code. The term "judicial proceeding" will have to be explained at some length (§ 2001). "*Or before an arbitrator*," who is a judge appointed by the consent of parties, and who, therefore, requires the same protection. It includes one or more *panchas* appointed by parties for the settlement of a matter in controversy between them. "*To entertain an erroneous opinion*," which means not merely a passing observation, but a definite order, or judgment though it may not be final. That opinion must be erroneous on a material point. In this respect the fabricator of false evidence enjoys an additional immunity not vouchsafed to a witness. Where, therefore, a document is produced which enables the Court to form not an erroneous but a correct opinion the person producing it cannot be held guilty of this offence.[1]

1993. What is Fabricating False Evidence.—Though the offence of fabricating false evidence is closely allied to the more general offence defined in the last section, still it presents some distinguishing features which have to be noticed. The offence here defined contains five principal ingredients: (*i*) There must be the causing of any circumstance to exist, or making any false entry in any book or record, or making any document containing a false statement; (*ii*) it must be with the intention that it may appear in evidence; (*iii*) such evidence must be before a judge, arbitrator or public servant and (*iv*) that it may cause him to entertain an erroneous opinion, (*v*) upon any material point. A person who gives false evidence in Court makes a false statement, with what intention it is immaterial, but intention in the case of the fabricator is all in all. Again, while the question of materiality and the effect of his evidence in Court is immaterial in the case of a perjurer, they are two essential elements in the constitution of his crime. This difference is due to the different circumstances in which the offences of the two are committed. The one gives evidence *in facie curiæ*, in respect to which the Court demands that whatever he shall state shall be truth. The other perpetrates his crime behind the back of the Court. In his case, therefore, the question of materiality is material. In fact, but for the safeguards here presented, a person charged with fabricating evidence may incur the penalty for fabricating false evidence, though his act may have caused no injury and may indeed never have been intended to be used as evidence. So it has been held that the preparation of a false balance sheet does not amount to an offence under the last section,[2] and *a fortiori* it would not be an offence under this section.[3] The question of falsity is one of fact, already considered, but the intention to impose on the Court is then a cardinal element in the composition of the crime.

(i) Falsity.

1994. A person may fabricate false accounts and he may, for so doing, incur the penalty provided by other sections of the Code. But unless his fabrication was accompanied by the intention of using the fabricated accounts in Court, he could not be convicted under this section. There may be no proceedings actually pending in Court—they may not have been even instituted, but the offence would be complete as soon as there is fabrication with that intention.[4] The fabrication here made punishable is the causing of any circumstance to exist, or making any false entry, or false statement in a document. It thus excludes all acts merely constituting preparation or attempt. If, for instance, intending to sue one on a forged bond, one purchases a stamp paper in the name of his intended debtor, that fact alone is said to fall short of an attempt; it is said to be only an act in preparation for which the Code prescribes no penalty.[5] But if even a word had been written on the stamp, the attempt, it is said, would have been complete, for then something would

Preparation: Attempt.

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(1) *Badri Prasad*, 40 A. 35.
(2) *Moss*, 16 A. 88; such a case would now be met by s. 477-A.
(3) Cf. *ill.* (*b*).
(4) *Mula*, 2 A. 105.
(5) *Ramsarun Chowbey*, 4 N. W. P. H. C R. 46.

have been done towards the commission of an offence, which is the essence of that offence.[1]

1995. As Turner, J., puts it: "The endorsement of the stamp vendor forms no part of the document which, it may be assumed, it was the intention of the person who procures the endorsement to make on the face of the stamp-paper. The offence of forgery had, therefore, not proceeded beyond the stage of preparation."[2] But the facts which that learned Judge had to deal with were exactly identical, and still the accused was convicted for fabrication. "The object of the endorsement, made by the vendor of a stamp is to afford proof of the person to whom it is sold; and in suits brought on documents written on stamp-paper, it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and, therefore, as evidence of the probability that the document was made by the person by whom the paper was procured."[3] He then went on to add that in the earlier case the accused was held not guilty of forgery, but the question whether he could not have been convicted of an offence under this section was neither raised nor considered. His view then was that the purchase of stamp in the name of another person with the intention of committing forgery constitutes fabrication, for which the accused may be justifiably convicted. This view has since been followed by another Judge of the same Court,[4] though no doubt, it leaves the accused, no *locus pœnitentiæ*,[5] but then as the section is worded it is difficult to see how any other view is possible.

1996. A person who purchases a stamp-paper in the name of another does abet the making of a false statement on any document, and if it is accompanied by the intention to forge a bond thereon, he could not but possess the intention to use it in evidence in a judicial proceeding, for he must know that such a proceeding is inevitable. It will certainly help to form an erroneous opinion concerning the debtor's indebtedness to him, which is a point material to the result of the suit. The question, however, remains, is the endorsement of a document within the meaning of the Code. It is, if it is "intended to be used or which may be used as evidence of that matter."[6] An endorsement of the name of the purchaser is not necessary under the Indian Stamp Act.[7] But it is provided for by the rules made by the Local Governments under section 74 of the Act. And the object is undoubtedly to prevent fraudulent manipulation of deeds.

1997. In such cases the act of the accused was intended to use in the Court an instrument for injuring another. But injury to another is not a component part of the offence. For a person may fabricate a document to screen himself from punishment, in which case he commits the offence without intending to injure anybody. So where a certain Municipality prosecuted a person for building without permission, and he pleaded permission, for which the accused, a Municipal clerk, was called upon to produce the papers, who finding them misled, forged the orders called for and produced them in Court. The original orders were subsequently discovered; he was thereupon prosecuted and the Court held his offence to fall under this section.[8] In another case, the accused altered the date of an instrument so as to bring it within time for registration, and the Court held that, though in the absence of dishonesty or fraud, the offence did not constitute forgery, still it amounted to an offence under this section.[9]

Intention and not Injury.

1998. The section strikes at a fraud practised on the Courts, and the fabrication of documents is but one mode in which it may be practised. The causation of any circumstance with that intention is sufficient to constitute the offence. Where the accused, intending to implicate their enemy, secreted some stolen railway pins

(1) *Ramsarun Chowbey*, 4 N.W.P.H.C.R. 46.
(2) *Mula*, 2 A. 105.
(3) *Ib.*
(4) *Durgacharan Gir*, 25 A. 75.
(5) *Dhundi*, 8 A. 304; Cf. *MacCrea*, 15 A, 173.
(6) S. 29.
(7) Act II of 1899, s. 74.
(8) *Muzhur Husain*, 5 A. 553.
(9) *Mir Ekbar Ali*, 6 C 182.

in his fields and godown, they were held to be guilty both of an offence under this section as well as one under section 414, because the accused intended that their enemy might be convicted on the strength of his being found in possession of stolen pins.[1] The same view was taken in another case in which the accused had dug a hole intending to place salt therein in order that the discovery of the salt so placed might be used in evidence against his enemy in a judicial proceeding. But in this case as the accused had done no more than dug a hole, he was convicted only of an attempt.[2] The same view was taken in another case in which the accused who were informers to the police of possession of illicit salt by a person, who was their enemy, accompanied the Police Inspector as he went to make a search carrying concealed on their person a quantity of illicit salt in two earthen vessels, but which they could not deposit into the house, before their own apprehension.[3]

1999. Intended Use in Judicial Proceeding.—The causing of a circumstance or the making of a false entry or statement in a document must be intended to be produced as evidence in a judicial proceeding, or in a legal proceeding before a public servant, or before an arbitrator. Since the gist of the offence lies in the intended use in a judicial proceeding, it follows that it is not necessary that the judicial proceeding should have been pending at the time of fabrication. All that is necessary is that such proceedings were imminent and the document in question was intended to be used in such a proceeding.[4] The intention to produce it, as such, must be proved by the prosecution. For it is an integral part of the offence. The intention must be to produce it as evidence and that evidence must be before the Court, or other public servant, or arbitrator as stated in the section. Now, as it is there pointed out, not only must it appear as evidence, but it must be evidence upon a point material to the result of the proceeding in which it was intended to appear.

(ii) Must be Admissible Evidence.

2000. In short, it must appear not merely as evidence, but as material evidence in the case. There can then, of course, be no fabrication, if it is not even admissible as evidence, for unless it is so admitted it is not evidence, much less material evidence which the section requires. This excludes the fabrication of documents which are anyhow inadmissible in evidence. Police-diaries furnish an apt illustration of this rule. Entries made therein by police-officers are inadmissible in evidence. They may be false and intended to be used as evidence, but being inadmissible as such, their author cannot be punished under this section. So where a police-officer who had suppressed a document entrusted to him to forward to his superior officer, made a false entry in his official diary that the document in question had been so forwarded, intending that, if he were prosecuted under the Police Act, for suppressing it, such entry might be used as evidence in his behalf to prove that he had so forwarded it, it was held that since the entry was not admissible on his behalf, though contrary to his intention, it might have been used against him, the accused could not be convicted for fabricating it under this section.[5] This case was followed in another case of the same Court in which it was pointed out that the fact that the special Police Diary is admissible in evidence to refresh the writer's memory, that alone did not render them material evidence, or indeed any evidence of any date, fact or statement therein contained.[6] Similarly, a false statement in the recital of title to property in a document, when not admissible in evidence against the person against whose interest such statement was made, furnishes no ground for a conviction under this section.[7]

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(1) *Rameshar Rai*, 1 A. 379.
(2) *Nunda*, 4 N. W. P. H. C. R. 133.
(3) *Soondur Putnaick*, 3 W. R. 59.
(4) *Gobind*, 45 B. 668; *Rajaram*, 22 Bom. L. R. 1229.
(5) *Gauri Shankar*, 6 A. 42; overruled on a different point in *Nand Kishore*, 19 A. 305, followed in *Zakir Husain*, 21 A. 159.
(6) *Zakir Husain*, 21 A. 159; following *Mannu*, 19 A. 390, F. B.; *Gauri Shankar*, 6 A. 42.
(7) *Chandra Kumar Missir*, 2 C. L. J. 46; *Mhd Kajim Ali* v. *Jarabdi*, 46 C. 986; *Gauri Shankar*, 6 A. 42; *ZakirHusain*, 21 A. 159; *Fazl Ahmad*, (1914) P. R. 1, 23 I. C. 696; contra *Canta Sarkar*, 30 I. C. (C.) 444; *Amolak Ram*, (1918) P. L. R. 56, 43 I. C. 429.

(iii) Evidence in Judicial Proceeding.

2001. In many of the above cases the document might be admissible in some proceeding; but the section requires that it should have been intended to be used as evidence in a judicial proceeding. Now, what is a judicial proceeding? According to the Code of Criminal Procedure, it includes a proceeding in the course of which evidence is or may be legally taken on oath.[1] As an oathincludes an affirmation[2] the power to take evidence on oath is the salient feature of a judicial proceeding. It thus differs from a non-judicial proceeding in which a witness may be examined, and may even be bound to answer all questions; but as the person examining him cannot administer an oath his statement so taken does not constitute evidence taken in a judicial proceeding.[3] All proceedings of a judge are not judicial, nor does the mere fact that the judge is legally empowered to administer oath make his proceedings necessarily judicial. In order to be judicial they must relate in some way to the administration of justice, or the ascertainment of any right or liability.[4] An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but even a judge acting without such an object in view, is not acting judically.[5] For instance, a Sub-Registrar making an inquiry for the purpose of determining whether he should register a document presented to him for registration, has not to determine the jural relations between parties arising out of the document presented for registration. His proceedings are, therefore, not judicial.

2002. So the Registrar on appeal, though he takes evidence, has the same limited function to discharge. His proceedings are consequently not also judicial. His inquiry is analogous to one by the Registrar of a High Court as to whether a clerk or other subordinate has done his duty properly. In such cases, the inquiring officer may possess some of the attributes of a Judge, but that alone does not convert his proceedings into judicial proceedings. As West, J., remarked: "A provision that a particular officer may, for particular purposes, be deemed a Court, does not warrant an extension of that provision so as by inference to produce a group of rules in conflict with the general system."[6] The definitions of the "Court" in the Indian Evidence Act[7] or of "judicial proceeding" in the Procedure Code, must then be regarded as framed for the limited purposes of those Acts, and could not be extended beyond their legitimate scope. So the investigation made by a police-officer under Chapter XIV of the Procedure Code, is not a judicial proceeding, nor does his examination of witnesses in the course of such proceeding under section 161 constituted evidence taken at any stage of a judicial proceeding.[8] Indeed, it was at one time even held that a Magistrate taking down the statement of a witness under section 164 of the Procedure Code in a case exclusively triable by the Court of Sessions in which he had no jurisdiction to make preliminary inquiry, could be said to be conducting a judicial proceeding[9] though this is a view which has since been overruled by the Legislature, and such examination can now no longer be regarded as otherwise than judicial.[10] The preliminary examination of a complainant by a Magistrate before deciding to take action on his complaint is a judicial proceeding, because it is a proceeding directed by law,[11] and more so because it is a proceeding in which the Magistrate had to determine the jural relation between him and the person accused.

2003. The same view must be taken of a magisterial inquiry under s. 144 of the Procedure Code,[12] or of an inquiry into the conduct of a pleader under the Legal Practitioners' Act.[13] In such cases, the term means nothing more nor less

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(1) S. 4 (*m*), Cr. P. C.
(2) General Clauses Act (X of 1897), s. 3 (36).
(3) *Kasim Khan*, 7 C. 121, F. B.
(4) Stephen, Dig. Cr. L., Art. 148.
(5) *Per* West, J., in *Tulja*, 12 B. 36 (42).
(6) *Ib.*
(7) S. 3, Act I of 1872; *Tulja*, 12 B. 36.
(8) *Ismail*, 11 B. 659; contra *Soondur Putnaick*, 3 W. R. 59, in which no reasons are given for holding otherwise.
(9) *Bharma*, 11 B. 702, F. B.
(10) S. 164, Expl., Cr. P. C.; *Alagu Kone*, 16 M. 421: *Suppa Tevan*, 29 M. 89.
(11) *Mata Dayal*, 4 N. W. P. H. C. R. 6.
(12) *Tirunarasimha*, 19 M. 18.
(13) *Kotha Subbachetti*, 6 M. 252.

than a step taken by the Court in the course of the administration of justice in connection with a pending case.[1] In this case, a bailiff had been, at the beginning of the day, solemnly affirmed once for all, to speak the truth as to the service of summonses in all the cases coming before the Court that day, still it was held that though the witness had been so sworn, and the names of the cases in the day's list had not mentioned when the affirmation was administered, still he was liable under section 193 for making a false statement, because the oath was considered to have been made in a stage of a judicial proceeding.[2] Here the proceeding was judicial, though the mode of conducting it was irregular.

2004. But there are cases in which the proceedings can by no means be considered judicial. Such would be the case where a Magistrate makes an inquiry within the province of the police, as where he makes an inquiry to trace the writer of an anonymous communication charging certain persons with murder, but not with the object of ascertaining the truth of the accusation.[3] The same view has been taken in Bombay where an inquiry made by a Magistrate to bring to punishment two writers of a scandalous petition against his predecessor, was similarly construed.[4] So where a Sub-divisional Magistrate made a preliminary inquiry under the directions of the District Magistrate with a view to ascertain whether there was a *prima facie* case against a police-officer with a view to sanctioning his prosecution, the Madras High Court held the proceedings to be departmental and not judicial, so that a witness examined in such an inquiry could not be punished for giving false evidence.[5] So where the Telegraph authorities having had a claim made against them by the heir of a deceased employee, referred it to the District Judge for verification, and he thereupon inquired into his claim and examined witnesses, his proceedings were held to be non-judicial.[6]

2005. In cases other than judicial, properly so called, sometimes the Legislature expressly declares certain proceedings to be judicial. They will then be so regarded whatever may be their nature and character. For instance, proceedings under section 12 and Chapter IV of the Income Tax Act have been expressly so declared,[7] and so are proceedings before a Coroner.

2006. It has been already stated that a document might be fabricated against a future judicial proceeding. Such was the case of the accused who being a yearly tenant of the complainant's got a rent note prepared for a period of four years and had it registered without complainant's knowledge. It was held that since the note contained an admission against the interest of the accused it was admissible on his behalf and as it had been prepared against a likely suit for ejectment, the accused was punishable under s. 193.[8]

Legal Proceedings before a Public Servant.

2007. The section is not, however, confined to a judicial proceeding, for it applies equally to a "proceeding taken by law before a public servant as such." But whether the proceedings be judicial or non-judicial, the section requires that they should be legal and authorized by law. This is especially necessary in the case of the proceedings of a public servant, for his proceedings are as varied as his duties, all of which do not enjoy the same legal protection. For instance, a forest-officer is a public servant,[9] and as such he is empowered to hold an inquiry into forest offence and in the course of such inquiry to receive and record evidence.[10] Where, therefore, the accused, a lessee of forest-revenues, in concert with his agent fabricated false accounts for production before the Forest Inspector, and the latter thereupon prosecuted them for fabricating false accounts for producing in a proceeding taken by law before a public servant as such, it was held that it did not amount to an offence under this section, the reason given being that the

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(1) *Venkatachelam*, 2 M. H. C. R. 43.
(2) *Ib.*
(3) *Bykunt Nath Banerjee*, 5 W. R. 72.
(4) *Jibhai Vaja*, 11 B. H. C. R. 11.
(5) *Venkataramanna*, 23 M. 233.
(6) *Chait Ram*, 6 A. 103.
(7) S. 371, Act II of 1886.
(8) *Rajaram*, 22 Bom. L. R. 1229.
(9) S. 72, Forest Act (VII of 1878).
(10) S. 71 (*d*), Forest Act (VII of 1878).

Inspector was not empowered by law to hold an investigation, and take evidence in any matter at all. "His function seems to be purely ministerial, and no proceedings by way of investigation being provided for and regulated by law, the statement laid before him, though false, would not be false evidence fabricated so as to expose the fabricator to the penalties" of s. 193.[1]

2008. But where the accused in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, and as to what estate the rents were in arrear, so that he might take steps to enforce payment, it was held that his offence was rather one under this section than under s. 466 under which he had been convicted.[2] Under this clause, then, all that is necessary is that the proceeding should be "taken by law" and that it should be before a public servant. The term "public servant," has been, of course, used here in the same sense in which it has been elsewhere defined,[3] and proceedings taken by law before him must refer to all legal proceedings, or such proceedings which he took in accordance with the provisions of law.

Arbitrator's Proceeding.

2009. Lastly, the section refers in the same breath to proceedings taken before an arbitrator. An arbitrator is really a judge appointed be the consent of parties to adjudicate upon a matter in controversy between them. As such, his proceedings are essentially judicial, and they are, therefore, necessarily entitled to the same protection.

iv. Materiality essential.

2010. Fabrication on a Material Point.—Two other ingredients are still required to complete the offence. In the first place, the fabricated evidence must be material to the issue, and in the second place, it must be such as to lead the Court or officer concerned to form an erroneous opinion touching any material point. Of course, if the fabrication is of a material evidence, it is likely to lead to the formation of an erroneous opinion on a material point. Otherwise the mere formation of an erroneous opinion is not enough to complete the crime, if the erroneous opinion was on a point not material to the case. The question whether a piece of evidence was or was not material in a case must depend upon the circumstances of each case. Where, for instance, the vendee had purchased a plot, correctly described by boundaries, but which was wrongly numbered in his sale-deed as "10" which he, after the registration of the document altered to "272," it was held that the alteration was innocuous, as it was not intended to confuse the identity of the property sold, which was otherwise sufficiently described. The alteration, had, indeed, brought the deed in accordance with the fact, and the accused could not, therefore, be convicted under s. 196, which must be read with this section.[4] In another case, the accused had made a hole in the wall of his own house, broken open a box belonging to his uncle of whom he was the next heir and removed the contents, to which he believed himself entitled, but as to which there was a dispute. His object in making the hole and forcing the box was to make it appear that the removal had been the act of thieves from the outside. He was tried for criminal misappropriation and fabricating false evidence, but it was held that he had committed no offence and that, inasmuch as there was no report to the police and no inquiry, he could not be charged with the fabricating of evidence under this section.[5]

2011. Where a patwari, knowing that certain documents were forged, made entries in his papers corresponding to, and based on, those documents, it was held that he had committed no offence under this section as he had made true entries of false facts, not false entries or false statements of true facts.[6] So in

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(1) *Per* West, J., in *Ramajirav*, 12 B. H. C. R. 1.

(2) *Per* Garth, C. J., and Field, J., in *Juggun Lall*, 7 C. L. R. 356.

(3) S. 21.

(4) *Per* Mahmud, J., in *Fateh*, 5 A. 217; followed, *per* the same Judge, in *Jiwanand*, 5 A. 221.

(5) *Thewa Ram*, 10 C. L. R. 187

(6) *Ramchand*, (1890) P. R. No. 26.

another case, the lessee executed a *kabuliat* in favour of a landlord without his consent, in which he falsely recited that an agent of the former had agreed to give him the lease of which the document executed purported to be the *kabuliat*. It was held that the document was not a false document, though it contained a false recital. It was also added that there was the absence of criminal intent necessary to constitute the offence.[1] The accused, a pleader, presented his power-of-attorney in a Civil Court only signed by his client, but falsely attested by a witness. He was prosecuted under this section, but it was held that as the document which was no part of the evidence in the case could not be taken into consideration in deciding it, and as the essential ingredients required by this section were wanting, the conviction of the accused could not be sustained.[2]

2012. Material Facts.—Immateriality in false evidence is never a ground for exoneration. It is only under this section that the question of materiality is relevant in this country. But in England, where the law of perjury is different (§§ 1942-1944), materiality plays an important part both in false as well as fabricated evidence. English cases are, therefore, instructive, only so far as they throw any light on the construction of this section. The word "material" there means evidence of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding or the credit of any witness; and a fact may be material although evidence of its existence was improperly admitted.[3] Hawkins says that he cannot find this matter anywhere thoroughly settled or debated, and, therefore, shall leave it to every man's own judgment which, from the consideration of the circumstances of each particular case, may generally, without any great difficulty, discern wnether the matter in which perjury is assigned were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it is punishable as perjury or not.[4]

English Law.

2013. Under English Law, facts affecting the credit of a witness in a case have always been held to be material.[5] So where the accused was indicted for selling beer without license, he falsely swore that he had not on a previous occasion when charged for the same offence authorized a plea of guilty to be put in, and that such a plea had been put in without his knowledge and against his will. It was held that as this statement affected the accused's credit as a witness, it was material, and that he was rightly convicted of perjury.[6]

2014. The same view was upheld in another case in which the plaintiff had falsely denied his previous conviction in cross-examination.[7] In an indictment for bestiality, a witness falsely swore that the flap of the accused's trousers was not unbuttoned, and that his trousers had no flap, it was held that the statement was material.[8] So a statement that *A* did not write certain words in the presence of *B* was held to be material, inasmuch as the presence of *B* might be as material as the writing of the words.[9] At the trial of *A* for perjury in an affidavit filed by him, his signature was proved, but there was no evidence that he swore to it. The accused falsely swore that *A* had sworn it before the taxing master. He was held to have perjured himself on a material point.[10]

2015. So on a trial of *A*, the accused, called to establish his *alibi*, falsely swore that he had seen *A* at a certain house at the time of the robbery, that he had lived therein for the last two years, and that he had never been absent therefrom more than two or three nights together during that time. In fact, *A* had been confined

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(1) *Jowahir Singh*, (1894) P. R. No. 16.
(2) *Kailasum Putter*, 5 M. H. C. R. 373.
(3) Stephen's Dig. Cr. L., Art. 148. So in *Phillpots*, 21 L. J. M. C. 18, the evidence given in respect to which perjury had been assigned was afterwards withdrawn, and was inadmissible, but it was held not to purge the false swearing.
(4) 1 Hawk., P. C., c. 27, s. 8.
(5) *Overton*, 2 Moo. C. C. 263; *Phillpots*, 21 L. J. M. C. 18; *Gibbon*, 31 L. J. M. C. 98; *Mullany*, 34 L. J. M. C. 111.
(6) *Batter*, (1895) 1 Q. B. 797.
(7) *Lavey*, 3 C. & K. 26.
(8) *Gardner*, 2 Moo. C. C. 95.
(9) *Schleisnger*, 10 Q. B. 670.
(10) *Alsop*, 11 Cox. 264.

in prison a whole year out of these two years. It was held that the second and third statements were material as tending to render the first statement more credible, and that the accused was rightly convicted of perjury.[1] The accused was sued for a debt as Burnard Edward Mullany. The Judge asked him his name and he replied "Edward." To the plaintiff's question he denied his name to be "Burnard," and said that he was "Edward" only. The suit was dismissed. The accused was then indicted for perjury and it appeared that his real name was "Burnard," but that he had latterly been known as "Burnard Edward." It was held that the accused's name was material as it had led the Judge to dismiss the action against him.[2] This case shows that a point, howmuchsoever immaterial, may become material by its relation to the matter in issue. The question of materiality thus is always a question, the determination of which depends upon the facts and circumstances of each case. A fact immaterial in one case may become material in another. But the degree of materiality is not to be measured. If a question was circumstantially material it is for the present purpose as material as one directly proving the issue.[3] It would seem that the materiality may in some cases depend upon the intention where, for instance, the accused erroneously thought that the period for obtaining the refund on a stamp was two months and so altered the date to bring it within time and the Court held him guilty though the period for refund was in fact six months.[4]

2016. Immaterial Facts.—The same observation may perhaps be made of questions regarded as immaterial. Equivocal statements have always been regarded as immaterial in English Law. Where a witness, being asked whether a certain sum of money had not been paid for two things in controversy between the parties, he replied that it was, though in truth it had been paid for only one of them, by agreement, that statement was held to be insufficient to sustain a charge of perjury.[5] So where the accused had been asked by a judge whether *A* brought certain number of sheep from one town to another altogether, he replied that he had done so; but it appeared that the sheep had been brought in two lots, it was held that the false statement was immaterial, because the substance of the question was whether he had brought the sheep, and the manner of bringing them was only a circumstance.[6] So where *A* beat *B* with a stick, and *C* swore to it saying that *A* had drawn his dagger, and beaten and wounded *B*, *C's* statement was held to be immaterial on the ground that the only thing material was the beating.[7] On the trial of *A* for garrote robbery on *B*, the latter was asked whether he had not met *A* with *C* on the previous evening and proposed to them to commit a burglary. *B* denied it, whereupon *C* was called and swore to it. *B* was then prosecuted, but his statement was held to be immaterial,[8] and so it was, because *B's* conduct had nothing to do with *A's* offence. So in another case, the accused was prosecuted for assaulting his wife, and a witness called for him falsely swore that he had seen the wife committing adultery, of which he informed the husband. But the statement was held to be immaterial as affording no ground of legal justification for the assault.[9]

2017. If the question of materiality is once settled the other question refered to in the section is not difficult of solution. For if the evidence was material to the issues and admissible, it may be presumed that the Court before whom it was tendered would entertain an erroneous opinion touching a material point. Of course, the section does not require that the Court should in fact have held such opinion. All it requires is that there should have been the possibility of its holding such opinion. It is not the actual mischief done, but the pitfall prepared that law reprehends and punishes. The Court trying one for perjury has then only to see if the Court was likely to go astray on the evidence produced. But this may sometimes raise a nice question. Suppose a person were to perpetrate a

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(1) *Tyson*, 37 L. J. M. C. 7.
(2) *Burnard Edward Mullany*, 34 L. J. M. C. 111.
(3) *Griepe*, 12 Mad. 145; *Rhodes*, 2 Ld. Raym. 887.
(4) *Mohesh Chandra*, 28 C. L. J. 213, 47 I. C. 871.
(5) 2 Roll. 42; 1 Hawk., P. C., c. 27, s. 8.
(6) 1 Hawk. P. C., c. 27, s. 8.
(7) *Hetley*, 97; 1 Hawk, P. C., c. 27, s. 8.
(8) *Murray*, 1 F. & F. 80.
(9) *Tate*, 12 Cox. 7.

glaring forgery, which the Court was not likely to take into consideration in deciding the case in which it was filed, is he to escape, because of his clumsiness? The solution of the question is to be found in the words of the section which looks to the intention of the accused, and not to the result. If he intended to influence the Court, it is enough, though his appliance may have been crude and clumsy.

Punishment for false evidence.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

***Explanation* 1.—A trial before a Court-martial * * * is a judicial proceeding.**

***Explanation* 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of judicial proceeding, though that investigation may not take place before a Court of Justice.**

Illustration.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *A* has given false evidence.

***Explanation* 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.**

Illustration.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *A* has given false evidence.

2018. Analogous Law.—Perjury in England is defined to be a wilful false oath by one who, being lawfully required to depose to the truth in any proceeding in a Court of Justice, swears absolutely in a matter of some consequence to the point in question, whether he believed or not.[1] The false oath must be "wilful," that is taken with some degree of deliberation. If, therefore, it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot be considered to amount to voluntary and corrupt perjury.[2] This is the sense conveyed by the word "intentionally" occurring in section 193. It was at one time stated that there could be no conviction for perjury unless it be sworn absolutely and directly, that is to say, the perjurer must swear from his own knowledge, and not merely from belief. If, therefore, he thought, remembered or believed in his statement, he could not be convicted of perjury,[3] but this doctrine did not long prevail, and Lord Mansfield, C.J., laid down "that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false";[4] and this view was affirmed by all the Judges of the Court of Common Pleas. And so it was held by the Court of Queen's Bench that, if a witness swore that[5] he thought a certain fact took place, it might not be difficult, indeed, to show that he committed wilful perjury, and the averment was as properly a subject of perjury as any other.[6]

2019. Again, perjury may be committed as much in a judicial proceeding before a competent jurisdiction, as in some other public proceeding of the like nature, wherein the King's honour or interest are concerned, as before Commissioners,

(1) 1 Hawk, P. C., c. 69, s. 1.
(2) 1 Hawk, P. C., c. 69, s. 2.
(3) *Inst.*, 166.
(4) *Pedley's case*, 1 Leach, 325.
(5) 1 Hawk, P. C., c. 69, s. 7 (note *a*); *per* Kenyon, C.J., in *Crespigny*, 1 Esp. 280.
(6) *Schlesinger*, 10 Q. B., 670.

appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents. And when perjury is committed in a judicial proceeding it is immaterial whether it is committed before a Court of record or whether it is a Court of Common Law or a Court of Equity or Civil Law and whether it has relation to the merits of a case or in a collateral matter, as where one offering bail for another, swears that his substance is greater than it is.[1] So far the Indian and English views coincide, and so far the English cases may afford a fit illustration of the rule here enacted.

English Law Distinguished.

2020. But excepting these particulars, the English Law of Perjury, presents some distinguishing feature upon points which it is as well to note :—

(*i*) The English Law requires, as stated by Lord Mansfield, that the false statement must be "material to the question depending,"[2] and this has become an established principle of Common Law[3] which remains unaffected by Statute.

(*ii*) *Secondly*, under English Law at least two witnesses are essential to establish the charge of perjury. As Coleridge, J., observed : "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice ; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction."[4] The same rule was laid down by Lord Tenterden, C.J.,[5] This rule does not obtain in India.[6]

(*iii*) In England the administration of an oath is a *sine qua non* of a valid charge. But this, of course, is necessary, but not indispensable in this country.

2021. Explanation 1 to this section has been amended by repealing the words "or before a Military Court of Request" after "Court-martial."[7] The two preceding sections define the offences for which this section prescribes the penalty.

2022. Procedure and Practice.—No prosecution can be instituted for an offence under this section without the previous complaint of the Court or public servant concerned as required by section 195 of the Code of Criminal Procedure. Section 643 of the old Code of Civil Procedure also prescribed a mode of dealing with persons guilty of this offence before them, but in view of the ample provisions of section 476 of the Code of Criminal Procedure, this section was considered unnecessary, and has been omitted from the present Code. It has been held under s. 195 of the Criminal Procedure Code before its amendment that where perjury comprises contradictory statements made in two Courts, both Courts must sanction the prosecution, and by parity of reasoning both the Courts must now complain.[8] The offence is non-cognizable, but warrant may issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, or Presidency Magistrate or Magistrate of the first class.

2023. In the case of false statements made in the course of a deposition, all the statements constitute only one offence, and not so many offences as are the false statements. Two or more persons giving false evidence in the same case cannot be tried together, even though they might be the scribe and attesting witnesses of a forged document and had conspired to support it.[9] The same person was both the District and Sessions Judge. As District Judge he sanctioned the prosecution of a person. As Sessions Judge he heard the appeal against his conviction. The High Court justified the procedure on the ground that the question when he was moved to sanction the prosecution was different from that which he had to consider

(1) 1 Hawk, P. C., c. 69, s. 3; *Crossby*, 7 T. R., 315.
(2) *Aylett*, 1 T. R. 69 ; *per* Lord Campbell, C.J., in *Stone*, 23 L. J. M. C. 14.
(3) *Griepe*, 1 Lord Rayon. 256 ; Bac. Abr., Tit. "Perjury" (A), 2 Roll 41, 42 ; 1 Hawk, P. C., c. 69, s. 8.
(4) *Yates*, C. & M. 132.
(5) *Champney's case*, 2 Lew, 258.
(6) *Arjun Singh*, 53 A.598.
(7) Cantonments Act (XIII of 1889).
(8) *Purshotham*, 45 B. 895, F. B.
(9) *Khoab Lall*, 9 W. R. 66; *Moharaj*, 16 W. R. 47 ; *Nathu*, 10 C. 405; *Anant Ram*, 4 A. 293 ; *Mehrban Singh*, (1884) A. W. N. 52 ; *Kotha Subba Chetti*, 6 M. 252 ; *Bhavani Shankar*, 5 B. H. C. R. 55 ; *Krishna Rao*, 4 Bom. L. R. 53 ; *Gunwant* 13 N. L. R. 35.

on appeal.[1] It is submitted that both the decision and its reasoning are unsound as it is wrong to make the prosecutor the Judge in his own case. A conviction without a legal complaint is bad and must be set aside.[2]

2024. Proof.—The High Court will not in its revisional jurisdiction interfere with a finding of the lower Court on a question of law which it finds not free from difficulty.[3] The points requiring proof are :—

(*i*) *False evidence*—

(1) That the accused was legally bound to state the truth either by an oath or by an express provision of law (s. 191) ;
(2) That as such, the accused made the statement or declaration ;
(3) That he did so intentionally ;[4]
(4) That it was false ;[5]
(5) That he either knew or believed it to be false, or did not believe it to be true (s. 191) ;

to which may be added the following aggravating circumstance—

(6) That such statement or declaration was made in a stage of judicial proceeding.

(*ii*) *Fabricating false evidence*—

(1) That the accused caused a certain circumstance to exist, or made the false entry, or made the document containing a false statement (s. 192) ;
(2) That he did so, intending that such circumstance, entry or statement should appear in evidence in a judicial proceeding pending or prospective[6] or in a proceeding taken by law before a public servant[7] or in a proceeding before an arbitrator (s. 192) ;[8]
(3) That the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence appeared ;
(4) That the accused intended that person to entertain an erroneous opinion upon that evidence ;
(5) That such erroneous opinion touched a point material to the result of such proceedings.[9]

2025. Grounds For and Against Complaint.[10]—Whenever the offence of perjury is committed "in, or in relation to any proceeding in any Court," the Courts are prohibited from taking cognizance of it without the previous complaint of such Court, or of some other Court to which it is subordinate.[11] Complaint is only a pre-requisite when the offence is committed in Court, or in relation to any proceeding in Court. If, therefore, it is committed in or in relation to a public servant other than a Court, no complaint is necessary.[12] Such an offence would fall under the second paragraph of this section. A complaint made by the Court is revocable on appeal. For the purpose of satisfying itself as to the propriety of complaining or sanctioning a prosecution, the Court is empowered to make a preliminary inquiry.[13] The object of the inquiry and complaint is to ensure that the prosecution is instituted after due consideration,[14] and only when it would be in the interest of public justice that it should be made. The object of the law in requiring the intervention of the Court to prosecute, is to restrain the exercise of private spite,[15] and to protect persons from being prosecuted out of mere malice, ill-will or reckless frivolity of disposition.[16] The Court ordering a prosecution incurs a heavy responsibility in setting law in motion, and it is therefore essential that the

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(1) *Gulam Ahmad*, 15 Bom. L. R. 104, 19 I. C. 190.
(2) *Vythinathaswami*, 51 M. L. J. 800.
(3) *Mhd. Kajim Ali* v. *Sarabdi*, 46 C. 986.
(4) *Taj Mohd.* 15 L. 407.
(5) Which must be proved as a positive fact ; *Gopi Nath*, (1917) Pat. 267, 41 I. C. 148 ; *Sakhawat*, 18 A. L. J. 1151, 59 I. C. 198 (In a suit on a promissory note consideration is presumed in a civil suit. but there is no such presumption in a prosecution for perjury).
(6) *Indrachand*, 56 B. 213.
(7) *Ismail Khadir Saheb*, 52 B. 385.
(8) *Tarak Nath*, (1935) C. 304.
(9) *Ganga Sahai*, (1902) A. W. N. 52.
(10) In this and the next paragraph cases are cited which were decided under s. 195 of the Criminal Procedure Code before its amendment by s. 47, Act XVIII of 1923, as the omission of all provisions as to sanction has not altered the law.
(11) S. 195, Cr. P. C. as amended by Act XVIII of 1923, s. 47, before which there was provision for both sanction and complaint. *Mathuranath*, 139 I. C. (C.) 89.
(12) *Putiram* v. *Mohd. Kasim*, 3 C. W. N. 33 ; *Thakur*, 4 C. W. N. 347.
(13) S. 476, Cr. P. C.
(14) *Mahomed Hossein*, 16 W. R. 37.
(15) *Ram Prasad Roy* v. *Sooba Roy*, 1 C. W. N. 400 (401) ; *Chundra Kant Ghose*, 3 C. W. N. 3.
(16) *Mahadeo Singh*, (1887) A. W. N. 142.

Court should conclude its proceedings and have all the facts before it, before filing a complaint.[1] It is said that this offence is against public justice and that the person best qualified to say whether a prosecution should or should not be instituted is the Judge before whom the evidence was given and who had considered all the facts of the case.[2] This is, however, not the view of the Legislature who have provided for an appeal against the Court's order and it is the duty of that Court to discharge its duty unfettered by any notion of the infallibility of the trial Court.

2026. Again, no Court should entertain an application to prosecute, made by persons who are not parties to the suit or proceedings out of which the proceeding for complaint arises.[3] It is the duty of the Court before filing a complaint to satisfy itself not only that there are good and sufficient grounds for prosecution, but also that the evidence forthcoming is such as will suffice at least to establish a *prima facie* case against the accused.[4] Its duty in this respect is to see that by embarking on a course of ill-advised prosecutions, it does not stultify itself, for as was remarked in a case, "it would be disastrous if there were a number of prosecutions ending, not in convictions, but in acquittals. The result would be that, instead of putting down perjury, it would rather tend to encourage it."[5] Moreover, even where a person has perjured himself, the Court has still to see whether it should order his prosecution. It is desirable to give witnesses a *locus pœnitentiæ*, and an opportunity to correct themselves, and if they do correct themselves immediately afterwards or on a second thought in the same deposition, a prosecution for perjury would hardly be desirable.[6]

2027. Then again, no person could be convicted of perjury on a comparison of his two contradictory statements without giving him a chance to explain them.[7] He must not, of course, be examined on oath when he is called upon to explain, since it is as an accused that he is to be questioned,[8] and if his explanation is plausible though not probable, it justifies the Court to stay its hand.[9] Where a prosecution is instituted on two contradictory statements it is stated to be necessary that the complaining Court should be empowered to complain in respect of each of the two statements.[10] But this is only a desideratum when a conviction is bad in the alternative, otherwise one of the statements may be used as merely evidence of the falsity of the other. But in that case it does not follow that that evidence must be necessarily true so that the other statement must be necessarily false. In other words, where a person is prosecuted in respect of a statement, reliable evidence must be forthcoming about its falsehood. It is not furnished by his mere previous contradictory statement.[11]

2028. Though not an invariable rule, the Court should not ordinarily initiate a prosecution for perjury in a pending proceeding.[12] As the complaint of Court is subject to correction on appeal, it is necessary that its proceedings should be so framed as to satisfy the High Court from the record as to the correctness and propriety of the order passed.[13] It need scarcely be added that the District Magistrate cannot initiate a prosecution in a case, disposed of by a second class Magistrate.[14]

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(1) *Chundra Kant Ghose*, 3 C. W. N. 3; *Nga Tha Win* v. *Nga San*, (1913) 1 U. B. R. 166, 20 I. C. 406.

(2) *Chiranji Lal* v. *Ram Lal*, 9 A. L.J. 538, 15 I. C. 495.

(3) *Chundra Kunt Ghose*, 3 C. W. N. 3 (4).

(4) *Pampapati* v. *Subha Sastri*, 23 M. 210; *Danappa*; 24 Bom. L. R. 45, 65 I. C. 640, (1922) B. 38.

(5) *Ram Prasad Roy* v. *Sooba Roy*, 1 C.W.N. 400 (401).

(6) *Pandu*, 19 Bom. L. R. 61, 39 I. C. 320; *Lakshmi Narain*, 16 O. C. 81, 19 I. C. 712; *William*, 25 O. C. 139, 69 I. C. 92; *Dasondha Singh*, (1911) P. L. R. 230, 11 I. C. 539; *Hit Narain*, 96 I. C. 505, (1926) Pat. 517 *Fakirchand*, 89 I. C. 1028, (1925) L. 646.

(7) *Narayana*, 8 M. L. T. 86, 6 I. C. 409.

(8) *Nag Tha Win* v. *Nga San*, (1913) 1 U. B. R. 166, 20 I. C. 406.

(9) *Barkat Ram*, (1911) P. L.R. 158, 10 I. C. 121.

(10) *Reddi Rami Reddi*, 27 M. L. J. 586; 25 I. C. 524.

(11) *Bakshali*, 5 S. L. R. 136, 13 I. C. 220.

(12) *Birendra Nath*, 18 C. W. N. 1342.

(13) *Kedarnath* v. *Mohesh Chunder* 16 C. 661; *Pampapati* v. *Subba Sastri*, 23 M. 210.

(14) *Abdul Jamal*, (1913) P. W. R. 13, 18 I. C. 667.

Venial Perjury.

2029. The fact that there was a *prima facie* case against a person is not alone sufficient to justify the prosecution for perjury. For, as observed before, there may be other circumstances which may render his prosecution inexpedient or inadvisable. Such would be the case where the witness was called to give evidence against himself or against his relations[1] or the contradictions were immaterial,[2] or made by an uninterested and ignorant witness, or where the latter statement was a reversion to the truth from an original false statement[3] or where the perjury was merely technical.[4] Of course, in such a case it might be said that the witness had nc business to make a first false statement, but then, as remarked by the Punjab Chief Court, "in such cases the grave danger of fixing a witness to an original lie, under pain of a sentence for perjury, must be carefully guarded against, and it is probably better that he should escape punishment for the prior false statement" than that his conviction should be an object lesson to those inclined to atone for their first wrong by a timely correction.[5] So in a case the High Court revoked the sanction for the prosecution of a boy-witness aged 11 years, holding his prosecution inadvisable in consideration of his youth.[6]

2030. In another case it was observed that sanction to prosecute ought not to be given when the intended prosecution is based on a series of statements, which were made in the course of cross-examination, which continued for more than a day, which were not absolutely irreconcilable and for which the accused had supplied explanation which went far to reconcile them.[7] Again, while an omission to administer the oath does not render inadmissible the evidence so given, still it is a question which the complaining Court cannot lose sight of.[8]

What the Order must Specify.

2031. A complaint to prosecute under the section must specify the Court in which and the occasion on which the offence was committed; and where the offence is that of giving false evidence in a judicial proceeding, it should further specify the particular statements in respect of which the offence is imputed.[9] It has been a moot question with the Courts whether before sanctioning prosecution of a person under section 195 of the Procedure Code, it is necessary to give him notice, and allow him to show cause why an order against him should not be passed. There is, of course, nothing in the Statute Law to render the giving of such a notice obligatory, but at the same time it is a salutary rule of law that no judicial order to the prejudice of a party should be made without giving him a chance of being heard. The necessity of notice is then, though not obligatory, necessary in the exercise of a sound judicial discretion,[10] so that, while the absence of notice *per se* does not vitiate the sanction, it may be a fact which may affect the order as the accused may then show in appeal that the order was precipitate or illconsidered and passed without giving due weight to his representation. If notice is once issued, the Court cannot then pass an order without hearing the accused, or waiting for its service.[11]

Irregularity How Far a Bar.

2032. All these are, however, questions which arise in proceedings anterior to a prosecution under this section. Their legality or propriety can be questioned only in those proceedings, or on appeal from them. For in a prosecution under this section it is not open to the accused to say that the sanction for his prosecution had been

(1) *Mayandi Nadar*, 145 I. C. (M.) 371.
(2) *Azibulla* v. *Udoy*, 13 C. W. N. 422; 1 I. C. 287; *Birendra Nath*, 18 C. W. N. 1342; 27 I. C. 211; *Kalisadhan*, 52 C 478; *Seshayya*, (1925) M. 1157; *Nga Bo Gyi*, 3 R. 224
(3) *Dad*, (1901) P. R. No. 21; *Allah Wasaya* 112 I. C. (R.) 468.
(4) *Tarachand Marwadi*, (1929) N. 279.
(5) *Santa Singh*, (1899) P. R. No. 3.
(6) *Goberdhone* v. *Habibulla*, 3 C. W. N. 35.
(7) *Baldeo* v. *Mhd. Inamul Huq*, 43 I. C. (C.) 826; *Rattan Singh*, (1911) P. W. R. 72, 10 I. C. 840.
(8) S. 13, Oaths Act (X of 1873); *Mati Ram*, 85 I. C. 710, (1925) A. 410.
(9) *Goberdhone* v. *Habibullah*, 3 C. W. N. 35; *Rakhal Chander Laha*, 13 C. W. N. 942.
(10) *Sheik Beari*, 10 M. 232; *Chota Sadoo*, 9 W. R. 3; *Krishnanund*, 12 C. 58, F. B.; *Mangat Ram*, 18 A. 358; *Zorawar*, (1890) A. W. N. 168; *James* (J. E.) 26 S. L. R. 295.
(11) *Umarbhai*, (1888) B. U. C. 440.

wrongly given, or that it was infected with an illegality which rendered it a nullity. The Court trying the accused cannot sit in judgment over the Court sanctioning the prosectuion. It will assume its validity and proceed with the trial, until the sanction given is withdrawn or revoked. But though the Court trying the case cannot canvass the propriety of the sanction, it cannot but take notice of an illegality affecting the authority or jurisdiction of the Court. If, therefore, the sanction was given by a Court or authority incompetent to grant it, the Court trying cannot then presume that it was duly given, for it cannot presume blindly a fact which it can see is not a fact. It will then refuse to act on a sanction so given.

2033. If the fabricated evidence was produced in a judicial proceeding the penalty is that prescribed by the first paragraph, otherwise the second paragraph will apply.

2034. Charge.—A charge is a precise formulation of the specific accusation made against a person, who is entitled to know its exact nature at the earliest stage.[1] Where a person is charged with giving false evidence in the course of a deposition, the incriminating passages stated to be false must be specified in the charge. It is not a proper charge to set out the whole deposition, and say that it contains false statements.[2] Such a course could be justified only when each and every statement in the deposition is alleged to be false.[3] So where the accused is charged in the alternative, it is not a proper charge to set out two long depositions which are in some respects contradictory, leaving the person charged to find out for himself in respect of which particular contradiction, it is, that he is said to have committed the offence.[4] Only the passages held to be contradictory must be specified in the charge, so that the accused may have his attention directed to the contradictions relied on against him, so as to enable him to prepare his defence accordingly. For this purpose it must set out the *precise words* used by the accused and not merely their substance or effect.[5] Not only must the false statements be specified, but the charge should disclose the Court before which and the date on which the statements charged were made.

2035. A statement in the charge that the statement was made, "on or about in June" is vague as it does not state the year and omits mention of the precise date on which the statement was made.[6] The charge should be framed on the English record prepared by the Magistrate, and not merely upon the vernacular record prepared by a clerk of the Magistrate.[7] So it was observed by Lord Ellenborough, C. J., that in an indictment for perjury, the deposition of the accused should be literally set out. If there be a blank in the deposition it cannot be supplied afterwards by looking at the context and that omission is fatal to the charge.[8] And not only must the exact words be set out in the charge, but they must be proved to have been uttered by the accused.[9] And if the false statement charged was made in the course of a judicial proceeding, the charge should specify the fact, and the particular stage of the judicial proceeding in which the false statement was made. A charge that the accused "on or about the 2nd day of April 1868 at Jessore, in the Court of the Joint Magistrate, being lawfully bound on oath to state the truth, intentionally gave false evidence in a stage of a Judicial proceeding, by stating, etc., "is clearly a defective charge inasmuch as it gives no notice to the accused that he is charged with having made a statement in the course of a judicial proceeding, or that any judicial proceeding at all was pending at the time the alleged false statement was made.[10]

2036. Where the accused is charged with giving false evidence on three different occasions, each occasion should form the subject of a distinct head in the

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(1) *Reily*, 28 C. 434.
(2) *Isah Mandal*, 28 C. 348.
(3) *Ib.*
(4) *Soonder Mohooree*, 9 W. R. 25.
(5) *Boodhun Ahir*, 17 W. R. 32; *Mungul Das*, 22 W. R. 28; *Amolak Ram*, 51 I. C. 579.
(6) *Dowlut Moonshee*, 8 W. R. 95; *Soondar Mohooree*, 9 W. R. 25; *Maharaj Misser*, 16 W. R. 47.
(7) *Mungul Dass*, 23 W. R. 28.
(8) *Taylor*, 1 Camp. 104.
(9) *Leefe*, 2 *Camp*. 134.
(10) *Fatik Biswas*, 1 B. L. R. (A. C.) 13.

charge. If the charge or any head of the charge is amended it ought to be made formally, should be explained to the accused, and it should appear on the face of the record.[1]

2037. The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you———, on or about the———day of———, at———, in the course of a trial of———, before———, stated in evidence, ———' which statement you either knew or believed to be false, and did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within my cognizance (*or* the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."[2]

2038. Principle.—This section merely prescribes a penalty for the two offences defined in the last two sections, where they are described as false evidence and fabricating false evidence. The Legistlature measures the gravity of these offences not by their nature and character, but by the nature of the tribunal before whom they are committed, and the two paragraphs here preserve the distinction in the varying maximum sentences to which offenders in the two cases are liable. The policy which has dictated the distinction is the difference between a crime perpetrated in the presence of the Court which is the sanctuary of truth, before whom the gravest issues are often tried, and those before whom matters of comparatively smaller consequences come up for decision.

2039. The essence of the offence of perjury lies in the "intention." Is this an element superadded to those laid down in the two preceding sections? It appears not, because a person who gives false evidence as defined there must do so "intentionally" and the addition of this word in this section would seem to have been added only by way of emphasizing the first pre-requisite of criminal liability under this section.

2040. Meaning of Words.—"*Whoever intentionally gives false evidence*": The definition of "false evidence" is given in section 191. This requires that it should be given "intentionally." What it means will be seen presently (§ 2042) "*In any stage of a judicial proceeding*": The meaning of "judicial proceeding" has been defined before (§§ 1958-1961). The clause means that the judicial proceeding must be continuing when the false statement was made. "*In any other case*" means other than a judicial proceeding, but in which the making of a false statement is an offence. Such cases are dealt with in sections 191 and 192. "*An investigation directed by law*": The explanation manifestly refers only to an investigation made under the express provision of law. But would the clause include an investigation into the truth of a complaint made by a police-officer, under the orders of a Magistrate passed under section 202 of the Code of Criminal Procedure? No, because such investigation is not directed *by law*, but is made *under* law. But the clause is probably too vague, and may, if strictly construed, even include an investigation by the police, preliminary to *challaning* a case in Court. But such is not the intention of the clause. "*An investigation conducted under the authority of a Court of Justice*" includes an investigation by a Commissioner or the like legally appointed by a Court of Law.

2041. Intentionally Giving False Evidence.—The giving of intentionally false evidence whether in a stage of judicial or non-judicial proceeding is an offence punishable under this section. Such evidence must be "false evidence," a term defined in and explained under section 191. In order to be punishable, such statement must comply with all the requirements of that section. The false evidence here made punishable may, however, be either false evidence as defined in s. 191, or fabricated evidence as defined in section 192. The penalty in each case is the same, if it is produced "intentionally" in a stage of judicial proceeding. But if it is produced in a non-judicial proceeding it is obnoxious to the lesser penalty described in the next paragraph. The gravity of the offence thus depends not upon

(1) *Feojdar Roy*, 9 W. R. 14; s. 227, Cr. P. C. (2) Sch. V, XVIII (5), Cr. P. C.

the nature and character of the false evidence, but upon the form in which it is uttered. Law regards a Court of Justice as the sanctuary of truth, and the grave issues there tried render it necessary that false statements made before it should be visited with commensurately severer penalties. The division of the offence here made is then (*i*) false evidence given in a judicial proceeding, and (*ii*) false evidence given in a non-judicial proceeding. The two vary only in the enormity of the crime, but in other respects the ingredients necessary to constitute the offence are the same.

2042. What is "Intentionally."—In the first place, then, the false evidence must be given "intentionally" (§ 2041). This word was probably intended to convey the same sense as is conveyed by the word "wilfully" used in a similar context. In England, the question receives assistance from the additional requirement of law which makes materiality another necessary ingredient of the crime. If a statement was material the witness could not have made it through carelessness, inadvertence, or mistake. If it was immaterial, there is no crime, whatever may have been the intention. In this sense, the question of materiality is not irrelevant in this country. For as the question depends upon "intention" and "intention" depends upon materiality, the latter question becomes important, though not for its own sake, but as reflecting upon the question of intention, upon which the question of criminality depends. So Scotland, C. J., observed in a case that "in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as, if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness."[1]

2043. As there can be no offence if a statement, though false, was made without an intention to make it, and as it is only the intentional making of a false statement that law condemns and punishes, the question of materiality reflects upon the question in another way. For persons swearing falsely do so to influence the Court to come to a conclusion other than that at which it would not otherwise arrive. It is, therefore, their intention to forswear to facts which they consider material in a case, and to which alone, to be successful, the perjured statement must be directed. The perjurer consequently selects only material points for the purpose of his falsehood. He cannot risk the chance of breaking down the material part of case by lying on its immaterial aspects. His plan is to deliver a frontal attack.

2044. The materiality of statement is, therefore, always important in determining the question of intention. But the law does not require proof of materiality, but only of intention, and materiality is only one test of intention.[2] But it is not its sole test. For it may be equally inferred from other facts. If the statement was false, and known by the accused to be false, it may be presumed that the accused gave false evidence, *intentionally*. If the perjurer had a motive for giving false evidence, it would be a good proof of intention, but here again, motive is merely a test of intention, and not an ingredient of the crime. Where for instance, the accused a decree-holder had realized money due on a decree on three different occasions, for which he failed to give credit, his subsequent denial of receipt of money was held to have been intentional, for the accused had no reason to forget what he had received, and he had a reason for suppressing its acknowledgment.[3]

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(1) *Aidrus Sahib*, 1 M. H. C. R. 38; *Lalmoni*, 1 Pat. L. R. 142, 72 I. C. 161; *Khajamal*, 14 S. L. R. 69, 58 I. C. 515.

(2) The view of Knox, J., in *Ganga Sahai*, (1903) A. W. N. 68, in which he held it "to be a material element that the false evidence should be given, so as to cause the person who in such proceedings is to form an opinion on the evidence to entertain an erroneous opinion, touching any point material to the result of such proceeding" is manifestly incorrect; *Babu Ram*, 26 A. 509. Indeed the learned Judge seemed too incorrectly to have thought that the requirements of fabricated and false evidences were the same.

(3) *Rhutten Ram*, 2 W. R. 63. But proof of *corrupt* intention is not necessary to constitute the giving of false evidence as appears to have been assumed in the case; *Amir Ali Khan*, 3 N. W. P. H. C. R. 133.

2045. Then again, the motive of a person in giving false evidence may be to make his story more credible or consistent with itself, as where a witness adds details of which he has no knowledge, or where he suppresses facts discreditable to himself or to the person in whom he is interested. But the fact that a person had no motive for perjuring himself, does not make his evidence any the less false, if it was false, and the accused must have known or believed it to be so. But in such a case though the accused may be technically guilty, the Court will probably withhold its sanction for his prosecution, or the Court trying him will consider it an offence only calling for nominal punishment.

2046. So where the statements of an uninterested and ignorant witness were in the main to the same effect and the contradiction was only in detail, and the later statement was probably a reversion to the truth from an original false statement, the Court deprecated a prosecution under such circumstances, as it has the effect of compelling a witness to adhere to his original lie under penalty of a prosecution if he tells the truth.[1] In another case the Court observed that in such cases the grave danger of fixing a witness to an original lie, under pain of a sentence for perjury must be carefully guarded against, and it was probably better that he should escape punishment for the prior false statement than that he should pervert justice by adhering to it. Moreover if the conviction does not determine which of the two contradictory statements is false, the benefit of the doubt must be given to the accused, and the punishment must be on the assumption that the statement which is false is the one which involves the least guilt on the part of the accused.[2]

2047. Contradictory Statements.—The rules as to a conviction based upon contradictory statements, require (*i*) that both the statements must be on oath,[3] (*ii*) that there must be sanction in respect of them,[4] (*iii*) that they must be irreconcilable,[5] and (*iv*) made so intentionally,[6] and not merely recklessly or negligently without advertence to the effect of his two statements,[7] from which it follows (*v*) that the accused must have had a *locus pœnitentiæ* or an opportunity for retraction, reconciliation, explanation, or correction.[8] A conviction based on statements so contradictory that one of them must be necessarily false is not illegal. But in such case, it is not safe to draw hasty conclusions from the mere existence of contradictory statements, for though the Court may believe that on one or the other occasion, the accused swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time being convinced that he was wrong, swear to the reverse without meaning to swear falsely either time.[9]

2048. As Chandavarkar, J., remarked in the case: "It is a well-known rule of law applied by eminent judges to cases of perjury arising out of contradictory statements, that the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another there can be no perjury unless he has on oath stated facts on which his first statement

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(1) *Dad*, (1901) P. R. No. 21.
(2) *Santa Singh*, (1899) P. R. No. 3.
(3) *Karri Venkanna*, 18 M. L. J. 591, 32 I. C. 330.
(4) *Reddi Rani Reddi*, 27 M. L. J. 586, 25 I. C. 524.
(5) *Fazal Ahmed*, (1914) P. R. Cr. 1, 23 I. C. 696; *Parvatanecil*, (1915) M. W. N. 34, 26 I. C. 318; *Imam Bux*, 7 S. L. R. 96, 23 I. C. 747.
(6) *Azibul*, 13 C. W. N. 422, 1 I. C 287.
(7) *Muhammad Ishaq*, 36 A. 362; *Mangat Rai*, 7 A. L. J. 93, 5 I. C. 695; *Ratan Singh*, (1911) P. L. R. 72, 10 I. C. 840.
(8) *Lachmi Narain*, 16 O. C. 81, 19 I. C. 712; *Dasoudha Singh*, (1911) P. L. R. 230; *Subramania*, 8 Bur. L. T. 79, 27 I. C. 218; *Girdhari Mal*, 9 S. L. R. 202, 34 I. C. 655.
(9) *Per Jenkins*, C J., in *Bankatram*, 28 B. 533; *Tikham Lakhi*, 7 S. L. R. 108, 24 I. C. 576.

was based, and then denied those facts on oath on a subsquent occasion."[1] It is, of course, the duty of the Court to see whether the statements can be reconciled or not. "The accused in a criminal case is merely on the defensive, and unless there is any positive admission of a fact by him, any omission on his part to explain what, indeed, can be explained without his explanation should not be pressed against him."[2] In this case the accused was charged with having made two contradictory statements, as follows :—

First statement.—"Dhondi Ram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession, and I manage them."

Second statement.—"I am Dhondi Ram's elder brother, we live separate. It is 13 or 14 years back our partition took place. Myself and Dhondi Ram divided in Shalla 1808 or 1809. Dhondi Ram was aged 12 or 13. Dhondi Ram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895, that only the cloth-shop was given to Dhondi Ram; that the land in dispute has come to my share...that it is true what I have stated, that Dhondi Ram separated before 12 or 13 years and all division of the property was made."

2049. The statements were held to be contradictory, but they were held not to constitute an offence under this section. In the first place it was observed, that in order to convict a person of perjury on the strength of contradictory statements, it is necessary that the effect of the whole of the deposition should be considered. For two statements may appear to be in themselves irreconcilable, but their explanation may be found in the rest of the deposition. So in the case last cited, the witness had stated :—

"I became divided from Dhondi Ram, there was no document made with respect to partition. Dhondi Ram lives separately from me. I have only given him a clothshop. No divisons have been made—I myself am in possession of all ancestral lands and manage them."

2050. These statements were held to explain themselves. What the witness had really intended to state was that there had not been allotments of shares, though the brothers had lived apart. "When he states in his second deposition that what he stated in his first was not true, he must be taken to have substantially meant that his denial of the relation of separated co-parcenary between him and his brother was not true. That.....bears on the question whether they were divided or not in point of law. It is a matter of opinion and as such cannot be made the basis of a conviction for perjury."[3]

2051. Where the accused was charged with perjury in that he made a statement on the first occasion that he saw one *L*, son of *R*, run away from the custody of the peon and on the second occasion that he saw one man going eastward, and that he was not certain whether that man was the accused, it was held that the accused could not be charged or convicted for perjury as, at the time of his second deposition, the accused was not asked to explain his first deposition in the light of his second statement.[4] In another case the accused deposed before a Magistrate that he had seen *P* and others gambling in a certain place. On the 1st February he was cross-examined in the same case before the same Magistrate, and he then deposed that he did not know *P* and had never seen him gambling. He was convicted of having made two contradictory statements, and the question raised by Bhashyam Ayyangar, J., was whether a contradiction occurring in the same deposition could legally form the basis of a conviction for perjury. On the difference arising between him and Moore, J., the question was referred to Benson, J., who held with Moore, J., that there is nothing in law to prevent a legal conviction from being bad on contradictory statements made in the course of the same deposition.[5]

2052. The contrary view has been supported on the principle that a witness should have a right of correcting himself, and if he made one statement in one portion of his deposition, and a contradictory one in another portion of it, that fact alone

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(1) *Bankatram*, 28 B. 533; *Ramji*, 10B. 124; *Bedoo Noshyo*, 12 W. R. 11; *Fida Husain* v. *Katub Hussain*, 7 A. 38.

(2) *Ib*.

(3) *Bankatram*, 28 B. 533.

(4) *Narayan Nair*, 8 M. L. T. 86, 6 I. C. 409.

(5) *Palagan*, 26 M. 55; *Habibullah*, 10 C. 937.

affords no ground for a conviction for perjury.[1] But the question cannot be disposed of as an abstract question of law, as it was by Bhashyam Ayyangar, J., though there is a good deal in what he observed about giving a witness a *locus pœnitentiæ* in correcting himself. But the question depends upon whether the contradiction was a correction or a deliberate departure from a former statement. If it was a mere correction or an explanation, the statement though false could not be regarded as made "intentionally." That word controls the whole section and, as has been remarked before, every statement, though contradictory, is not necessarily false within the meaning of the section. If a false statement does not bear directly on a material issue in the case, being relative to incidental or trivial matters only, it may be regarded as made inadvertently or by mistake, and not advisedly knowing it to be a false, and with the intention of deceiving the Court and of leading it to be supposed that which he stated is true.[2]

2053. In England, a conviction on the sole basis of contradictory statements is illegal,[3] but in India the legality of such conviction has now become established.[4] But the evidence required in such cases is the same as is requisite to establish any other case of perjury. As Markby, J., remarked in a case: "Of all criminal charges which can be made, perhaps the charge of perjury is that which the ends of justice require to be the most carefully and accurately worded. The more general is the allegation of falsehood, the less is the risk in putting it forward, and the greater the difficulty of rebutting it. It is, therefore, the right of the person accused of perjury to leave the statement which he is charged with having falsely made, distinctly and separately pointed to him, and I will venture to say that no Court can safely and satisfactorily arrive at a judicial conclusion relative to a charge of perjury, unless its investigation be directed singly to each alleged false statement, with the view to ascertaining, *first*, whether it was made at all; *secondly*, whether, if made, it was true or untrue; and *thirdly*, whether, if untrue, its untruth was present to the mind of the person making it at the time he made it."[5]

2054. So Parker, C. J., observed in an English case: "There is this difference between a prosecution for perjury and a bare contest about property that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favour of either party; but, in the former, the presumption is one to be made in favour of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man for perjury, a probable or credible witness is not enough, it must be clear and strong testimony."[6] But this dictum does not support the rule enunciated by Norman, J., "that no man can be convicted of giving false evidence, except on proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true; if the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because assuming all that is proved to be true, it is still possible that no crime was committed."[7]

2055. Judicial Proceeding.—This section prescribes a punishment for giving false evidence in a judicial proceeding. An attempt is made to describe this term in the three explanations appended to the section. The word "Judge" is defined in s. 19 and "Court of Justice" in s. 20. A judicial proceeding is nowhere

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(1) *Per* Wilson, J., in *Habibullah*, 10 C. 937; *per* Bhashyam Ayyangar, 26 M. 55; *Tarachand Marwadi*, 117 I. C. (N.) 210.

(2) *Babu Ram*, 26 A. 509; following *Mahomed Hossain*, 16 W. R. 37; *Shib Prosad*, 19 W. R. 69: dissenting from *Ganga Sahai*, (1903) A. W. N. 68.

(3) *Harris*, 5 B. & Ald. 926; *Wheatland*, 8 C. & P. 238; *Jackson*, 1 Lewin C. C. 270.

(4) *Zamiran*, B. L. R. 521, F. B.; *Mohomed, Hoomayoon*, 13 B. L. R. 324; *contra* in *Mugapa*, 18 B. 377.

(5) *Kalichurn Lahoree*, 9 W. R. 54.

(6) *Muscot*, 10 Md. R. 194.

(7) *Ahmad Ally*, 11 W. R. 25 (27), *contra* in *Mahomed Ismail Khan*, 22 O. C. 236, 54 I. C. 60.

defined, but it must mean the proceeding of a Judge exercising jurisdiction in the matter. Where, therefore, the Sub-Divisional Magistrate having called upon the complainant to show cause why he should not be prosecuted under s. 211, directed the Honorary Magistrate to record in a preliminary inquiry purported to be held on his behalf under s. 476 of the Code of Criminal Procedure, it was held that the Honorary Magistrate had no jurisdiction to hold such inquiry and that a witness for the complainant who gave false evidence before him, could not be ordered to be prosecuted for this offence.[1] So a judicial proceeding must strictly comply with the requirements of law. Where, therefore, a statement of a witness taken by a Civil Court was not read over to him as required by Ord. XVIII, r. 5 of the Code of Civil Procedure the deponent could not be convicted of giving false evidence under this section.[2] But the mere absence of a certificate that the deposition had been read over to the deponent does not render the deposition inadmissible since the Court is bound to presume that the Judge had complied with the law.[3]

2056. A statement recorded by a Magistrate in the course of a police investigation under s. 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of Explanation 2.[4] Where, however, the accused had made two contradictory statements, one in the course of a police investigation under s. 164 and another during the trial, the Court was divided on the question whether the two statements were admissible to support a conviction under this section, the majority being of opinion that the first statement was false evidence "in any other case" within the meaning of clause 2 of the section, and it can be linked with the other statement made in the course of a judicial proceeding, the two being treated as a series of acts upon which an alternative charge was justified by s. 236 of the Criminal Procedure Code.[5] In Civil Cases an affidavit is evidence cnly when it conforms to the provision of some law ; *e. g.*, Ord. XIX of the Code of Civil Procedure cr s. 74 of the Criminal Procedure Code. Where therefore the accused supported their application for transfer by an affidavit not called for by the Court under Ord. XIX, r. 1 of the Code, or s. 74 of the Criminal Procedure Code, the accused could not be convicted thereon.[6] It was so held in a case in which the accused had sworn an affidavit before a Magistrate and filed it in the Civil Court in support of their application for transfer.[7] Even where it is called for, it must contain a statement made on personal knowledge.[8]

2057. Non-Judicial Proceeding.—Clause 2 deals with perjury in a non-judicial proceeding ; *e.g.*, a statement made to a Registrar under s. 68 of the Registration Act.[9]

2058. Proof of Perjury.—In a case of false evidence it is necessary to prove the deposition alleged to contain the false statement.[10] It may be proved by production of the original record, and the statement of the person who made it to the effect that it is a true record of what the accused had stated, or if the production of the original is inconvenient or impracticable, then a certfied copy of the deposition may be placed on record, but neither the production of the original nor of the certified copy is by itself sufficient to prove the statement against the accused which can only be proved by the person who took down the deposition, or at least by some one who had heard the deposition given.[11] But the oral testimony of a

(1) *Sakhi Bai*, 49 I. C. (Pat.) 917.
(2) *Karbat Singh*, (1917) P. R. No. 12, 39 I. C. 847. Though the deposition might be read by the clerk in the presence of the Judge ; *Meango* v. *Baviah*, (1918) M W. N. 239, 45 I. C. 507. How such deposition might be proved ; *Mirabuys*, 18 N. L. R. 192, 68 I. C. 36.
(3) *Jagat Ram*, (1918) P. R. No. 28, 47 I. C. 872.
(4) *Purshottam*, 45 B. 895, F. B. ; *Sajawal* 137 I. C. (L.) 131.
(5) *Ib. Per* Macleod, C. J., Pratt, Fawcett, and Setalvad, JJ. (Shah, J., dissenting).
(6) *Dibal Safar*, 5 S. L. R. 102, 12 I. C. 651
(7) *Ib.*
(8) *Dina Nath* v. *Nek Ram*, 21 A. L. J. 88, 74 I. C. 75.
(9) *Narayanswamy*, (1912) M. W. N. 1107, 18 I. C. 662.
(10) *Bhakoas Tutum*, 7 W. R. 13 ; *Mahomed Ismail*, 22 O. C. 236, 54 I. C. 60 ; *Ramoo Singh*, (1920) Pat. 20, 54 I. C. 173.
(11) *Mi Shwe Ke*, (1902) 1 B. L. R. 268

witness without the deposition is inadmissible in evidence,[1] so that one without the other is insufficient to prove a case of perjury. The deposition should be put in, because it is a record made and required by law to be made, of the statement of the accused.[2] The proceedings in the case in which it was taken, ought also to be put in to show the nature of the proceedings in which the evidence was given.[3]

2059. But these records do not prove themselves. They have to be proved by those who made them, or those in whose presence they were made. This evidence must be directed to showing that the accused is the person who gave the evidence, that it was given in a judicial proceeding on or about a certain day, and that he gave it on oath or affirmation.[4] The deposition if reduced to writing must have been taken in accordance with law. That is to say, it must comply with the requirements of the law under which it was taken. If, for instance, it was taken under the Code of Civil Procedure, it must comply with the provisions of that Code relating to the reading over and signing of it by the Judge,[5] in the absence of which there can be no prosecution for perjury. For such evidence being required by law to be in writing no evidence other than the document itself is admissible in evidence, and the defects of the evidence cannot be permitted to be made good by parol. Where, for instance the witness was examined in Assamese, and the Judge recorded it in English, but it was neither signed by the Judge nor certified by him as having been interpreted to the witness, it was held that the defects were incurable and could not be made good by any other evidence.[6]

2060. Of course, a deposition taken under the Code of Criminal Procedure has similarly to be read over to the witness in the presence of the accused or his pleader, and it must then be certified as having been so read over, and must, of course, be signed by the Magistrate.[7] It is not necessary that the Magistrate must himself read the deposition over to the witness. All that is necessary is it must be read over to him by or before the Magistrate and to his hearing.[8] So where a deposition taken in a criminal case was read over to the accused, but not in the presence of the accused or his pleader, it was held to be a deposition not taken in accordance with law and as such it is not admissible under s. 80 of the Indian Evidence Act[9] and since s. 91 of that Act excludes parol evidence in such cases, it follows that no case of false evidence can be made out on such deposition.[10]

2061. Proof of Falsity.—It is on the prosecution to prove that the statement of the accused complained of is false. It must prove that it is not probably but necessarily false,[11] and that he knew it to be so.[12] A statement might be inaccurate,[13] ambiguous,[14] dubious or uncertain.[15] But it is not on that account necessarily false. The fact that the statement suggested a wrong inference may suffice to make it false, but it cannot then be held to be intentionally false.[16] It may be that the accused has contradicted his previous statement; but that alone would not prove its falsity.[17] An account of the witness's statement in the judgment of the Court is not relevant to prove the statement.[18]

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(1) *Bapu Naran*, (1888) B. U. C. 401.
(2) S, 91, Indian Evidence Act (I of 1872).
(3) *Bapu Naran*, (1888) B. U. C. 401.
(4) 8 W. R. Cr. L. 16.
(5) Ss. 182, 183, C. P. C., Ord. XVII, rr. 5, 7; C. P. C. (Act V of 1908).
(6) *Mayadeb Gossami*, 6 C. 762; *Bai Ratan*, 10 B. H. C. 166, *Shivya*, 1 B. 220; *Viran*, 9 M. 224.
(7) Ss. 359, 362, Cr. P. C; *Mohendra Nath Missar*, 12 C. W. N. 845; following *Kamatchinathan*, 28 M. 308.
(8) *Meanwo*, (1916) M. W. N. 239, 45 I. C. 507; *Mirabux*, 68 I. C. 36, 18 N. L. R. 192; *Muthukumara*, 21 M. L. J. 411, 9 I. C. 262.
(9) *Mohendra Nath Missar*, 12 C. W. N. 845; *Kamatchinathan*, 28 M. 308.
(10) *Ib.*
(11) *Nirghin*, 56 I. C. (Pat.) 660.
(12) *Kalyanji*, 48 M. 395; *Taj Mhd.* 107 I. C. (L.) 100.
(13) *Chandra Mohan*, 43 I. C. 822; *Abdul Wahid*, 21 A. L. J. 211, 71 I. C. 661.
(14) *Ramgobind*, 1 Pat. L. R. 17, 72 I. C.887.
(15) *Ratansi*, 9 S. L. R. 170, 32 I. C. 688.
(16) *Nirghin*, 56 I. C. (Pat.) 660.
(17) *Buck Shah*. 5 S. L. R. 136, 13 I. C. 220.
(18) *Nirghin*, 56 I. C. (Pat.) 660; *Oates v. King-Emperor*, 38 C. L. J. 163.

2062. Fabricating False Evidence.—Besides giving false evidence, a person may be dealt with under this section for fabricating false evidence, a term which has been defined in the last section. Such evidence may consist of an act done in Court, though the accused may not be on oath, or even open his mouth. Where, for instance, one Debi was charged with enticing away a married woman, and on the case being called on, both he and his brother Cheda Lal, the accused, applied to the Magistrate to call upon the prosecution witnesses to identify him. The Magistrate permitted this to be done, and thereupon Cheda Lal, brought up ten or twelve men and said that Debi was amongst them. All the witnesses including the woman said to have been enticed away, failed to identify Debi from amongst them, and thereupon the Magistrate asked Cheda Lal where Debi was, and he pointed to a man as being Debi, who being questioned said that he was Debi. It was discovered that the man was wearing a false moustache and that he was not Debi but Cheman. Cheda Lal was thereupon prosecuted for fabricating false evidence, and it was held that he had committed the offence inasmuch as the three circumstances necessary to constitute the offence were present. In the first place the accused had caused a circumstance to exist, namely, the placing of Cheman as Debi. In the second place he had intended that such circumstance might appear in evidence in a judicial proceeding, for he had intended that Cheman should personate Debi, and lastly that circumstance would have naturally materially affected the judgment of the Court, for, it would have disbelieved the witnesses implicating Debi, since their identification of the accused was evidence of an important character bearing materially on the result of the trial.[1]

2063. The first paragraph of this section consists of two distinct clauses relating to giving false evidence in any state of a judicial proceeding, which contemplates a judicial proceeding in existence ; and fabricating false evidence for the purpose of using it at any stage of a judicial proceeding, which contemplates some definite judicial proceeding being foreseen. Lastly the second paragraph deals with giving or fabricating false evidence in any other case. A case must fall under one or other of these three clauses to constitute an offence under this section. If it does not, then it is not punishable as an offence under this section, whatever may have been the immorality of the act. The accused had executed a mortgage deed. He fraudulently endorsed thereon the return of consideration. He was held guilty of fabricating false evidence.[2] The accused had executed a dower deed in favour of a woman whom he described as his wife and in which he falsely recited his marriage to her which in fact he had failed to secure. It was held that the deed fell within the terms of this section as the accused had intended to use the transfer deed to secure possession of the woman as his wife.[3]

2064. Where, however, the accused appeared before a Marriage Registrar, representing himself to be the bridegroom, while his confederate appeared to prove that the marriage had been duly solemnized, thereupon the Registrar made an entry of the registration of the marriage, which was false, whereupon the two confederates were prosecuted under this section for fabricating false evidence, and the question was whether their act amounted to that offence. It was held that that act did not come under the first and second clause, nor did it amount to the giving of false evidence before a public servant. The question then was whether it amounted to the fabricating of false evidence within the meaning of section 192. But it was held that of the three ingredients required to constitute that offence evidence of the intention to use the false entry in any judicial or other proceeding was wanting, and the accused were consequently acquitted, it being held that it may well be that the false entry was made to be useful in cases other than those specified in s. 192, for it may be to prevent the marriage of the girl with any other person, or it may be that the entry was made for any other purpose. But the fact that it was not

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(1) *Cheda Lal*, 29 A. 351.
(2) *Abdul Rashid*, 12 A. L. J. 104, 22 I. C. 911.
(3) *Legal Remembrancer* v. *Abi Lal*, 48 C. 1005.

shown to have been made with any of the purposes specified in section 192 entitled them to be acquitted of a charge under this section.[1]

2065. The same view was taken in another case in which the accused had signed a lease for his father, and applied for its transfer to the Deputy Commissioner. He was prosecuted for having falsely signed his father's name, but the Court quashed his conviction on the ground that he had affixed his father's signature with his authority and that it was therefore not a false statement, nor was there any intention on the part of the accused that it should appear in evidence in any proceeding, for though the Deputy Commissioner might have taken evidence on the petition, the petition itself could in no sense be called in evidence.[2] Such was held to be the case of the accused who had signed a report without reading it. It was held that his act was indiscreet but not one which could be described as abetment of the fabrication of a false report.[3]

2066. Measure of Punishment for Perjury.—The punishment for perjury must necessarily vary with the gravity of the offence, which depends upon the circumstances under which the false statement was made. Evidently a servant perjuring himself in the interest of his employer, will have to be judged by a very different standard to one who was entrapped into inconsistent statements by the ingenuity of the cross-examining counsel, or who from ignorance, recklessness or want of proper understanding had made statements which were self-contradictory. A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, it is not an offence of the same complexion as a mis-statement made with no ulterior object from which no inference can be drawn.[4]

2067. The question of materiality, then, becomes once more relevant in this connection. For a person accusing another by his falsehood cannot be judged in the same light as one who utters a falsehood to save himself. Indeed, it has been observed that although a person under examination as a witness is bound by his affirmation, to tell the truth if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts for fear of penal consequences. Although, without such a warning, he may make a false denial, and thereby become guilty of the offence, his offence will be one not deserving of severe punishment.[5]

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law of British India or England, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

—Giving or fabricating false evidence with intent to procure conviction of capital offence;

and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

if innocent person be thereby convicted and executed.

[*For List of Capital Offence*—See s. 35.] [*Offence*—s. 40.]

2068. Analogous Law.—This section was amended by the substitution of the words "the law of British India or England" for "by this Code or the law of England."[6] The words "or the law of England" were added in 1890 by the Indian Railways Act, section 149.[7]

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(1) *Mahomed Siddiq*, 11 C. W. N. 911.
(2) *Po Shin*, (1906) 4 B. L. R. 45.
(3) *Jai Jai Ram*, 17 A. L. J. 374, 50 I. C. 28.
(4) *Gurjoon Aheer*, 7 W. R. 37.
(5) *Judoonath Dutt*, 2 C. L. R. 181.
(6) Indian Penal Code Amendment Act (XXVII of 1870) s. 7.
(7) Act IX of 1890.

2069. Procedure and Practice.—No prosecution can be initiated under this section without the complaint of the Court concerned, as required by s. **195** of the Procedure Code. The offence is non-cognizable, but warrant should, ordinarily, issue in the first instance. It is both non-bailable and non-compoundable, and is triable exclusively by the Court of Session.

2070. Whipping.—A person is, on a second conviction both under this as well as the last section, liable to the sentence of whipping in addition to the punishment here prescribed.[1]

2071. Proof.—The points requiring proof are those mentioned under the last section, in addition to which the following further points must be proved :—

That the accused when giving or fabricating false evidence, intended thereby to cause or knew that it was likely that he would thereby cause the person in question to be convicted of the capital offence, under the Indian Penal Code, or under the English Law.

For the second clause, prove further :—

(1) that the capital punishment was carried into effect; and
(2) that the person executed was an innocent person.

2072. Principle.—This is an aggravated form of the same offence as is made punishable under the last section—the aggravation consisting in the perjury involving the risk of life. It is, therefore, divided into two parts according to the peril it has caused. If the perjury was aimed only at procuring conviction of a person of capital crime, the maximum sentence prescribed is transportation but if it has led to the execution of an innocent person, then the perjurer is himself liable to the sentence of death. In either case, the offence need not be necessarily committed "in any stage of a judicial proceeding," and in this respect the terms of this section are wider than those of the last section—the difference being due to the gravity of the offence, which may lead to the sacrifice of human life. The offence would then be complete even if the evidence be given before a police-officer investigating into a case, of the nature described in the section.[2]

2073. But this view is not consistent with that maintained in Bombay where it has been held that this section only applies to false or fabricated evidence given in the final stage, for example the trial, and not merely in the preliminary inquiry into the case. Where, therefore, an accused had in a preliminary inquiry before a Magistrate, given a deposition in which he had falsely stated that he had seen the person charged before the Magistrate in the act of committing murder, it was held that the offence committed could not be punished under this section. This view proceeds upon the words "intending or knowing it to be likely that he will thereby cause any person to be convicted" of a capital crime. "Ordinarily" it was aberved "only his deposition before the Court of Sessions could have this effect, and the usual presumption of his intending the natural consequences of his act, would fix him only with an indent to get the accused committed for trial. True the Sessions Judge might refer to the depositions in the preliminary inquiry, but this would be exceptional, and cannot be supposed to have been contemplated by the prisoner.

2074. The words "in any stage of a judicial proceeding," which occur in section 193 are not repeated in section 194, and the Court think the latter refer only to the final stage, *i.e.*, the trial of the case.[3] The word "thereby" in the section certainly lends countenance to this view, for it could ynly mean that the intention of the perjurer was to use the evidence directly for the durpose of attaining the result desired.[4] It is not necessary that he should implicate some specified person, for, all that the section requires is that such evidence should be given, knowing it to be likely that he will thereby cause any person to be convicted of a capital offence. In one case the accused deposed before the committing Magistrate that Mohan Lall had committed the murder for which he was being prosecuted. He was committed to the Court of Session, and then the accused changed his statement and said

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(1) S. 4, Whipping Act (VI of 1864).
(2) *Nim Chand*, 20 W. R. 41 (43); but *contra* in *Kokal Das*, (1874) B. U. C. 80.
(3) *Gokuldas*, (1874) B. U. C. 80.
(4) *Muhammad*, (1886) P. R. No. 32.

that the murderer was another person by name Dava, and not Mohan Lall. There was, however, other evidence implicating the latter, and he was convicted, and the accused was thereupon prosecuted under this section, inasmuch as, by his statement before the Court of Sessions, he had implicated Dava who was innocent of it. But the Court held that the offence of the accused fell under section 193, because in implicating Dava, his object was to save Mohan Lall, and not to cause the conviction of Dava. In fact in giving that deposition in the trial of Mohan Lall, he could not possibly cause the conviction of Dava of murder. He could not, therefore, know that he would cause, or was likely to cause the conviction of Dava for murder.[1] Of course, his evidence had the effect of throwing suspicion on an innocent person of the murder, and it may have been that his deposition may have let to his prosecution for that offence. But this was neither his primary intention, nor was it likely in that proceeding and in consequence of his statement. The section was therefore rightly held to be inapplicnble.

2075. Of course, it is not necessary that some specified person should be the target of such perjurer. If his intention was to implicate "any" person, his offence may be complete, though it fails to implicate a certain person. But in order to sustain a conviction under this section, the false evidence must be such that, if believed, it would result in a conviction for a capital offence.[2] It is only then that the accused can be said to know the likelihood of a conviction for a capital offence. If his evidence is not direct, but circumstantial, it may then be a question whether he could be said to possess that knowledge which is a gist of the crime. So where in a case the accused Naurang deposed that he had heard a sound of something like a brick or stone falling into a well, and that he subsequently saw a dead body in the well, and noticed Bihari and another person running away, and Bihari was acquitted, it was held that the deposition of Naurang made out only a case of concealing evidence of murder, and did not by itself, or coupled with other evidence make out Bihari to be the murderer. He could not therefore be charged under this section.[3] This case suggests another. Suppose two persons *A* and *B* conspire to see *C* an innocent person convicted of murder. *A* and *B* divide the points necessary for *C*'s conviction, but the evidence of one without the other is insufficient for the purpose. There are the statements of *A* and *B* but no evidence of conspiracy against them; could both of them be convicted under this section? If there is evidence of conspiracy, the question presents no difficulties. But in the absence of conspiracy the evidence taken singly would be insufficient for a conviction. In that case neither *A* nor *B* could be convicted under this section.

2076. Section When Inapplicable.—This section is inapplicable to a person accusing another of murder to a police officer in an inquiry under s. 174 of the Code, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible.[4]

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment.

(1) *Hardyal*, 3 B. L. R. (A. Cr.) 35.
(2) *Per* Knox, J., in *Naurang*, (1906) A. L. J. 110, *notes*.
(3) *Naurang*, (1906) A. L. J. 110, *notes*.
(4) *Mhd. Hayat*, (1922) P. W. R. 6, 65 I. C. 434, (1922) L. 133.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause *Z* to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. *A*, therefore, is liable to such transportation or imprisonment, with or without fine.

[***Offence***—s. 40. ***Fabricates false evidence***—s. 192. ***Gives false evidence***—s. 193.]

2077. Analogous Law.—This section with the last was twice amended, once in 1870,[1] and then again by the Indian Railways Act in 1890.[2] Before its amendment the words used after " an offence which " were only " by this Code." The first amendment added to them " or the Law of England," so that the amended clause was extended to " by this Code or the law of England." Their scope was, however, further enlarged by the subsequent amendment, when the present words were substituted.

2078. This is only a somewhat attenuated form of the last section. Otherwise the two sections deal with the same class of crime. The last section dealt with perjury in a capital case. This section deals with the same offence in cases neither capital nor punishable with less imprisonment than for seven years. Whatever remains would then be punishable under the provisions of section 193.

2079. Procedure and Practice.—No prosecution can be initiated under this section without complaint[3] which should be made by the Court mentioned in s. 195 of the Code of Criminal Procedure. The making of a complaint is a judicial act and should not be performed as a matter of perfunctory duty. Where the accused persuaded a person to falsely state to the police that she had witnessed a dacoity, whereupon the District Magistrate sanctioned her prosecution under this section, the High Court quashed the proceeding holding the order precipitate and the offence neither amounting to the giving or fabricating false evidence.[4] The offence is non-cognizable, and non-bailable, and warrant should ordinarily issue in the first instance. It is non-compoundable, and is exclusively triable by the Court of Session.

2080. In addition to the punishment here provided, the accused may on a second conviction be sentenced to whipping by way of additional punishment.[5]

2081. Proof.—The points requiring proof are the same as for an offence under s. 193, in addition to which the following fact must be established :—

> That the accused, when giving or fabricating false evidence, intended thereby to cause, or knew that it was likely that he would thereby cause any person to be convicted of an offence not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards.

2082. Principle.—In point of gravity this offence takes an intermediate place between the offences punishable under the last section and section 193. As the offences to which it relates are only next to capital, special provision was called for to deal with offenders of this class.

2083. The requirements of this section are otherwise the same. There must be the giving or fabricating of false evidence. It must be with the intention or knowledge that the person accused will be thereby convicted of an offence, the punishment prescribed for which is transportation for life or imprisonment for at least seven years. Besides the facts necessary to prove an offence under s. 193, these three ingredients must be clearly established. That is to say, there must be clear evidence of intention or knowledge that the evidence was given to procure a false conviction of a person for an offence of that gravity. The evidence of knowledge must be unequivocal, though it may not be direct. But it must be nevertheless evidence sufficient to justify a finding that the evidence was given or fabricated with only that, and no other, intention. So where, in a case, one Sheo Charan went to the accused's house to remonstrate with him for having beaten his nephew,

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(1) Indian Penal Code Amendment Act (XXVII of 1870) s. 7.
(2) Act IX of 1890, s. 169.
(3) S. 195, Cr. P. C.
(4) *Durga Prasad*, 30 I. C. (A.) 651. following *Tabarak*, 30 A. 52.
(5) S. 4, Whipping Act (IV of 1864).

and thereupon the accused assaulted him, and immediately set fire to a thatch in front of his house with the object of getting Sheo Charan convicted of arson, the Court held that the accused could not be convicted under this section, as he had set fire to it in a public manner, and took no steps to implicate Sheo Charan. In other words, the act was at best merely preparatory to the commission of an offence under this section, though it was by itself sufficient to constitute mischief punishable under s. 436.[1] But suppose, that in such a case, the accused had, after setting fire to the thatch, charged Sheo Charan with arson, would the offence under this section have then been complete?

2084. Such a question presented itself before Hobhouse and Loch, JJ., in a Calcutta case in which the accused had not only set fire to his own house, but also immediately afterwards charged the accused falsely of burning it, on which Hobhouse, J., remarked: "The firing of his house by prisoner was simply, it seems to me, a minor act on his part subordinate to the major act of making the false charge, for the fact of the burnt house was manifestly intended to be used as evidence of the said charge."[2] But this appears to be no reason for taking the case out of the section, and if it were a reason, it would apply equally to the case supposed in the illustration. Indeed, such a case is scarcely distinguishable from that where the accused secreted some stolen railway pins in the field of his enemy, so that the latter might be apprehended and charged with their theft, and who was thereupon held to have committed an offence under this section.[3] Such was held to be the case of the accused who enclosed in an insured cover worthless paper and produced its receipt in proof of discharge of a debt.[4]

2085. Indeed, it is to provide adequate punishment for acts such as these, that the scope of the section was enlarged by the Railways Act,[5] so that a person fabricating evidence so as to procure another's conviction for an offence under s. 126 of that Act[6] would, since the amendment, be equally liable to a conviction under this section, for the offence is one which is by that section, punishable with transportation for life, or with imprisonment for a term which may extend to ten years.

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

[***False evidence***—s. 191. ***Fabricated evidence***—s. 192. ***Corruptly***—*see* § 2091.]

2086. Analogous Law.—Evidence which is false or fabricated must conform to the definition of those terms as given in sections 191 and 192. The giver of such evidence is punishable under the provisions of ss. 193-195. Its suborner is punishable under this section. Such a person is in fact the abettor of the principal offence, but it may not be always possible to establish the elements of abetment. Moreover, law regards such an abettor as much guilty as the principal offender, and this section therefore makes him liable to an equal punishment. In so far as the provisions of this section relate to fabricated evidence, they may be compared with those of section 471, which presents common elements, and in such cases a person may be convicted on either count, though not on both.[7]

2087. Procedure and Practice.—No prosecution can be instituted under this section without the previous complaint of the Court or public servant concerned, as required by section 195 of the Code of Criminal Procedure. The offence is non-cognizable, but warrant may issue in the first instance. It is bailable only if the offence of giving such evidence is bailable, otherwise it is non-bailable. It is non-compoundable and is triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class.

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(1) *Shib Dyal*, 5 N. W. P. H. C. R. 186.
(2) *Bhugwan Ahir*, 8 W. R. 65.
(3) *Ib.*
(4) *Vithinathaswami*,, 51 M. L. J. 800.
(5) *Per* Spankie, J., in *Rameshar Rai*, 1 A. 379.
(6) Act IX of 1890.
(7) *Oodun Lall*, 3 W. R. 17.

2088. As remarked before, so far as this offence relates to fabricated evidence, its provisions are similar to those of s. 471. But the fact that an offence under that section is not invariably triable by the same Court as an offence under this section, may create a difficulty. For if a Magistrate convicts under this section, the accused may justifiably plead defect of jurisdiction, on the ground that his offence was one under s. 471 and triable exclusively by the Court of Session. To obviate such a difficulty, cases arising out of the filing of forged documents should be invariably committed to the Court of Session on a charge both under this as well as under section 471. According to the Calcutta High Court in such cases, a conviction by a Magistrate under this section would be illegal.[1]

Jurisdiction.

2089. Proof.—The points requiring proof are :—

(1) That the accused used or attempted to use some evidence.
(2) Which was false or fabricated.
(3) That he used or attempted to use such evidence as true or genuine evidence.
(4) Though he then knew it to be false or fabricated evidence.
(5) That he used or attempted to use it corruptly.

2090. Charge.—This section prescribes a punishment for two distinct and separate offences namely, for " using " and " attempting to use " false evidence. They should be, therefore, separately charged, and where the facts only warrant a charge of one or the other, the charge should then use only words appropriate to it. In case of doubt, the charge may be framed in the alternative.[2] In any case the charge should specify whether the evidence used or attempted to be used was false or fabricated. It may be worded thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That you——on or about the——day of——at——corruptly used (*or* attempted to use) as true or genuine evidence, the evidence, to wit——which you knew to be false (*or* fabricated) and as such punishable under s. 193 (*or* 194, *or* 195 of the Indian Penal Code), and thereby committed an offence under s. 196 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2091. Principle.—Persons who give false evidence are naturally exposed to the penalties provided in the three preceding sections. Those who procure or suborn such evidence may be guilty as abettors or under the provisions of this section. If their abetment was merely confined to instigation, they would then be only liable under the general law of abetment. But if they have attempted to use or in fact used such evidence, their offence is scarcely distinguishable from the offence of those who actually gave that evidence. But a person may call a witness who may give false evidence, but it does not render the party calling him liable under this section. His liability depends upon using such evidence "corruptly "—a word which the Code does not define, but which is here probably used to denote an impropriety brought about by bribery or undue influence resulting in acts which are inconsistent with the proper discharge of official duty or the rights of others. It implies impropriety but not necessarily venality.[3] An act may be ' corrupt ' if it is wicked or immoral, though it may not be technically dishonest or fraudulent. A person who desires toprocure a false conviction does so corruptly, though his intention may be merely improper.[4] In this sense not only the party who procures or tenders false evidence, but also the judge who improperly uses it for the purpose of determining any question he is called upon to decide, commit an offence under this section. The word " use " is therefore not confined merely to procurers and suborners of such evidence. It may equally apply to the judge, who makes use of false evidence which he knows to be false. In this view the section presents a wider outlook than at first sight it seems to do.

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(1) *Kherode Chunder Mozumdar*, 5 C. 717.
(2) 2 W. R. Cr. 9.
(3) *Kherode Chunder*, 5 C. 717; *Muddoo Soodan*, 7 W. R. 23; *Lakshmi*, 7 M. 289; *Fazl Ahmed*, (1914) P. R. 1, 23 I. C. 696 (699); *Rama*, 4 O. 317.
(4) *Fazal Ahmad*, (1914) P. R. Cr. 1, 23 I. C. 696.

2092. Meaning of Words.—"*Corruptly uses or attempts to use*": For the meaning of "corruptly" *see* the last paragraph. The word implies no more than a general felonious intent.[1] No use or attempted use of a thing is punishable unless it amounts to "evidence" not necessarily admissible evidence[2], but at least such as is *prima facie* admissible. Consequently, a mere attempt to obtain a medical certificate which was refused could not be punished under this section, because there was merely an attempt to procure evidence, and no attempt to use it.[3] "*As true or genuine evidence*": the word "true" has been used in contradistinction to "false", and "genuine" in contradistinction to "fabricated" evidence. "*Any evidence which he knows to be false or fabricated*": That is to say, the evidence must in fact be false or fabricated, and it must have been known to be so by the accused. "*Punished in the same manner*": That is, to the same extent. The penalty for the offence is the same as for giving false or fabricated evidence, but the offence committed is not the same.

2093. Corrupt Use of False Evidence.—This section deals with the corrupt use of false or fabricated evidence. The question what is a false or fabricated evidence calls for no comment. Those terms have been the subject of sufficient notice elsewhere.[4] The questions that present themselves here for consideration are those which deal with the special requirements of this section. In the first place the section speaks of *using* any evidence, which has been held to exclude a mere case of subornation, for false evidence can be used as genuine only after it has come into existence.[5] In other words, a person who hires a false witness and gives his evidence in Court, may, according to this view, be punished as an abettor of such evidence, but he cannot be punished under this section. For the intention of a person to give evidence is not evidence. That intention when fulfilled is evidence. But subornation has then done its work, and the suborner cannot be punished for using it. So far then it may be difficult to bring the offence of a mere suborner, as such, within this section. But it is seldom that a suborner stops short of using the evidence he has brought into being. He would then be clearly punishable under this section. It may be that the person who gives or fabricates false evidence is the same as the one who uses it, in which case, the offender may be convicted either for the one offence or for the other, for the penalty is in each case the same. But there may be cases in which it may not be possible to prove fabrication. In that case punishment may be awarded for its use as apart from its fabrication. So where a landlord sued a person for arrears of rent, and the latter denied his tenancy and arrears, to prove which the village patwari was called as a witness, who produced a fabricated assessment list, showing that the defendant held a certain quantity of land of a certain rent, and swore to its authenticity, it was held that the filing of a fabricated list was using fabricated evidence, and swearing to its authenticity was giving false evidence. The prisoner could thus be convicted either under this section or section 471, though he could not be convicted under both of them.[6] In another case, the accused produced a cattle pound receipt and called the Patel of another village to prove his *alibi* which was false. He was held to have "corruptly" fabricated false evidence since it was a fair inference that such evidence could not have been procured otherwise.[7]

2094. So far as the applicability of this section is concerned the same view was taken by Mahmud, J., in an Allahabad case arising out of the same facts.[8] In this case the Court appears to have construed the terms of this section as wider than those of section 471, for its view was that a false document filed to support a true claim without any intention to cause harm or loss to others, did not answer the requirements of s. 471,[9] but this is a view which can now be no longer maintained.[10]

(1) *Fasal Ahmad*, (1914) P. R. Cr. 1, 23 I. C. 696.
(2) *Baroda Kanta*, 30 I. C. (C,) 444.
(3) *Kabari Veerannat*, 35 I. C. (M.) 820.
(4) Ss. 191, 192.
(5) *Suffurudden*, 1 L. J. (O. S.) 122.
(6) *Oodun Lal*, 3 W. R. 17.
(7) *Rama*, 46 B. 317.
(8) *Sikandar Khan*, (1887) A. W. N. 285.
(9) *Ib.*, p. 287; following *Mir Ekrar Ali*, 6 C. 482; *Lakshmiji*, 7 M. 289.
(10) *Dhunum Kazee*, 9 C. 53 (60) and *see* s. 471, Comm.

Indeed, the word "corruptly" in this section has not a wholly different meaning to what is implied by the expressions "fraudulently" or "dishonestly" as used in s. 471.

2095. Again, the accused must have used the evidence "corruptly," that is to say, from a dishonest or improper motive (§ 2091). An innocent use of false evidence is not then within the category of the crime. The object of these penal provisions is no doubt to safeguard the Court against the perversion of their proceedings by the introduction of false and fabricated evidence. But at the same time law cannot visit with its penalty, persons who do not know that the evidence they are offering is false and who, moreover, do not offer it corruptly. The fact that the evidence tendered was false does not necessarily imply that it was known to be so by the accused, nor does the fact that it was known to be so, necessarily imply that it was used corruptly.[1] The question of materiality may thus become relevant, though not for its own sake, but as tending to throw light on the question of knowledge and intention. So where a person was shown to have produced as evidence an account book in support of his claim and it appeared that one page of it has been fraudulently abstracted and another substituted for it, it was held that though the account book had been tampered with, still it did not necessarily follow that the accused was necessarily guilty. The question was, how far the account book was material as a piece of evidence, for on its materiality depended the question whether the accused was likely to have used it corruptly. It was found that, having regard to the dates of the transactions entered next to the page abstracted, the missing page could not possibly have contained an entry of the disputed transaction. It could not then be presumed that the accused had used the book corruptly, when the only forgery which had taken place, had no relation whatever to the purpose for which the false evidence was used.[2]

2096. The evidence of knowledge is then essential to constitute the crime. But such evidence need not be direct. Indeed, direct evidence may not be always procurable. It may consist of such fact or circumstances as may lead the Court to believe that the accused's mind was possessed of the information that the evidence given was false or fabricated. Mere belief, however reasonable, is not enough. There must be knowledge. That knowledge need not, however, go beyond the fact that the evidence was false or fabricated. A document need not have been fabricated for the purpose for which it was used. For it is enough if it was fabricated, when and for what purpose it is immaterial. So where the accused sued on a bond and at the trial sought to support his claim by a letter of acknowledgment forged six years previously for the purpose of securing registration of the bond, it was held that the filing of the letter in the bond-suit constituted its corrupt user so as to bring the offence of the accused within the visitation of this section.[3] Of course, there can be no user, certainly not corrupt where a person produces a document because he is ordered to do so.[4]

2097. The case of false evidence presents no difficulty. But the case of fabricated evidence raises another question. Must it have been fabricated in British India? And if so, what should be the consequence, if the place of its fabrication be unknown? According to West, J., the word "fabricated" as used in this section, must mean fabricated so as to constitute an offence. Consequently, evidence fabricated out of British India is not fabricated in the sense of this section, and a person who uses such evidence, however corruptly, is not liable under this or any other section of the Code.[5] He then pointed out the dangerous consequences of this view, adding "In ordinary cases he would be liable to transportation for using such fabricated evidence to procure a capital conviction, but if the evidence has been fabricated on the other side of the frontier, he goes scot-free."[6]

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(1) *Madoo Soodun*, 7 W. R. 23.
(2) *Mudoo Soodun Shaw*, 7 W. R. 23.
(3) *Lakshmaji*, 7 M. 289.
(4) *Matin Lon* v. *Maonru*, 3 R. 36.
(5) *Moorga Chetty*, 5 B. 338.
(6) *Ib.* 353.

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Issuing or signing false certificate.

2098. Analogous Law.—Several Acts of the Legislature provide for the granting of certificates to persons who are then thereby invested with certain rights or empowered to do certain things, by virtue of the authority so conferred upon or declared to be in them. The certificates are in the nature of letters patent and their authenticity and correctness is presumed and must be above reproach. This section punishes those who issue or sign them knowing or believing them to be false on any material point.

2099. Procedure and Practice.—This section requires no complaint of a public servant as a necessary preliminary to prosecution. The offence is non-cognizable, and warrant must issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class.

2100. Proof.—The points requiring proof are :—

(1) That the document in question is a certificate.
(2) That it was required by law to be given or signed, or that it related to some fact of which such certificate is by law admissible in evidence.
(3) That the certificate is false.
(4) That it is false in a material point.
(5) That the accused issued or signed it.
(6) That at the time he issued or signed it, he knew it to be false.

2101. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——, on or about the——day of——at——being required by law, to wit—— to issue (*or* sign) a certificate, issued (*or* signed) the same and of which is by law admissible in evidence of the fact to wit——knowing (*or* believing) that such certificate is false in any material point, to wit——, and thereby committed an offence under s. 197 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2102. Principle.—This section penalizes only the wilful falsification of such certificates as are either required to be signed or given by law, or are such as afford *prima facie* eivdence of the fact to which they relate. There are a number of Acts under which public servants are empowered to issue such certificates. They carry with them their own evidence of authenticity and correctness the value of which depends upon the care and circumspection used in preparing them. Those responsible are, therefore, justly visited with the penal consequences here prescribed, if they sign or issue a certificate false on a material point, which might be the means of causing injury to those acting upon it.

2103. Meaning of Words.—"*Issues or signs*" : The word issue merely means delivery, issuing being the act of sending out or causing to go forth. "Issued" then simply means the act of giving or delivery, and the section itself interchangeably uses the two words "issue" and "give." It may be issued to a definite person or an indefinite body of men, such as the public. "Signs" means signing in token of authentication. A clerk initialling a certificate on the strength of which the responsible official signs it may be liable as an issuer, but he does not sign within the meaning of this section. "*Any certificate*": A certificate is a testimony given in writing to declare or verify the truth ot anything. It is a formal document and does not include a petition or other document in which a fact is stated or certified.[1]

2104. Criminal Liability for False Certificate.—In order to make a person criminally liable for a false certificate two things are essential : (*i*) The certificate given must be such as is required by law to be given or signed or it must be

(1) *Mahabir Thakur*, 20 C. W. N. 520, 33 I. C. 316.

by law admissible in evidence,[1] and (*ii*) it must be false in any material point. A certificate of character or the like is thus excluded from the category of the crime. It only safeguards those certificates which are required by law to be given, and which are then declaratory of a certain right or *status*, and which thus serve the same purpose as decrees of Courts. Such a certificate may be given by the Administrator-General,[2] entitling the claimant to the estate of a deceased person, to recover any sum belonging to him up to the extent of Rs. 1,000 and any debtor paying any sum and obtaining a copy of the certificate with a receipt for the sum annexed shall then be fully discharged.[3] A similar certificate may be given by a Court under the Succession Certificate Act,[4] which has the effect of indemnifying all persons making payments on its strength.[5] So the Registrar of Companies is empowered to issue a certificate of incorporation which shall be conclusive evidence that all the requirements contained in respect of registration under the Indian Companies Act have been complied with, and that the company is authorized to be registered under that Act as a limited or unlimited company as the case may be; and the date of incorporation mentioned in such certificate shall be deemed to be the date on which the company is incorporated under that Act.[6]

2105. Pleaders and Mukhtears admitted to practice, receive a certificate signed by an officer appointed by the High Court, which authorizes them to practise up to the end of the year for which it is given,[7] after which it may be renewed. So the Registrar of Assurances is, on completion of registration of an assurance, empowered to endorse thereon a certificate containing the word "registered." "Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by the Registration Act, and that the facts mentioned in the endorsements referred to in section 59 (of the said Act) have occurred as therein mentioned."[8] A minister of religion acting under the Indian Christian Marriage Act,[9] is empowered to issue a certificate of notice given and declaration made under ss. 17 and 24, and the Marriage Registrar may issue a certificate under s. 41 of the same Act permitting the contracting of a contemplated marriage, and a person licensed to solemnize marriage is empowered to certify it, and "the certificate shall be signed by such licensed person, and shall be received, in any suit touching the validity of such marriage, as conclusive proof of its having been performed."[10] Custodians of public records have to furnish a copy of public documents on demand and payment of the legal fee therefor, and such copy must bear a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate is to be dated and subscribed by such officer with his name and official title and it must be sealed whenever such officer is authorized by law to make use of a seal.[11] Such certified copy may be produced in proof of the contents of the public documents or parts of the public documents, of which they purport to be copies.[12]

2106. The Civil Courts have also to issue certificates under the various provisions of the Procedure Code. It may, for instance, have to certify a payment or adjustment of a decree made out of Court,[13] or grant a certificate of sale to an auction-purchaser,[14] or of a case being a fit one for appeal to His Majesty in Council.[15] In all such cases the certificate creates certain rights or declares a certain *status*, and it is legally admissible in evidence, and is, moreover, in some cases even conclusive proof of the matter therein stated. A person issuing or signing any such

(1) *Bijendra Nath Chatterjee*, 30 C. W. N. 120, 42 C. L. J. 557.
(2) Ss. 36-41, Act II of 1874.
(3) *Ib.*, s. 39.
(4) Act VII of 1889.
(5) *Ib.*, s. 16.
(6) S. 236, Act VI of 1882.
(7) Legal Practitioners' Act (XVIII of 1879) s. 7.
(8) S. 60, Act III of 1877.
(9) Act XV of 1872.
(10) Indian Christian Marriage Act (XV of 1872) s. 61.
(11) S. 76, Indian Evidence Act (I of 1872).
(12) *Ib.*, s. 77.
(13) Ord. XXI, r. 2, C P. C. (Act V of 1908).
(14) Ord. XXI, r. 94, C. P. C. (Act V of 1908).
(15) Ord. XLV, r. 3, C. P. C. (Act V of 1908).

certificate would therefore be subjected to the penalty prescribed in s. 193. That section, however, prescribed penalties for giving false evidence either in a stage of judicial proceeding or in any other case. This section does not specify as to which of the two penalties an offender under this section will be subject; but inasmuch as a person issuing a false certificate cannot be treated as one tampering with judicial proceedings, the penalty prescribed here is, it is apprehended, imprisonment of either description extending to three years as well as fine.

2107. Certificates granted under various Acts of the Legislature are as a rule admissible in evidence, either because they are the official acts of public servants,[1] or because they are made expressly admissible in evidence by the very Acts authorizing their issue. But their admissibility in evidence is no test of the crime. For all that the section requires is that the certificate must be required by law to be signed or given, or it must relate to a fact in which such certificate is admissible in evidence, and in which latter case alone is the fact of its admissibility material for the constitution of the crime.

2108. All official acts of public servants in the form of certificates are not *ipso facto* admissible in evidence, unless they are declared by law to be so admissible[2] or are otherwise admissible under the provisions of the Indian Evidence Act.[3] A false certificate not required by law to be given or signed, or which is not legally admissible in evidence cannot be made the basis of a conviction under this section, though the person issuing or signing it may be otherwise dealt with, as, for example, of giving false information to a public servant.[4] So where the notice of transfer of land was signed by a person who falsely personated his father, and the declaration appended thereto was signed by the accused who confirmed the false personation, it was held that as the declaration was not required by law, the accused could not be convicted under this section, though he might have been for giving false information to a public servant. But a copyist who had made an incorrect copy of a document by adding a name not to be found in the original, on the basis of which the persons to whom it was delivered maintained a suit was held to have committed an offence under this section.[5]

2109. Such a person was held not to have "framed or translated" a document within the meaning of s. 167 of the Code, but he was held to have issued or signed a false certificate within the meaning of this section. It is not necessary that the certificate should have been signed or issued by the person legally empowered to sign or issue it. It may have been issued by a person wholly unauthorized, and still he may commit the offence, for all that the section requires is that the certificate must be one either required by law to be issued or signed, or it must relate to a fact admissible in evidence. "Whoever" issues or signs such a certificate, brings himself within the penal visitation of this section, whatever may have been his authority, duty or power.

2110. Abetment.—A bailiff falsely stating to the Nazir that he had effected service of a summons upon a person, which in fact he knew he had not, and whereupon the Nazir certifies due service would be guilty of abetment of an offence under this section, though the Nazir may be wholly innocent.[6] But if the bailiff did not know that the person he was serving was the person to be served, he could not be convicted of abetment, for knowledge or belief in falsehood is the cardinal ingredient of the crime.

2111. Lastly, the certificate must be false on a *material* point. The question what point was material must depend upon the nature and object of the certificate. For instance, a wrong date may be material in one case and wholly immaterial in another. So even the names of the parties may be immaterial having regard to the object for which the certificate is granted. A person knowingly falsifying a

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(1) Indian Evidence Act (I of 1872).
(2) S. 79, Indian Evidence Act (I of 1872).
(3) *Ib.*, s. 77.
(4) *Mulharji*, (1882) B. U. C. 182; *Mahabir Thakur*, 20 C. W. N. 520, 33 I. C. 316.
(5) *Dewn Singh*, (1879) P. R. No. 15.
(6) *Hissamuddin*, 3 W. R. 37.

certificate will probably falsify it on a material point. On the other hand, inaccuracy on an immaterial point does not detract from its value,[1] and cannot be presumed to have been due otherwise than to inadvertence.

Using as true a certificate known to be false.

198. Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

2112. Analogous Law.—This section bears the same relation to the last as section 196 bears to sections 193, 194 and 195. The language of the two sections is closely analogous, and the commentary under that section is *mutatis mutandis* equally applicable to this section.

2113. Procedure and Practice.—An offence under this section is non-cognizable, but a warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Sessions, Presidency Magistrate or Magistrate of the first class.

2114. Proof.—The points requiring proof are :—

(1) That the document in question purports to be a certificate ;
(2) That it was either required by law to be given or signed, or that it related to some fact of which such certificate is by law admissible in evidence ;
(3) That such certificate is false ;
(4) And false on a material point ;
(5) That it was signed or issued (not necessarily by the person legally authorized to sign or issue it) ;
(6) That the accused used or attempted to use such false certificate ;
(7) That he did so corruptly ;
(8) That he then knew that it was false in a material point.

2115. Charge.—The charge should follow the form given under section 196.

False statement made in declaration which is by law receivable as evidence.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

[***Court of Justice***—s. 20. ***Public Servant***—s. 21.]

2116. Analogous Law.—This is not the only section dealing with false declarations, for section 191 also deals with them. The difference between the two sections, however, is this, that while section 191 deals with compulsory declarations, this section deals with those voluntarily made. But the penal consequence attaching to a declaration in each case is the same. This section is referred to in the explanation to section 200, which must be read as a part of this section.

2117. Certain Acts specially provide for the penalty attaching to false declarations made under them. So the Special Magistrates' Act, 1872, provides as follows :—

Penalty for signing declarations or certificate containing false statement.

"Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code."[2]

2118. Procedure and Practice.—Complaint of public servant is required for a prosecution under this section.[3] The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or Magistrate of first

(1) S. 79, para. 2, Indian Evidence Act (I of 1872).
(2) S. 24, Act III of 1872.
(3) S. 195; *see* ss. 476-478, 487, Cr. P. C.

class. On a case failing under this section the Court refused to convict in revision under section 182 holding that to sustain a conviction under that section sanction was necessary and that section 537 of the Criminal Procedure Code did not condone an irregularity to that extent. It, however, left it open to the District Magistrate to initiate a case under section 182 if so advised.[1]

2119. Proof.—The points requiring proof are :—

(1) That the accused made or subscribed the declaration in question.
(2) That such declaration was inadmissible in evidence of the fact therein stated.
(3) That the accused made a statement in such declaration.
(4) That the statement was false.
(5) That such false statement was on a point material to the object of such declaration.
(6) That the person making the declaration either knew or believed it to be false or did not believe it to be true.

2120. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——, on or about the——day of——at——made (*or* subscribed) a declaration which a Court of Justice to wit——(*or* any public servant *or* other person) was bound (*or* authorized by law) to receive as evidence of a fact, and therein made a statement to wit '——' which is false, and which you knew to be false (*or* did not believe to be true) on a point material to the object for which the declaration was made (*or* used) and thereby committed an offence under section 199 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court.)

"And I hereby direct that you be tried (by the said Court) on the said charge."

2121. Principle.—There are certain facts upon which a person must make a declaration, there are others upon which he may do so. In the former case such a declaration falls within the terms of section 191, in the latter case the penal consequences attaching to such a voluntary declaration are also the same, provided that the declaration was admissible in evidence. In other words, whether a declaration be compulsory or voluntary, a person making it falsely is liable to conviction as for giving false evidence if it was a declaration either required to be made by law,[2] or was admissible in evidence. As the risk of mischief was in either case the same, the penalty provided by law is also identical.

2122. Meaning of Words.—"*Declaration made or subscribed by him*": "Declaration" means any statement of fact made in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or the solemn affirmation substituted for an oath. In short, such a declaration is receivable in lieu of personal testimony.[3] An affidavit, in a case in which evidence may be given by an affidavit, is a declaration within the meaning of this section.[4] A person who subscribes to a declaration certifies that the facts therein declared are correct. A verbal declaration may be "made," while a written one must be subscribed by the person making it. "*Bound or authorized by law receive as evidence*" : In the one case, he must, in the other case he may, receive it in evidence. "*Knows or believes to be false, etc.*": For the meaning of this phrase, *see* s. 191. "*Touching any point material to the object*": This provision as to materiality shows that the section has no reference to the evidence of a witness in a judicial proceeding. In one sense, such evidence is a declaration, but then it is a declaration on oath or affirmation and, as such, within the comprehension of section 191.

2123. False Declaration.—A false declaration made under the circumstances specified in the section exposes the declarant to the same penalty as if he had given false evidence. These circumstances are stated by the section to be (*i*) that it must be a declaration ; (*ii*) that it must be admissible in evidence ; (*iii*) that it

(1) *Ismail*, 8 Bur. L. T. 82, 25 I. C. 515.
(2) S. 191.
(3) *Per* Scotland, C. J., and Ellis, J., in *Vedamuttu*, 4 M. H. C. R. 185; followed in *Ismail*, 8 Bur. L. T. 82, 25 I. C. 515.
(4) *Palaniappa Chetti* v. *Annamalai Chetti*, 14 M. L. J. R. 74 ; *Shahzad Khan*, (1933) Pat. 513 ; *Kari Gopi*, 6 Pat. 760.

must be false on a point material to its object; and (*iv*) that the declarant must have known or believed it to be false at the time he made it.

(i) It must be a Declaration.

2124. In the first place it must be a declaration, that is to say a formal statement of facts in the form simply of a declaration which, for the purpose of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation. It must be a declaration which having been made, is afterwards receivable as evidence of the fact declared.[1] Examples of the declarations here contemplated are affidavits in civil suits, statutory certificates under sections 2 (8) and 4 of the Bankers' Books Evidence Act[2] and declarations and certificates under the Special Marriage Act, 1872.[3] Any report required and made under any law cannot be treated as a declaration for the purpose of this section. For instance, a person entering upon possession of revenue paying land is under the several local Acts, required to make a report of that fact to a Revenue Officer, but such report is not a declaration, and if false, the reporter cannot be punished under this section.[4] Where a statement has to be sworn to before an officer duly authorized for that purpose, it must be sworn to before him, otherwise it is not a declaration.[5]

2125. A declaration may be oral or written. If the latter, it must be subscribed to by him. This means that he must affix his signature at the end of the writing in token of its correctness. A sworn oral statement, such as a deposition of a party or witness in a judicial proceeding, if false, may amount to perjury, but the provision as to its materiality shows that it was intended to be excluded from this section.[6]

2126. Then, again, there must be evidence that the declaration was made or subscribed to by the accused. If a false declaration be then made not by the accused, but by his pleader, the accused could not be punished under this section. Where therefore the accused who was defendant in a suit instituted against him for the enforcement of a bond denied the execution of the bond, and later on, his pleader filed a petition asking that the suit was compromised and might, as such, be struck off, it was held that not having signed the petition it could not be made the foundation of a charge or conviction under s. 199 though a deposition on oath supporting such petition would justify a charge under s. 193.[7]

(ii) It must be Admissible.

2127. Secondly, the declaration must be (*a*) evidence and (*b*) at least admissible as such by law.[8] A false statement as to the amount due to the applicant in a petition for execution, though verified in accordance with law, is a declaration, but nevertheless it is not punishable under this section because it, of itself, is no evidence of the sum due,[9] though it is only a choice of evils, since such a case would unquestionably fall under section 193. So where the accused identified a person who falsely personated another, the husband, before the Mahomedan Registrar of Marriages, and obtained the registration of the husband's divorce from his wife, it was held that the accused could not be convicted under this section inasmuch as the Registrar was not bound or authorized by law to receive his statement in evidence, though he might be guilty of an offence under section 466 and section 114 if he knew that the man had personated another, or at least had no knowledge of his identity.[10] An application by the accused under section 526 of the Code of Criminal Procedure, made to the High Court, for the transfer of a case, is a "criminal proceeding" within the meaning of section 5 of the Oaths Act, under which it is unlawful to administer an oath or affirmation to the accused. Therefore an affidavit

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(1) *Vedamuttu*, 4 M. H. C. R. 185; *Ismail*, 8 Bur. L. T. 82, 25 I. C. 515.
(2) Act XVIII of 1891.
(3) S. 21, Act III of 1872.
(4) *Ismail*, 8 Bur. L. T. 82, 25 I. C. 515, (1889) A. W. N. 29.
(5) *Kotayya*, 27 I. C. (M.) 159.
(6) *Vedamuttu*, 4 M. H. C. R. 185.
(7) *Ram Rewas Kowar*, 7 C. L. R. 356.
(8) *Iswarchunder Guho*, 14 C. 653; *Abdul Majid* v. *Krishnalal Nag*, 20 C. 724.
(9) *Bapuji*, 10 B. 288; *Haran Mandal*, 2 B. L. R. App. J. C. 1.
(10) *Yasin Sheik*, 9 C. W. N. 69, 2 Cr. L. J. 8.

sworn to by him before the Deputy Registrar of the High Court is a mere nullity and he cannot be convicted for any false statement therein.[1]

2128. Before a declaration can be made the subject of a prosecution under this section it must be shown to be a declaration which law treats as evidence—not merely as an admission against the declarant, but as evidence for and against h m.[2]

2129. For example, there is a provision made in the Code of Civil Procedure for the swearing of an affidavit for certain purposes, which is, of course, then a sworn declaration of a fact therein stated.[3] But there is no corresponding provision in the Code of Criminal Procedure and a person filing a false affidavit[4] or a declaration[5] in a Criminal Court cannot be convicted under this section, as that Court is not authorized by law to receive it as evidence.

2130. The fact that there is no prohibition against the receptibility of such evidence does not render it admissible. For the powers of the Court and public servants are defined and circumscribed by law, and before a declaration can be made the foundation of a prosecution for perjury under this section, there must be some law under which the declaration must be at least admissible in evidence. So where the accused applied to a Municipality for a hackney license for two carriages and six ponies, declaring that to be the number owned by him, though in fact he had been plying nine animals upon which he was prosecuted under this section, the Court held his liability under this section to depend upon the provisions of the Municipal Act. If that Act creates an obligation on an applicant for a license truly to declare the conveyances and animals in his possession then the offence would be one made punishable under s. 193. If, again, there be anything in that Act to make it admissible in evidence before the Municipal Commissioners, then the offence would be one made punishable by this section. In another case the accused had obtained from the Mamlatdar a certificate of his solvency, based upon a false declaration made before him. He used it for the purpose of securing a license from the Abkari officials. It was held that the accused could not be convicted of this offence for making a false declaration, since there was no law under which the Mamlatdar could have received it "as evidence" of the accused's solvency.[6]

2131. But as the Court remarked: "It needs a very slight acquaintance with the Indian Evidence Act, and with the principles of law which are embodied in it, to satisfy any one that the statement made by the accused for the purpose of taking out these licenses, is no evidence at all against any one but himself, and could only be evidence against himself as proving an admission by him, that at the time he made it he had in his possession six horses and no more, for which he was liable to pay the tax. It is obvious that it is impossible to strain the words of the section, so as to bring such a case within them, and we are clearly of opinion that on the facts alleged here, no charge can be framed against Chandi Pershad under section 199."[7] This case then clearly establishes that in order to render a declaration penal under this section, it must be something more than a mere admission in a party's own favour; if it is an admission it must be such as was admissible in evidence in the proceeding in which it was tendered. The same view was taken in another case in which the accused had made a false written declaration to a Mamlatdar in Bombay, with a view to obtain from him a certificate of his solvency to enable him more easily to obtain an excise contract for which he had tendered. When tried under this section he pleaded guilty, but the High Court acquitted him holding that his plea merely amounted to an admission of the fact and that as he had committed no offence in law he was entitled to an acquittal.[8] A false verification in a plaint

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(1) *Ramasawmy Chetty*, 1 Weir 176.
(2) *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131.
(3) O. XIX, C. P. C.; *Iswar Chunder Guho*, 14 C. 653; *Abdul Majid* v. *Krishna Lal Nag*, 20 C. 724; *Dital Sabar*, 5 S. L. R. 102, 12 I. C. 651.
(4) *Chandi Pershad* v. *Abdur Rahman*, 22 C. 131.
(5) *Ram Parshad*, 35 A. 53.
(6) *Rajappa*, 17 Bom. L. R. 222, 28 I. C. 645.
(7) *Bapuji Dayaram*, 10 B. 288.
(8) *Rajappa*, 17 Bom. L. R. 222, 28 I. C. 645.

or pleading of an application for execution, does not therefore fall within this section, though they are punishable under section 193, because a plaint, pleading or an application for execution is not admissible as "evidence of any fact" as required by this section.

(iii) False on a Material Point.

2132. Thirdly, it must be false on a point material to its object. The question of materiality is a question of fact dependent upon the object of the declaration. It will be noticed that materiality is by no means directly essential to constitute the offence of perjury (§ 1944), though it is of the essence of the offence.

(iv) Knowledge of its Falsity.

2133. Lastly, knowledge of belief in its falsity is an essential here as it is in the case of false evidence, and the meaning of the qualifying phrase in the two sections is the same (§§ 1984-1988).

Using as true such declaration, knowing it to be false.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—**A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.**

2134. Analogous Law.—This section is again related to the last in the same wise as section 198 is to 197 or section 196 to sections 193, 194 and 195. The object is not only to punish the false declarant, but also one who corruptly uses or attempts to use it as true, though he then knew it to be false in any material point.

2135. Procedure and Practice.—No prosecution can be instituted under this section without previous complaint.[1] The offence is non-cognizable, but warrant must issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or Magistrate, first class.

2136. Proof and Charge.—The points requiring proof are :—

(1) That the accused used or attempted to use a declaration ;
(2) That he did so corruptly ;
(3) That he used the declaration as true ;
(4) Though in fact it was a false declaration ;
(5) And was false on a material point ;
(6) And which fact the accused knew ;
(7) That the declaration was one which a Court of Justice, or any public servant or other person was bound or authorized by law to receive as evidence, of any fact (s. 199).

For a form of charge, *see* ss. 196 and 198.

2137. Principle.—The policy underlying this section as well as s. 196 and 198, is the same. They make the users of false evidence, certificate or declaration equally liable with the makers thereof, if only they knew them at the time to be false on any material point. Law regards such persons as *particeps criminis*, and as such holds them liable.

For a further commentary on this section, *see* ss. 196 and 198.

Causing disappearance of evidence of offence or giving false information to screen offender ;

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment or with that intention gives any information respecting the offence which he knows or believes to be false,

if a capital offence.

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

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(1) S. 195, Cr. P. C.; *cf.* ss. 476-478, 487.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

If punishable with transportation;

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

If punishable with less than ten years' imprisonment.

Illustration.

A, knowing that *B* has murdered *Z*, assists *B* to hide the body with the intention of screening *B* from punishment. *A* is liable to imprisonment of either description for seven years, and also to fine.

[***Reason to believe***—s. 26. ***Offence***—ss. 40, 203, Expl.]

2138. Analogous Law.—This section belongs to the group of sections to which sections 118-120, 176, 177, 181, 182, and 201-203 belong. The first group of sections [1] deals with the concealment of design to commit an offence. The second deals with the omission to give information,[2] the third with giving false information,[3] and the fourth with the causing of disappearance of evidence,[4] which is made punishable by this section, but which though generally worded, does not extend to false information given by a witness in a judicial proceeding, and which is false evidence punishable under sections 193-195 of the Code.[5]

2139. Aiders and abettors have been classed in English Law as accessories before the fact, accessories at the fact, and accessories after the fact. The first two are reached by the Code under the law of abetment. Accessories after the fact were dealt with by the Law Commissioners as "subsequent abettors" but these last were swept away by the English Law Commissioners from the list of abettors. "There seems no reason," they said, "for continuing the provisions as to accessories after the fact, the offences of parties falling within this description at present, being for the most part referable to the class of offences against public justice."[6] The Law Commissioners acceded to this view and provisions relating to subsequent abetment were deleted from the chapter on abetment and the offences so available were distributed over the other parts of the Code. This section with its illustration formed section 106 of the original Bill, and which was a section under the chapter on abetment. And its transposition to this place was effected in pursuance of the view that there was no reasonable justification for the retention of the tripartite division of accession of English Law.

2140. Procedure and Practice.—This offence is non-cognizable, but warrant may issue in the first instance. It is bailable but not compoundable, and if the offence screened is punishable with death it is triable exclusively by the Court of Sessions ; if the offence screened is punishable with transportation or imprisonment for ten years, then either by the Court of Session, Presidency Magistrate or Magistrate of the first class ; otherwise it may be tried by a Presidency Magistrate, or Magistrate of the first class, or the Court by which the offence screened is triable. In awarding the sentence regard must be had not to the offence actually committed but only to that the accused knew had been committed.[7]

2141. Proof.—The points requiring proof are :—

(1) Commission of an offence;
(2) That he—
(*a*) caused any evidence of the commission of the offence to disappear, or

(1) Ss. 118-120.
(2) Ss. 176, 202.
(3) Ss. 177, 181, 182, 203.
(4) Ss. 201, 204.
(5) *Mt. Sharing*, (1884) P. R. No. 42.
(6) 7th Rep., §§ 103-108, cited in 1st Rep. s. 220, Reprint, p. 242.
(7) *Chinna Gangappa*, 54 M. 68 (74).

(*b*) gave any information respecting the offence which he then knew or believed to be false;

(3) That the accused then knew or had reason to believe that the offence had been committed;

(4) That he did as in (3) with the intention of screening the offender from legal punishment.[1]

To these may be added the following in proof of aggravation—

(5) That the offence in question was punishable with death, or with transportation for life, or with imprisonment extending to ten years.

2142. Charge.—An accused charged under this section cannot be convicted under the next section (s. 202) inasmuch the ingredients of the two offences are not identical, nor are those of one implied in the other.[2] It is highly undesirable though not quite illegal [3] to charge the same person in the alternative, of murder and this offence,[4] or to convict him in the alternative.[5] In fact the two charges are inconsistent, and if the accused is found to have been principal, he could not be convicted of accession under this section. An accused charged both under this offence and that under s. 302 may be convicted of this offence by the High Court, though he is acquitted of murder and the Sessions Judge omitted to give any finding in respect of it.[6] A person who gives false information to the police, accusing another of murder, in order to screen the real offender, commits offences not only under ss. 201 and 203 but also under s. 211.[7]

2143. The charge should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——, on or about the——day of——, at——knowing (*or* having reason to believe) that certain offence, to wit——punishable with——, have been committed, did cause certain evidence of the said offence to disappear, to wit——(*or* knowingly gave false information, to wit——) with the intention of screening the said (name of the offender screened) from legal punishment, and thereby committed an offence punishable under section 201 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session *or* High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2144. Principle.—The section presents a case of accession after the fact. "An accessory after the fact" said Lord Hale "may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon."[8] Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he should know of the felony committed.[9] In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment, makes the assister an accessory."[10] The offence of an accessory after the fact was never regarded so serious as that of other accessories, and as such an accessory might have been moved by feelings of love or pity to assist the felon, in which case his prosecution was seldom ordered, and it was always discouraged.[11] That policy has led to the elimination of that class of offenders from the Code; but there still remained persons whose offence could not be similarly overlooked. There are those who know of the felony committed[12] and that it is complete[13] and still assist the felon not only by relieving, comforting or assisting him; but also by weakening the prosecution against him. Such a case is made punishable by the section, the policy of which is to prevent such accessories from tampering with justice. Of course, the section has no application to the offender himself who cannot be prosecuted for obliterating

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(1) *Subramanya*, 3 M. H. C. R. 551.
(2) *Rino*, 5 S. L. R. 123, 13 I. C. 210.
(3) *Umed Sheihh*, 30 C. W. N. 816; *Rup Narain*, 10 Pat. 140 (146).
(4) *Sumanta*, 20 C. W. N. 166, 32 I. C. 132; contra in *Hanmappa*, 25 Bom. L. R. 231; *Chinna Gangappa*, 54 M. 68.
(5) *Nolli Narasigadu*, 30 I. C. (M.) 135.
(6) *Mhd. Shah*, (1915) P. R. 8, 19 I. C. 710; *Durlav Namasudra*, 59 C. 1940; *Chinna Gangappa*, 54 M. 68; *Mitta Venkatamma*, 56 M. 63.
(7) *Tapinessa*, 46 C. 427.
(8) I Hale, P. C. 618.
(9) 2 Hawk, P. C. 319.
(10) 4 Black, Comm. 37.
(11) Foster, Cr. L. 372.
(12) 2 Hawk, P. C., c. 29, s. 32.
(13) *Kashi Nath*, 8 B. H. C. R. 126.

the traces of his own crime.[1] Nor can he be tried for abetment.[2] It only applies to others who make his escape easy by putting the prosecution off the scent.

2145. Meaning of Words.—"*Whoever knowing that an offence has been committed*" *i.e.*, the "whoever" must not be the offender himself. The section deals with an accessory after the fact. (§§ 2039, 2148). "*Causes any evidence to disappear*": Such evidence may or may not be material to the proof of crime. Nor need it be legally admissible. The word "evidence" is here used in its primary sense as meaning anything that is likely to make the crime evident, such as the existence of a wounded corpse, or blood stains, or fabricated documents or similar material objects indicating that an offence has been committed.[3] The disappearance must have been caused, and not merely *suffered*. It must have been brought about by the active assistance of the offender, and its primary object must have been to screen offender from punishment. Mere knowledge that it will have that effect is insufficient.[4] Removing,[5] concealing or otherwise disposing of the body of a murdered person amounts to causing disappearance of evidence.[6] "*With that intention gives any information*": To whom? Presumably to those interested in bringing up to justice.

2146. Screening an Offender.—The opening sentence of this section enacts "whoever knowing or having reason to believe that an offence has been committed," from which it would at first sight appear that the mere having reason to believe was sufficient to support a conviction, it being immaterial whether an offence was, or was not in fact committed. But this is obviously not its meaning. It postulates the commission of an offence and then proceeds to describe the elements of criminality. "For, it is impossible for any one to know, or to have reason or sufficient cause to believe that an offence has been committed when it has not been committed. A person may fancy that he knows or has reason to believe an offence to have been committed when it has not been committed, but he is mistaken in so fancying. He may, under the influence of such a mistake, remove something which he supposes to have been committed; and he may be morally blamable for so doing. But it is beyond the province of criminal legislation to punish a man for a delusion or even for an act which has not caused any actual harm to the public or any individual member of society."[7]

2147. There are other sections which proceed upon the same assumption.[8] There are others[9] in which the language used is more exact, but in either case the sense appears to be the same. It may then be taken as settled that the first pre-requisite of the offence described in this section is that an offence must have been committed, and there must be an offender, though the accused need not be necessarily aware of his identity,[10] for if he is dead, one may screen his memory from disgrace, but one cannot screen the offender from punishment. Again, one cannot be convicted of screening an offender when the offender himself has been tried and is acquitted of the offence.[11] For then the offender being not guilty his abettor could not be convicted of screening him for punishment.[12]

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(1) *Kashi Nath*, 8 B. H. C. R. 126; *Sumanta Dhupi*, 20 C. W. N. 166, 32 I. C. 132; followed in *Rup Narain*, 10 Pat. 140.

(2) *Toolshee Rai*, 5 N. W. P. H. C. R. 186; *Pelka Nushyo*, 2 W. R. 43.

(3) *Anver Khan*, 23 Bom. L. R. 823, 63 C. 146.

(4) *Per* Pearson, J., in *Abdul Kadir*, 3 A. 279. F. B.

(5) *Mata Din*, 6 O. W. N. 1017.

(6) *Muzammal*, (1909) P. W. R. No. 8, 3 C. 622.

(7) *Abdul Kadir*, 3 A. 279,F.B.; *Fateh Singh*. 12 A. 432; *Saminatha*, 14 M. 400; *Matuki Misser*, 11 C. 619; *Girish Mythe*, 23 C. 420; *Ram Rachea Singh*, 1 Wym. 1; *Subhramanya Pillai*, 3 M. H. C. R. 251.

(8) *Eg.*, s. 214.

(9) *Eg.*, s. 212.

(10) *Rino*, 6 S. L. R. 76, 16 I. C. 753.

(11) *Abdul Kadir*, 3 A. 279, F. B.

(12) *Ramsoonder Shootar*, 7 W. R. 52; *Behala Bibi*, 6 C. 789; *Torap Ali*, 22 C. 638; *Kashi Nath Dinkar*, 8 B. H. C. R. 126; *Ghanasham*, 8 B L. R. 538; *Sumanta Dhupi*, 20 C. W. N. 166; 32 I. C 132; *Krishna*, 2 A. 713; *Lalli*, 7 A. 749; *Dungar*, 8 A. 252; *Fakiruddin*, (1877) P. R. No. 4; *Mir Afzal*, (1881) P. R. No. 25; *Mula Singh*, (1895) P. R. No 19.

2148. From what has been said elsewhere (§ 2039) it is manifest that the section only applies to persons other than the actual offenders.[1] A person who first commits an offence and then conceals evidence of it cannot be punished for both the offence as well as its criminal concealment,[2] nor, indeed, alone for the latter.[3] He may be suspected of one and convicted of the other, and in that case there would be other difficulties to overcome. But it would be wrong to minimize the offence of the culprit by prosecuting him under this section when the facts warrant his trial as a principal.[4] For the question then would be whether the statement made was self-exculpatory or made to screen another person an offender. And even when the latter is the case, the question may still be whether the statement was not made to inculpate another with the object of exculpating oneself. For it cannot be the object of the section to punish a person circuitously when he cannot be punished directly. Nor does the section penalize an offender for the absence of exalted morality in obliterating the traces of his crime with the object of insuring his escape from justice by diverting suspicion from himself and which he may do, either by concealing the *corpus delicti* or by falsely incriminating another.[5] In such a case, the accused may bring himself within the penal visitation of some other sections, but his is not the case to be dealt with under this section.

Actual Offender Excluded.

2149. On the other hand, there is nothing illegal in convicting a person under this section of criminal concealment, though he may have been tried and acquitted of the principal offence.[6] But in such a case it is neither safe nor proper, to convict him upon his own confession, made in the previous case, in which he may have made the statement inculpating another with the object of exculpating himself. And in such case the evidence must be clear to the effect that the accused had caused evidence to disappear in order to screen some other offender known or unknown, from legal punishment.[7] So, where two or more persons are accused of complicity in a crime, and some of them are acquitted, whilst others convicted, there is nothing against the former being tried under this section for screening the latter.[8] So where six persons including the two accused, had been tried for murder, and the evidence against the accused was that they had carried the dead body in their cart which was blood-stained, upon which they were acquitted of murder, it was held that upon that evidence, if believed, there was nothing to prevent their being convicted under this section.[9]

2150. The accused was tried under this section to cause the disappearance of evidence of a murder, to screen his sons whom he suspected of the crime. The sons were tried and acquitted of the charge. It was held that the ordinary consequences of the accused's act was that the offender, whoever he might be, would be screened and that if the accused contemplated this ordinary consequence, he would be answerable for this offence though he could not be held guilty of the offence of screening his sons.[10]

2151. Since suicide is no offence, the removal or concealment of the body of such person is not punishable under this section.[11] So a person assisting another, in concealing the body of a man killed by him, is not necessarily guilty if the killing was no

Concealing Corpus Delicti.

(1) *Toolshee Rai*, 5 N. W. P. H. C. R. 186; *Sumanta Dhupi*, 20 C. W. N. 166, 32 I. C. 132; *Rup Narain*, 10 Pat. 140; *Chinna Gangappa*, 54 M. 68 (70) *contra*, *Har Piari*, 49 A. 57, (submitted unsound as view opposed to tenour of the language of the section); *Ahmad*, 91 I. C. 541, (1926) L. 209; *Kudaon*, 21 N. L. R. 86, (1925) N. 407; *Andal Shah*, 86 I. C. 973, (1925) S. 306.

(2) *Krishna*, 2 A. 713.

(3) *Sumanta Dhupi*, 20 C. W. N. 166; 32 I. C. 132; followed in *Rup Narain*, 10 Pat. 40; *Har Piari*, 87 I. C. 44 (1926) A. 787.

(4) *Ib.*

(5) *Behala Bibi*, 6 C. 789.

(6) *Nazree*, (1902) P. R. No. 6 also *Ditta*, 110 I. C. (Lah.) 682.

(7) *Bucha*, (1904) P. R. No. 1, 1. Cr. L. J. 113.

(8) *Ib.*

(9) *Ib.*, *Har Piari*, 97 I. C 44, (1926) A. 737; *Kudaon*, 91 I. C. 236, (1925) N. 407.

(10) *Rino*, 6 S. L. R. 76; 16 I. C. 753.

(11) *Thakri*, (1911) P. W. R. 17, 11 I. C. 609.

offence, as, if it be a justifiable homicide. Such was the case of a person who getting scent of a thief making an aperture in the wall of his house came out stick in hand, and on the thief advancing to attack him, the latter struck at him in the dark killing him on the spot. He then called out the two accused, who were his uncle and nephew, who lit a lamp and saw that the man had died. Thereupon they carried his corpse to a sugar-field, a mile distant, and left it there. This was evidently done to screen their relative from the charge of killing the thief, but, as it was justifiable, there was no offence committed, and as there was no offender, the accused could not then be convicted of screening him.[1]

2152. In another case, *A* went into *B's* field where he found *C* with whom he had an altercation, in the course of which he slapped him. *C* fell down, and the next day he was found lying dead near the spot where he had been hit by *A* on the previous day. *A* was prosecuted for culpable homicide and discharged for want of sufficient evidence. *B* was then prosecuted for having burnt *C's* corpse before the police could be communicated for having prevented the making of a report. But it was held that, as there was no offence or offender after *A's* discharge, *B* could not be charged for concealing evidence.[2] So where two persons were charged with murder and both were discharged on the ground that though the evidence pointed conclusively to one or the other being the actual murderer, there was no evidence to show which of them had committed the murder, it was held that neither of them could then be convicted for causing disappearance of some evidence in the case.[3]

Knowledge Necessary.

2153. Assuming then that there was an offence committed, and that there is an offender awaiting justice,[4] the next thing required by the section to be proved is that the person to be charged under the section, must have known or have reason to believe that an offence has been committed. But of the offence he may not have much knowledge. He may believe a person to be guilty, but he may have no reason for his belief. In that case he does not transgress the provisions of this section by doing what is here condemned. The section only punishes him who either knew or had *reason to believe* that an offence had been committed. Now, no one can be said to have reason to believe a thing unless he had sufficient cause to believe that thing.[5] It lies on the prosecution to prove that the accused had such sufficient cause for his belief. This must depend upon the facts and circumstances of each case. So where a person was by chance present at the commission of a murder, and being too frightened he did nothing to prevent it, and he was afterwards threatened into joining with the murderers in concealing the body, it was held that though the accused could not be convicted of abetment of murder still his offence fell under this section.[6] So persons accused of complicity in a murder may not be convicted of it, but there may be sufficient evidence against them to uphold a conviction under this section. So where the two accused were along with four others jointly tried for murder, but the only evidence against them was of having removed the corpse in their cart which was found to be blood-stained, it was held that though the accused might have been acquitted of murder, there was nothing against their being convicted of criminal concealment under this section.[7]

2154. What Disappeared must be Evidence.—These were flagrant cases of criminal concealment. But there may be cases in which, the criminality of the accused may not be quite so obvious. In this connexion it is well to note that what the section penalizes is causing the disappearance of evidence of the offence

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(1) *Pelkoo Nushyo*, 2 W. R. 43.
(2) *Matuki Misser*, 11 C. 619.
(3) *Torap Ali*, 22 C. 638; distinguished and dissented from in *Limbya*, (1895) B. U. C. 799, in which the learned Judges have held that the conviction of the accessory for an offence under this section is not illegal, merely because it is suspected but not proved or admitted that the accused committed or was one of the several persons who committed the offence.
(4) *Adho*, 86 I. C. 961, (1925) S. 257; *Nawab Din*, 144 I. C. (L.) 12.
(5) S. 26.
(6) *Goburdhun*, 6 W. R. 80.
(7) *Bucha*, (1904) P. R. No. 11.

of the commission of which, the person accused had knowledge. If, therefore, what had disappeared was not evidence of the offence, the accused commits no offence, whatever may have been his act. So where *A* and *B* murdered *C* in their own field, and then removed the corpse to *C's* own field to divert suspicion from themselves, it was held that the accused could not be convicted for causing disappearance of evidence, first, because they had not done so to screen themselves from punishment, and secondly, because the removal of *C's* corpse to *C's* field had not the effect of causing any evidence, which that corpse afforded, to disappear.[1]

2155. So in another case, a son of the accused having murdered a child in a room of her house, the accused removed the blood-stained sheet from the child's body and placed it in a box which she locked up, as also her house, upon which she was incriminated under this section, but the Court held that the locking up of the sheet and the house did not amount to the disappearance of evidence, as "the presence of the sheet on the body did not constitute evidence that murder had been committed, it was in itself no evidence of the murder, and its concealment did not cause evidence of the murder to disappear. The same must be said of the locking of the door of the house. The body was in the house in an inner room, and was covered with cotton stalks. The act of locking up the door merely prevented access to the interior of the house, and did not amount to moving the body or concealing it from sight. The body remained where it lay, and could be seen by any one who obtained access to the house.[2]

What Constitutes Evidence.

2156. The disappearance of evidence does not include disappearance of a witness who would have given evidence in the case. The word 'evidence' as used here, has probably not the same meaning as it bears in the Indian Evidence Act.[3] It is here used in its primary sense, as meaning anything that is likely to make the crime evident or manifest; in short, it means such facts, as may probably lead to the proof of the crime. An eye-witness is not such a fact, for the value of his evidence depends upon his credibility. So where the accused having reason to believe that a murder had been committed, whereupon he took away the wife of the murdered man as she knew about it, in order to prevent her from giving information, it was held that the act of the accused did not bring him within the limits of the offence here described, as the taking of measures to keep a person out of the way; who is possessed of knowledge of the occurrence of the crime and who is likely to communicate that knowledge to others, does not amount to causing disappearance of evidence within the meaning of the law.[4] Again, the words "causing disappearance" implies some active exertion in that direction, and not a mere passive acquiescence or neglect. So where the established facts against the accused were, that they had allowed a dead body to remain near their fields and gave no information of the occurrence of a crime which they had good reason to believe, had been committed, but no positive act of concealment was proved against them, it was held that the facts proved did not warrant a conviction under this section.[5]

2157. Intention to Screen the Offender Essential.—Again, even though the thing screened be evidence, the next requirement of the section is that the screening must have been with the intention of screening the offender. In other words, what the section requires is that it should be the primary and sole object of the accused. The fact that the concealment was merely likely to have that effect, is not sufficient, for, the section speaks of intention as distinct from a mere likelihood. Whenever the Code speaks of likelihood, the phraseology adopted is "intending or knowing it to be likely," but here what is stated is intention only, and it must therefore be proved by evidence which establishes something more than a mere likelihood.[6] So where the prisoners having discovered the body of a woman who had evidently been murdered, lying within the limits of their village, and who

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(1) *Krishna*, 2 A. 713.
(2) *Rajam (Mt.)*, (1905) P. R. No. 53.
(3) Act I of 1872, s. 3.
(4) *Muhammad Baksh*, (1882) P. R. No. 21.
(5) *Mir Afzul*, (1881) P. R. No. 25.
(6) *Toolshee Rai*, 5 N. W. P. H. C. R. 186. *Taprinessa*, 46 C. 427.

thereupon apparently with no other intention than to save themselves from the harassment and expense of a police-investigation removed the body to another village, which had the effect of putting the police off the scent for a time, it was held that, as the removal was not with the intention of screening the offender, the act of the accused did not fall within the section.[1] So where *A* killed a thief in the exercise of his right of private defence, and *B* and *C* helped him to remove the corpse to a field, a mile distant, the latter were held to have committed no offence as *A*'s killing was a justifiable homicide, and there being, therefore, no offender, there could be no offence under this section.[2] (§§ 2146, 2150).

2158. A woman who with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing; she made three different statements: (*a*) that she had left it with her husband, (*b*) that she had been enticed away by one *R*; (*c*) that one *H* had drowned the child. The Sessions Judge believed the last statement, and convicted her under this section, but her conviction was quashed on appeal by Pontifex and Field, JJ., who held that the woman's statements were made more to exculpate herself from having to account for the missing child, and that she could not, therefore, be convicted of an offence under this section.[3] Of course, as observed before, a person commits no offence under this section for defending himself by making a false statement concerning another, whether it be to inculpate him or not.

2159. Concealment or False Information.—Again, not only must the intention of the accused be to screen the offender, but with that intention in view, he must have caused disappearance of any evidence of the offence or given any false information respecting the offence. The giving of false information respecting the commission of an offence is one thing, its concealment is another. They are bot offences calculated to thwart justice, but the same intention is not common to both. In the one case there may be no intention to conceal the real offender but merely an intention to screen an offence or to implicate one falsely: in the other there is an active desire to save a person from legal punishment.

2160. No Offence.—The accused, a Head Constable, while investigating a complaint of theft, searched the house of a suspect, found there two clothes which the complainant identified as his own, and produced similar clothes to confirm his statement. The Head Constable recorded their statements; but afterwards suppressed these papers and fabricated other statements in which the complainant was stated to have withdrawn his complaint and produced the very clothes which he said had been stolen. A *panchnama* to this effect was also concocted. He was convicted both of this as well as of the offence punishable under s. 218; but his conviction of this offence was set aside, on the ground that the suppressed papers could not be construed to be evidence of the commission of theft though they were evidence relating to the inquiry of the Commission of the theft.[4] A person who acts under overpowering compulsion cannot be said to act with any intention to screen the offender.[5]

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Intentional omission to give information of offence by person bound to inform.

[***Offence***—s. 40, s. 203, Expl. ***Legally bound***—s. 43.]

2161. Analogous Law.—The provisions of this section are analogous to those of s. 176 of the Code, which is, however, more general, for, while it relates to the legal obligation to furnish information on any subject, this section only

(1) *Toolshee Rai*, 5 N. W. P. H. C. R. 186; *Baktawari (Mt.)*, 120 I. C. 268.
(2) *Pelkoo Nushyo*, 2 W. R. 43.
(3) *Behala Bibi*, 6 C. 789.
(4) *Anver Khan*, 23 Bom. L. R. 823, 63 I. C. 146.
(5) S. 94; *Autar*, 47 A. 306 (309).

relates to the commission of an offence. As it is, both the sections have but an application limited to the class of persons "legally bound" to give information. Such persons are, for example, the Police, village headman, village accountant, village watchman, village police officer, owner or occupier of land, and the agent of any such owner or occupier, and every officer employed in the collection or revenue or rent of land on the part of Government, or the Court of Wards.[1] The public are also under the legal obligation to inform the police, regarding the commission of certain offences specified in s. 44 of the Procedure Code. The subject has already been discussed in the preceding pages (§§ 1749-1752). The distinction between this section and the next should be noted. No one except those "legally bound" is liable for omitting to give any information. But if he gives information, whether he was or was not legally bound to give it, he is liable if he gives it knowing or having reason to believe it to be false.

2162. Procedure and Practice.—No sanction is required for a prosecution under this section. The offence is non-cognizable, and summons must issue in the first instance. It is bailable, but not compoundable, and it is triable by a Presidency Magistrate or Magistrate of the first or second class, and may be tried summarily.

2163. Proof.—The points requiring prcof are:—

(1) That the accused was "legally bound" to give the information in question;
(2) That it was information respecting the commission of an offence;
(3) That the accused knew or had reason to believe that such offence had been committed.
(4) That he omitted to give information;
(5) Though he knew or had reason to believe that the offence about which he was legally bound to inform, had been committed;
(6) That such omission was intentional.

2164. Charge.—The charge if necessary should run thus:—

"I (*name and office of Magistrate, etc.*) do hereby charge you (*name of the accused*) as follows:—

"That you——, knowing that on or about the——day of——at——the offence of——was committed (*by*——), intentionally omitted to give information respecting its commission, which you were legally bound to give, and thereby committed an offence punishable under s. 202 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2165. Principle.—This section, like the last, postulates the commission of an offence, though it does not expressly say so. But it is, nevertheless, abundantly clear that no person can be said to know or have reason to believe that an offence has been committed, when nothing has been in fact committed (§§ 2146, 2150). The commission of an offence must be assumed. The section then makes an intentional omission to inform by those 'legally bound' to do so, criminal. This is in accordance with the modern notion of citizenship when many of the duties, at one time confined only to the police, have been delegated to other functionaries, and even in certain cases to the public. In such cases intentional omission to inform is criminal, but it is only so when the accused "knew or had reason to believe that an offence had been committed." This must be proved by the prosecution. The fact that a person had facility of obtaining a certain information, is no ground for holding that he knew or believed it. Nor is it his duty to enquire. He is not bound to be inquisitorial in order to perform his legal obligation. Nor does the law require it. If he knows *or* believes that an offence has been committed, then he must communicate; otherwise he is under no obligation.

2166. Criminal Omission to Inform.—As observed before (§ 2161) the liability of a person for omitting to give information is limited by his legal obligation to give it. If he was not legally bound to furnish it, he cannot be held liable for intentional omission under this section. Even if he was so liable, the section does not visit his mere omission with penal consequences. For it only punishes

(1) S. 45, Cr. P. C.

those who knowing or having reason to believe that an offence has been committed, intentionally omit to give the information. In order to make a person liable, it is therefore in the first place necessary to establish the *corpus delicti*.[1] If it is not established, there can then be no conviction for intentional omission to give information, respecting an offence which is not proved to have been committed.

2167. Then again, as this section only applies to the commission of an offence, a person is not bound to inform about its apprehension. So where a police patel was charged with omission to report the arrival at his village of dacoits, and with having supplied them with food and drink, it was held that he could not be convicted under this section as there was nothing to show that an offence had been committed by the persons who visited the accused's village.[2] In such a case the accused might, however, have been convicted under s. 176 on mere proof of intentional omission, but which was wanting. Indeed, intentional omission cannot be inferred from a mere omission to report. It must be not only an omission, but a wilful omission, that is to say, an omission which amounts to suppression due to some ulterior object. So where the police-patel ordered the Kulkarni to write a report, regarding a suspicious death in his village, but which was neither written nor sent, the omission was held to be intentional, in view of the fact noticed by the Court " that when a murder has occurred the patel has gone in pursuit of the offender, or has recorded evidence, or has held the inquest, and where his good faith is thus apparent, it would not be proper to convict him under s. 202 of the Indian Penal Code of an intention to evade the law about the first report."[3] Proof of intention as well as omission is therefore essential.[4] As Kemp, J., remarked : " There may be knowledge or a reason to believe that an offence has been committed ; there may be an omission to give information ; but it is clear, at least, to me that the gist of the offence is intention."[5]

2168. Lastly, the penalty of the section attaches to the omission to give "any information." If, therefore, the accused gave out only very little though he may have known a good deal more, it is enough to exonerate him, for no one is bound to give out all one knows and criminality under the section cannot be judged by the degree of information possessed and imparted.[6]

203. Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Giving false information respecting an offence committed.

Explanation.—**In sections 201 and 202 and in this section the word " offence " includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.**

[***Reason to believe***—s. 26. ***Offence***—s. 40, and *see* Expl.]

2169. Analogous Law.—The explanation to this section was added by the Indian Criminal Law Amendment Act, 1894.[7]

2170. The language of this section is, again, too wide. If literally construed, it would render a person giving false replies to questions put to him by the Police, in the course of their investigation, punishable ; but it is obviously not its meaning. The "information " given here must have been volunteered and not vouchsafed to question put either by the Police,[8] or, indeed, by the Magistrate ; otherwise the

(1) *Ram Ruchea Singh*, 4 W. R. 29.
(2) *Bala*, (1881) B. U. C. 160.
(3) *Mahalu Babaji*, (1895) B. U. C. 783.
(4) *Woodoy Chand Mookhopadhy*, 18 W. R. 31.
(5) *Ib.*, p. 32.
(6) *Ib.*, p. 32.
(7) Act III of 1894, s. 6.
(8) *Sarju Sahan*, 7 A. L. J. 1150, 7 I. C. 50 ; *Joy Narain*, 20 W. R. 66 ; *Akhtiar*, 6 S. L. J. 143, 19 I. C. 508.

accused setting up a false plea, would render himself liable to suffer the penalties of this section. The offence is designed to punish one who by volunteering misleading information, puts the investigating officer off the track of the real offender; and in this sense this offence may be regarded as yet another instance of an accession after the fact.

2171. Procedure and Practice.—This offence is non-cognizable, but warrant may issue in the first instance. It is bailable, but non-compoundable, and is triable by Presidency Magistrate, or Magistrate of first or second class. A person once acquitted of this offence, cannot be retried for an offence under section 177, as the two offences possess the same essential ingredients.[1]

2172. Proof.—The points requiring proof are:—

(1) The commission of an offence;[2]
(2) That the accused knew or had reason to believe that it had been committed
(3) That he gave the information;
(4) That it was with respect to that offence,
(5) And that it was false,
(6) Which the accused then knew or had reason to believe that it was false.

2173. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*), as follows:—

"That you——knowing that on or about the——day of——at——the offence of——was committed by——gave information respecting the said offence, to wit——which you knew or had reason to believe at the time to be false, and thereby committed an offence punishable under s. 203 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2174. Principle.—This section only prohibits the communication of misleading information, by persons who may or may not be under a legal obligation to supply any information. It only requires that if persons do give information, whether because they must or because they choose to, it must not be wilfully false, for the giving of false information may mislead those who are to avail themselves of it, and if it is given knowingly or with reason to believe in its falsity, then the deception practised becomes wilful and therefore criminal. It is not necessary to prove an intention to screen the offender for that may not be the intention, and yet the object may be criminal. Here again, the first thing assumed is the commission of an offence. The giving of false information respecting the commission of a crime never committed, may be punishable elsewhere,[3] but it is not punishable under this section. As Jackson, J., observed: "The object of the legislature was not to insure general veracity or the making of correct statements in regard to supposed offences, or to offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police, in regard to offences which had been actually committed, and which the person charged knew, or had reason to believe, had been actually committed.[4]

2175. Liability for False Information.—The general scope of this section has been already discussed (§ 2174). It punishes the wilful communication of false news, whether the communication be voluntary or in pursuance of a legal obligation referred to in the last section. It does not punish the falsehood, but only its dissemination after knowledge or belief in its falsehood. The question of motive or intention is immaterial, and it is therefore neither required to be proved by the prosecution, nor is it a complete answer to a charge. It may, however, show that the informer did not possess the knowledge or belief in its falsity, and that he believed in the information he had imparted. But where the evidence of knowledge is clear and cogent, there is then no room for mistaken belief. For example, where the accused chowkidar was shown to have seen the body of a murdered person with wounds in the throat and jaw which indicated foul play, from a distance of 10 or 12 feet,

(1) *Mahadeogir*, 9 N. L. R. 26 (92).
(2) *Joynarain*, 20 W. R. 66.
(3) *E.g.*, ss. 182, 211.
(4) *Joynarain*, 20 W. R. 66.

his report that the man had died of cholera, was held to be unaccountably false, and such as was sufficient to justify a conviction under this section.[1]

2176. The explanation is new and only applies to more serious crime. Its object is to prevent falsification of reports, not only with respect of crimes committed within British India, but also serious crimes committed outside. Reasons have already been given why the policy of the criminal jurisprudence in all countries, has of late been to regard a criminal not merely as a concern of the State, but as an enemy of mankind. This is, of course, only true of persons who commit those offences which are regarded as such, in the penal laws of all countries, and which are here enumerated.

Destruction of document to prevent its production as evidence.

204. Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Court of Justice***—s. 20. ***Public servant***—s. 21. ***Document***—s. 40.]

2177. Analogous Law.—This offence is only an aggravated form of the offence made punishable by section 175, with which it must be compared. The section applies equally to civil as well as criminal proceedings, and it lays down a penalty which is independent of that to which a recalcitrant person may be otherwise liable.

2178. Procedure and Practice.—The offence is non-cognizable, but warrant may ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency or first class Magistrate.

2179. Proof.—The points requiring proof are :—

(1) That the accused secreted, or destroyed, or obliterated or rendered illegible the whole or any part of a document;
(2) That the document was such as he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant;
(3) That in doing so[2] his intention was to prevent the document from being produced or used as evidence, or he did so after he had been lawfully summoned or required to produce the document to be used as evidence.

2180. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——secreted (*or* destroyed *or* obliterated *or* rendered illegible) the whole (*or* any part) of a document to wit——which you may be lawfully compelled to produce as evidence in a Court of Justice (*or* in any proceeding lawfully held before a public servant) to wit——with the intention of preventing the same from being produced (*or* used as evidence) before such Court (*or* public servant) (*or* after you had been lawfully summoned or required to produce the same for being produced or used as evidence) and thereby committed an offence under s. 204 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2181. Principle.—This section contemplates but does not necessarily imply, the institution of some proceeding, judicial or non-judicial, in which the document mutilated, concealed or destroyed, is required or expected to be required to be produced in evidence. A mere refusal to produce it, is punishable under s. 175, but its disfigurement or destruction is naturally regarded as a more serious contempt and meriting the more serious punishment here prescribed. But in either case, there is no offence without a criminal intention.[3]

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(1) *Cheetoour Chowkidar*, 1 W. R. 18; *Nga Po Lwin*, 57 I. C. (Bur.) 940.
(2) *Cheetoour Chowkidar*, 1 W. R. 18.
(3) *Gangaram*, 14 Bom. L. R. 1163, 17 I. C 1008.

2182. Meaning of Words.—"*Which he may be lawfully compelled to produce,*" which must depend upon the statutory power of the Court to compel production of documents, *e.g.*, ss. 130, 131 of the Indian Evidence Act, Ord. XIV, r. 7 of the Civil Procedure Code, and s. 94 of the Code of Criminal Procedure.

2183. Destruction of Documentary Evidence.—The gravamen of the offence lies in the intention of the offender,[1] to withdraw from the Court a document which it has the right to see. The power of the Court to obtain production of documents is by no means unlimited or unqualified; and before a person can be held accountable for contumacious non-production of a document, the prosecution must show that the Court had lawfully summoned or required him to produce the document and that he was equally lawfully bound to produce it. The mere fact that it is lawful of the Court to call for the document, does not make one lawfully liable to produce it, for he may be merely its custodian and may then justly refuse to produce it without consulting its owner.[2] Moreover, a mere refusal to produce a document is neither secreting nor destroying it. A person may be guilty of contempt if he refuses to produce a document, but he cannot be dealt with under this section unless all its terms are strictly complied with.

2184. The offence does not consist in the intentional destruction of a document, but in its destruction with the intention of making it unavailable in evidence which law conclusively presumes for its destruction, after a lawful demand for its production, as evidence. There is no question here of the value or materiality of the evidence. A person has no more reason to destroy an immaterial piece of evidence than one which is material in a case. It may be his property, and as such he may possess the right to destroy or secrete it; but he cannot do so without incurring the penalty of law, if his intention was to prevent the document from being produced or used as evidence.[3] As the first information given to the police may be so used, a person who destroys it and substitutes therefor another account, commits an offence under this section. So in a case the two accused who were Thanedar and Moharir attached to a police station-house, were indicted both under this as well as s. 218, and the charge against them was that in order to keep from the knowledge of their superior officer, the fact that two dacoities had taken place within their jurisdiction, they tore up the report of one dacoity, and substituted therefor another, a report of simple theft, which they induced the informant to sign, they were held to be guilty of the offences under s. 218 and this section.[4]

2185. The fact that the document was withdrawn after it had been produced in Court, would not exonerate one from the penalty, if he had afterwards secreted or destroyed or obliterated it. So in a case the plaintiff's suit for recovery of money due on a bond was by consent of the parties, referred to arbitration. The parties were at issue as to the exact amount repaid on the bond. The plaintiff admitted Rs. 516 as so repaid, whereas the defendant claimed credit for Rs. 540. One of the witnesses before the arbitrator stated that the sum repaid was Rs. 540 and that it was so endorsed on the bond, and the defendant then requested the arbitrator to show the endorsement to the witness to refresh his memory. The accused strenuously objected to the bond being shown to the witness and on the arbitrator deciding to show it to him, he seized the document and ran out of the house with it, and subsequently refused to produce it. It was held that in doing so, the immediate object of the accused was, that considering himself aggrieved by the adverse decision, he determined to prevent effect being given to it, and with that intention removed the document, to be subsequently refused to produce it. The loss or gain was held to be present in the mind of the accused and operating to influence his conduct. But, nevertheless, he was held to be guilty of an offence under this section, but not of theft, and sentenced to pay a fine of Rs. 50.[5]

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(1) *Gangaram*, 14 Bom. L. R. 1163, 17 I. C. 1008.

(2) *Bhagawat Prasad Singh*, 14 C. L. J. 120, 11 I. C. 794.

(3) *Amir Chand*, (1889) P. R. No. 24; *Debendra*, 38 C. L. J. 158.

(4) *Muhammad Shah Khan*, 20 A. 307.

(5) *Subramania*, 3 M. 261.

2186. Intention Material.—Though the section does not speak of the disappearance being caused with any intention, it is clear that, without a criminal intention, there can be no crime. Consequently, where in the course of an investigation, a police officer had a certain documents drawn up and signed by a *Panch* but finding it disfigured by scratches and interlineations, he had it recopied by the same writer and the same *Panch*, the first copy being then destroyed, it was held that the act explained itself and that there being no *mens rea*, there was no crime.[1]

False personation for purpose of act for proceeding in suit or prosecution.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

2187. Analogous Law.—There are five sections in the Code dealing with the offence of false personation.[2] False personation of a soldier is made punishable by s. 140, of a public servant, by ss. 170,171, of a juror or assessor by s. 229, and of a party, witness or surety by this section. The section raises the question whether there can be false personation of a fictitious person. It will have to be considered later on (§§ 2193-2195).

2188. Procedure and Practice.—No prosecution can be instituted under this section, without previous complaint as required by s. 195 of the Procedure Code. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session or Presidency Magistrate or a Magistrate of first class.

2189. Proof.—The points requiring proof are :—

(1) That the accused falsely personated another;
(2) That he made any admission, statement or confession, or caused any process to be issued or became bail or security, or did any other act ;
(3) That he did as in (2)[3] in his assumed character as is in (1);[4]
(4) That such admission, etc., was made in any suit or criminal prosecution.

2190. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——, on or about the——day of——at——falsely personated——(*name of the person personated*) in——(*specify the suit or prosecution*) and in such assumed character, you made an admission, to wit——(*or* a statement or confession, *or* caused any process to be issued, *or* became bail *or* security *or* did any other act) and thereby committed an offence punishable under s. 205 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said ckarge."[5]

2191. Principle.—The offence of false personation under this section consists merely of acting in an assumed character, independently of intention, raud or wrongful gain.[6] So a person may falsely personate another even though the personation be with the consent of the person personated. The evil lies in the deception practised, resulting in the falsification of official records, the truth and integrity of which should be above suspicion. At the same time law does not punish false personation under any circumstance. It only punishes that personation which is false not only in fact but also in intention.

2192. Meaning of Words.—"*Whoever falsely personates another*," for the meaning of which *see* the last paragraph (§ 2191). "*And in such assumed character*": that is, there must not only be false personation, but some specific act done in that

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(1) *Gangaram*, 14 Bom. L. R. 1163, 17 I. C. 1008.
(2) Ss. 140, 170, 171, 205. 229.
(3) 5 W. R. Cr. L. 6; 8 W. R. Cr. L. 18.
(4) *Suppakon*, 1 M. H. C. R. 450.
(5) *Manjunath* v. *Venkatesh*, 6 B. 54.
(6) *Watkins* v. *Fox*, 22 C. 948; *Venkata Chandrappa* v. *Venkatarama*, 22 M.256.

character. *"In any suit or criminal prosecution"*: suit is defined to be a proceeding which terminates in a decree. It is, properly speaking, a proceeding, regulated by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them, is treated as a suit. *"Or does any other act"*: Should such act be *ejusdem generis*? It would seem so, for, otherwise, the section would not specify all the important acts the doing of which it condemns.

2193. False Personation in Suit or Prosecution.—An offence under this section is committed if a person (*i*) "falsely personates" another, and (*ii*) in that assumed character (*iii*) performs any act in a suit or criminal prosecution. In the first place, what is falsely personating another, and this question raises another, should that "another" be a real person? No, according to the view taken in an old case of the Calcutta High Court.[1] But this view has been combated in Madras where the mere assumption of fictitious name was held to be insufficient. "It must also appear" the Court remarked, "that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instances from blameless, and in other instances, from indifferent or bad motives—*"in cog,"* as the disguise s often termed in the former, and "with or under an *alias*," in the latter instances. But, whatever the motive, the use of an assumed name without more, is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under section 205, we think, is the feigning to be another known person. The whole language of the section clearly imports the acting the part of another person, the act of pretending that he is that person."[2]

2194. So it was agreed by the Judges in an English Case, that in all forgeries, the instrument supposed to be forged must be a false instrument in itself, and that if a person give a note entirely as his own, his sul scribing it by a fictitious name will not make it a forgery, the credit ther being wholly given to himself, without any regard to the name, or any relation to a third person.[3] This case was cited with approval by Cockburn, C. J., in a case in which th p isoner, Robert Martin, had issued a cheque to the prosecutor, in the name of William Martin, upon a Bank, at which he had ceased to have an account. It was dishonoured on the ground that the signature was not that of any customer of the Bank. The prisoner was indicted for forgery, and Cockburn, C. J., reserved the case for opinion of the Judges, whether the drawing of a cheque under a false christian name amounted to forgery, and the Court was of opinion that it was not.[4] In this case, it must be noted, the prisoner was found to have no fraudulent or dishonest motive in signing the cheque in the manner he did. If such motive had existed, then probably the result would have been very different. That the person personated must be real, necessarily arises out of what Law regards as false personation. For, though the section does not refer to criminal intention, it is obvious that a mere false representation in fact, without that intention, would scarcely fall into the category of the crime. Where, for instance, a person presents a petition in the name of his father or uncle by whom he is authorized to present it, and on being questioned, he gives the name of the person whom he represents, it cannot be doubted but that there is false personation, but it cannot be said that the person innocently believing himself to be the *alter ego* of his parent, brings himself within the penalties of this section.[5]

2195. At the same time this doctrine of innocent representation must not be carried too far, nor indeed, can it be laid down as a general proposition that false personation is never criminal, unless it is accompanied by criminal intention. Where, for instance, *A* having lost two bullocks, employ d *B* to personat him

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(1) *Bhitto Kahar*, (1862) I. J. O. S.) 3.
(2) *Kadar Ravuttan*, 4 M. H. C. R. 18.
(3) *Dunn's Case*, 1 Lea C. C. 59.
(4) *Martin*, 5 Q. B. D. 34 (37).
(5) *Narain Acharji*, 8 W. R. 80.

and *B* representing himself to be *A* made a report of their theft, and deposed in Court in the name of *A*. *B's* object throughout was to spare *A* the trouble of making the complaints in person. It was held that *B's* act constituted an offence under this section, though his act was in no way fraudulent.[1] But this is probably an extreme case, and it is in conflict with the view taken in Calcutta.[2] This conflict was noticed in a Bombay case in which the accused had been requested by another to obtain a return of a document in his name, which he had left with the Registrar, and the question was whether he had brought himself within the terms of s. 82 (*a*) of the Indian Registration Act, which penalizes the intentional making of a false statement.[3] It was held agreeing with the Madras High Court that fraudulent gain or benefit of the offender was not an essential element of the offence described in this section, and the accused was indicted under the Registration Act, and sentenced to a nominal fine.[4] It was, however, conceded that the word *personation* by itself means false personation.

2196. A man may personate another in the sense of assuming a character, without any intention of seriously posing as being that other. There is no false personation in such a case, because the personator's act is both intended and known to be a mere imitation.[5] The Bombay High Court relied also upon a case of the Calcutta High Court.[6] Probably the distinction pointed out in the Calcutta case[7] referred to in the Bombay judgment, reconciles the conflict. There the vendor who was going to register a document fell ill on the way, and she thereupon deputed her companion to go and register the deed in her name. She was prosecuted for cheating by personation, but the Court held that the intention to defraud or injure any one being wanting, there could be no conviction under s. 419 of the Code, though the accused could be convicted under the Registration Act. Unfortunately this case loses much of its authority as a help to the interpretation of this section by reason of the fact that it makes no reference to it, and the elements of fraud or dishonesty are expressly required to constitute the offence of cheating, which was the only section present in the mind of the Court. But whatever may be the trend of the decided cases, it would seem to be a necessary implication, from the wording employed that there can be no false personation unless there is a false assumption of a character for any of the purposes mentioned in the section, and a character could scarcely be held to be falsely assumed, unless it is done intentionally. Any other view would make an extension of criminality wholly in dissonance with the spirit of criminal law.[8]

2197. Suit or Criminal Prosecution.—Again, the false personation must be in any suit or criminal prosecution, and not merely in any suit or proceeding. The word "suit" implies a proceeding of a civil nature, so that the whole phrase refers to a judicial proceeding, whether civil or criminal (§ 2192). And the term "criminal prosecution" would include not only a prosecution under the Code, but also one under any special or local law. So a prosecution under the Bombay Spirituous Liquors Act[9] was held to be a criminal prosecution.[10]

206. Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which

Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.

(1) *Suppakon*, 1. M. H. C. R. 450.
(2) *Narain Acharaj*, 8 W. R. 80.
(3) Act III of 1877, s. 82 (*a*).
(4) *Kalya*, 5 B. L. R. 138; following *Suppakan*, 1 M. H. C. R. 450; *Luthi*, 2 B.L.R. (A.C.) 25; dissenting from *Narain Acharaj*, 8 W.R. 80.
(5) *Kalya*, 5 B. L. R. 138 (139).
(6) *Luthi*, 2 B. L. R. (A. C.) 25.
(7) *Ib.*
(8) Cr. *Per* Hobhouse, J., in *Narain Acharaj*, 8 W. R. 80 (81).
(9) Act III of 1852.
(10) *Ganga*, (1871) B. U. C. 59.

has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Court of Justice***—s. 20 ***Fraudulently***—s. 25]

2198. Analogous Law.—This and next few sections ending with s. 210, borrow their principle from the Bankrupt and Insolvent Laws,—the fraudulent alienation and concealment of property being regarded as much a crime against public justice as the escape of an offender from custody, in order to avoid execution of a sentence of imprisonment, or the offence of harbouring or assisting such an escaped offender.[1] Sections 421-424 contain similar provisions against fraudulent transfer, in fact, their provisions are so similar that it may be well doubted if what little is distinguishable in them might not have been incorporated here, striking the later sections altogether out of the Code.

2199. Procedure and Practice.—No prosecution can be instituted for an offence under this section without special complaint.[2] But though this is a *sine qua non*, still where such an offence was taken cognizance of by a Magistrate without sanction, but there was nothing in the proceeding to show that the want of such sanction had in fact occasioned a failure of justice, it was held that the conviction was not bad only on that account.[3] The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

2200. Proof.—The points requiring proof are .—

(1) That the accused removed, concealed or transferred or delivered his property to another;
(2) That he did so intending thereby to prevent it from being taken by his creditor or the Court as stated in the section;
(3) That his intention was thus to defraud;
(4) That the property so removed, etc., had become liable, or was likely to become liable to be taken as a forfeiture, or in satisfaction of a fine, or in execution of a decree or order of a Civil Court;
(5) That the seizure made or considered likely was by a competent authority.

2201. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

"That you———fraudulently removed (*or* concealed, *or* transferred, *or* delivered to———) your property———(*specify it*) intending thereby prevent it from being taken as a forfeiture (*or* in satisfaction of a fine) under the sentence which had been pronounced (*or* which he knew to be likely to be pronounced) by———(mention the Court of Justice or other authority) in criminal case No.———(*or* intending thereby to prevent its being taken in execution of the decree which had been made by the Court in Civil Suit No.———), and that you thereby committed an offence punishable under s. 206 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2202. Principle.—The principle underlying this and the following sections is to punish a person for fraudulently withdrawing his property, so as to defeat the just claims of those who have, or may shortly have a right upon it. As the Law Commissioners observe : "If it is an offence against justice in a culprit to escape from custody, in order to avoid execution of a sentence of imprisonment, and an offence to harbour or imprison him and that such offences are fit subjects of punishment, we think upon the same grounds that the removal or concealment of property, or any dealing with it in order to prevent the execution of a sentence of fine, for example instead, of imprisonment, is an offence against justice and a fit subject of punishment.[4]

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(1) *Sunder Doshad* v. *Sital Mahto*, 28 C. 217.
(2) 2nd Rep., s. 162.
(3) S. 195, Cr. P. C.
(4) 2nd Rep., s. 162.

2203. These sections are in principle salutary, but they have practically remained a dead letter owing to the difficulties they have presented in their application. And, indeed, the decisions of the Civil Courts now present a conflict which it will be difficult to reconcile with the section (§§ 2205-2209).

2204. Meaning of Words.—"*Whoever fraudulently removes any property*": The words "any property," taken with the word "whoever" do not restrict the removal merely to the owner. The word "fraudulently" has been defined in s. 25. It is to be distinguished from "dishonestly" defined in s. 24. "*Removes, conceals, transfers or delivers*": Removal implies withdrawal so that it is no longer available to the creditor. It does not mean merely its carriage from one place to another. "*Conceals*": Concealment may be by transfer or removal. "*Transfers*": The word has been used here as defined in s. 5 of the Transfer of Property Act. "*Delivers*": The word "again" implies either a transfer or concealment. Delivery to a person in trust to be returned when required, would be concealment, if it is made against an attachment. "*Intending thereby to prevent..... .....in a civil suit*": which he knows to be likely to be made in a civil suit, *i.e.* a pending suit and not in a possible future suit,[1] "*Decree or order to be made by a Court*": It excludes an attachment by a Revenue Court, probably because the claim so made is otherwise secured.

2205. Fraudulent Withdrawal of Property.—The fraudulent transfer of property is declared to be void by s. 53 of the Transfer of Property Act.[2] It is further made penal by the provisions of this section, the requirements of which are (*i*) that there should be a withdrawal; (*ii*) that it must be with a certain fraudulent intention; and (*iii*) it must be directed against certain claims. The question of withdrawal presents comparatively no difficulties. Any removal, concealment or transfer whether for or without consideration, would be within the rule, if its dominant object was to defeat the claims of those specified in the section. Indeed, sometimes the best index of the intention is the transfer itself. If it was ill-considered or hurried, or made without sufficient consideration, or on the eve of bankruptcy, or of a threatened suit or attachment, it would be undoubtedly, regarded as fraudulent within the general acceptation of that term.

2206. On the other hand, such a transfer is neither necessarily fraudulent and void, as that term is understood in the civil law,[3] nor is it criminal within the meaning of this section. For it is settled that a debtor transferring his property, with the sole intention of defeating a threatened attachment, commits no fraud within the meaning of s. 53 of the Transfer of Property Act, even though both parties be privy to it. As Kindersley, V. C., observed in a case: 'Even if, say the purchaser had asked Hawkins why he wanted to sell, and Hawkins had told him that it was to defeat an execution, that would have been no ground for impeaching the transaction."[4] In such a case it would seem that what cannot be impeached on the civil side, could scarcely be regarded as criminal under this section. But it is evidently not so. For, a person fraudulently removing any property from being taken in execution of a decree or order of a Civil Court, has been held to be guilty under this section.[5] Of course, there is no fraud, where the debtor assigns his property to one creditor in anticipation of its attachment by another creditor.[6] But in such a case there is the lawful discharge of a just debt, though there is also the preference of a creditor. But mere preference of a creditor does not render a transaction void, nor indeed, is it any ground for a prosecution under this section.

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(1) *Ponuuswami*, 8. R. 268.
(2) Act IV of 1882.
(3) *See* The subject discussed in Authors' Law of Transfer (5th Ed.), pp. 651-654 §§ 1021-1025.
(4) *Mall* v. *Metropolitan Omnibus Co.*, 28 L. J. Ch. 777, S. 32, Gour's Law of Transfer (5th Ed.), p. 546, § 875.
(5) *Gour Chunder Chuckerbutty*, 10 W. R. 46; *Murli*, (1888) A. W. N. 237.
(6) *Appa Maliya*, (1876) B. U. C. 110.

2207. There is, however, such a thing as fraudulent preference in insolvency, which renders a transaction void against certain persons thereby prejudiced.[1] In such a case, the fraudulent transferor certainly brings himself within the ambit of this section. Indeed, it is clear from the language here employed that the transfers the section was intended to penalize, are not different from those prohibited under the two Elizabethan Statutes[2] since codified as s. 53 of the Transfer of Property Act. Under the provisions of that section, as under this section, the validity of the transfer depends upon the "intent to defraud." If that was the dominant motive of the transfer, then law reprobates the transfer as fraudulent, whatever may have been the consideration paid. On the other hand, if the transfer was not dominated by that intention, it cannot be impeached though it may be without any consideration. But there is this difference between a transfer with, and one without, consideration that, while the one is presumed to be *bona fide*, the other is presumed to be fraudulent. In the one case then it is for the person impeaching it to shew that though supported by consideration it was fraudulent. In the other case it stands self-condemned, and it is for those upholding it to show that, in spite of the absence of consideration, it was not made to defraud.

2208. Benami Transfer.—Apart from fraudulent intention, there is nothing against a person transferring his property nominally in favour of another person. Indeed, as remarked by the Privy Council, the practice of *benami* transactions is inveterate in India.[3] But as observed in a Calcutta case, "while it is impossible to ignore the existence of *benami* transactions in Bengal, we have no doubt that they must be judged by the ordinary and well-established rules of law, and that a third party cannot be made to suffer by the voluntary acts of owners of property. It is not to be supposed that because the existence of *benami* transactions has been recognized by our Courts, parties are at liberty to use the system to the injury of others, whether by direct fraud or by putting other parties in a position to defraud or take undue advantage of innocent persons."[4] But, while there is nothing *per se* fraudulent in a *benami* transaction, still it is a system that easily lends itself to fraud, and the fact that certain property is held *benami*, enables the beneficiary at any time to disclaim his ownership, while it is not an easy task for a stranger to assail it successfully. One test, though by no means the only test of whether a transaction is *benami* or otherwise, is to ascertain from whose funds the purchase money proceeds: but this fact alone does not create anything more than a strong presumption which may be rebutted.[5] Where property is held *benami*, the question of fraudulent intent may be a matter of inference, but such inference may fall short of the degree of proof required to establish an offence under this section.

2209. Proof of Fraud.—The question whether a particular transaction is or is not fraudulent, is a question of fact depending upon the circumstances of each case. At the same time, there are certain circumstances which are regarded as the badges of fraud. These were all considered in a leading English case,[6] which has been examined at considerable length by the present writer in his other work on the Law of Transfer to which reference must be made for an exhaustive presentation of the law on the subject. The commentary here is necessarily summary and by no means exhaustive. The questions that require consideration, in considering the fraudulent character of a transaction, are: (*i*) Why was the transfer made; (*ii*) was it a transfer of the entire estate; (*iii*) if it required change

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(1) Gour's Law of Transfer (5th Ed.), p. 655, § 1028.

(2) 13 Eliz., c. 5; 27 Eliz., c. 4, set out in Gour's Law of Transfer (5th Ed.), pp. §§ 598-602, 939-947.

(3) *Judonath* v. *Shumshoonissa*, 11 M. I. A. 551; *see* cases cited in 1 Gour's Law of Transfer (5th Ed.), p. 484, § 769.

(4) *Rakhaldas* v. *Bindoo*, 1 Marsh 392 (295).

(5) *Sreeman Chunder* v. *Gopaul*, 11 M. I A. 28 (43, 44).

(6) *Twyne's case*, 1 S. L. C. 1.

of possession, was possession transferred ; (*iv*) how and when was the consideration paid, and (*v*) for what purpose was it appropriated ; (*vi*) what publicity attended the sale ; (*vii*) was the transfer antedated, (*viii*) and was it subject to trust in favour of the transferor ; (*ix*) was it made on the eve of bankruptcy or on the eve of a threatened suit, attachment or execution.[1] These considerations may be sufficient to determine, whether a transfer is *bona fide* or fraudulent. But, as has been before observed (§§ 2207-2208), all transfers held fraudulent do not necessarily expose the transferor to the penalties of this section. For it does not condemn all such transfers, but only those as are intended to withdraw the property from being made available to satisfy the sentence of forfeiture or fine, or the execution of a Civil Court. Consequently, transfers made to defeat other creditors, are not within the grasp of the rule.

2210. Eliminating then from consideration such transfers, and confining the present discussion only to those intended to defeat a sentence or execution, two questions arise. Was the transferor actuated by the fear of sentence or execution, or was it made to defeat them. The fear of a sentence or execution could only arise when there was a reasonable chance of its being passed or taken out. This must depend upon what proceedings were impending or likely to take place, and how did the disposal of the property impair the chance of recovery. If the funds withdrawn still left enough to be available for the purpose, the question of fraudulent disposition would scarcely arise. For the funds available would be a sufficient reply to any charge of fraudulent transfer. The question could only arise when the transferor has, after his transfer, nothing to meet his existing or probable liabilities. So the assignment by the decree-holder, of a decree obtained upon the basis of a debt under attachment, does not *per se* amount to the commission of this offence, inasmuch as such assignment cannot affect the rights of the attaching creditor.[2] But it would be otherwise where, in pursuance of the assignment, money is paid over and which cannot be recovered. So the cutting and carrying off crops which the accused knew to be under attachment in execution of a certificate under the Public Demands Recovery Act,[3] was held to be an offence under this section.[4] The section is not confined merely to transfers, but extends to removal, concealment and deliver'. In this respect, the section has a wider scope than the Elizabethan Statutes to which reference has been made before.

2211. But whatever may be the nature of the withdrawal, the object in each case must be the same, namely to prevent its being taken in execution. So where two tents were distrained and made over to the accused for safe custody, and on their being requisitioned he produced two other tents of inferior value and concealed or removed those distrained, it was held that in order to constitute an offence under this section, the removal must be to prevent the property " from being taken" ; but as in this case the property had already been taken in distraint and the removal was subsequent, the accused could not be convicted under this section, though, if the facts were proved, the accused would be guilty of criminal breach of trust.[5] In this case the distraint was made under the orders of the local Revenue authority for the recovery of an arrear of land revenue, and it raised the question whether the distraint of property by a Collector under s. 153 of the N. W. P. Land Revenue Act[6] for non-payment of rent, constituted a forfeiture under a sentence pronounced or likely to be pronounced within the meaning of this section.

2212. That the levy of rent under a coercive process of law, cannot be regarded as the sentence of fine or forfeiture admits of no doubt ; but whether it

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(1) For consideration of all these questions, *see* Gour's Law of Transfer (5th Ed.), pp. 633-653, §§ 994-1024.

(2) *Ram Narain* v. *Jokhi Ram*, 3 A. L. J. R. 1.

(3) Beng. Act I of 1895.

(4) *Sunder Dasadh* v. *Sital Mahto*, 28 C 217.

(5) *Murli*, (1888) A. W. N. 237.

(6) Act XIX of 1873.

could not be regarded as money due under a decree, was not considered by the Court in the Allahabad case, but it was so held in a Calcutta case decided under the analogous provisions of the Public Demands Recovery Act,[1] section 8 of which, however, expressly provides that " every certificate made under s. 7 shall, as regards the remedies for enforcing it, and so far only have the force and effect of a decree of a Civil Court." This act then expressly declares the orders of the Revenue Court, passed for recovery of land revenue, the *status* of the decree of Civil Court and, as such, they would naturally be treated as such decrees for the purposes of this section. Of course, Revenue officers may pass decrees which will have the effect of decrees passed by a Court of Justice. So a Collector trying a case under Act X of 1857 is a Judge, and a suit for rent is a civil suit, so that if a person fraudulently remove property intending thereby to prevent that property from being taken in execution of his decree or order, he would commit an offence under this section.[2]

2213. No Offence.—The essence of the offence is fraud. There is no fraud in a person removing his property to avoid its being mistaken with another property legally liable for seizure.[3]

Fraudulent claim to property to prevent its seizure as forfeited or in execution.

207. Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Court of Justice***—s. 20. ***Fraudulently***—s. 25. ***Whoever***—s. 206.]

2214. Analogous Law.—This section follows the example of those in which the accomplice receiver is equally punished with the principal offender.

2215. Procedure and Practice.—No prosecution can be instituted under this section without special complaint.[4] It is not cognizable, but warrant may ordinarily issue in the first instance. It is bailable, but not compoundable, and it is triable by a Presidency Magistrate or a Magistrate of the first or second class.

2216. Proof.—The points requiring proof are.—

(1) That the accused fraudulenty accepted, received or claimed any property or any interest therein, or practised any deception touching any right to any property;
(2) That he then knew that he had no right or rightful claim to it;
(3) That he intended thereby to prevent that property or interest therein from being taken in forfeiture, fine or execution;
(4) That he then knew that such forfeiture, fine or execution was pending or was likely to be pronounced;
(5) That the forfeiture, fine or execution was of a Court of Justice or of a competent authority.

2217. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you———fraudulently accepted (*or* received *or* claimed) any property, to wit ———(*or* any interest therein, to wit———) knowing that you had no right or rightful claim to it [*or* (you practised any deception, to wit———) touching any right to any property or any interest therein] intending thereby to prevent that property (*or* interest therein)

(1) Beng. Act I of 1895, ss. 7, 8, 9, and 22; *Sunder Dasath* v. *Sital Mahto*, 28 C. 217.
(2) *Gour Chunder Chuckerbutty*, 10 W. R. 46.
(3) *Basappa*, 19 Bom. L. R. 535, 41 I. C. 160.
(4) S. 195, Cr. P. C.

from being taken as a forfeiture (or in satisfaction of a fine) under a sentence which has been pronounced (*or* which you knew to be likely to be pronounced by the Court of——— (*or* by a competent authority to wit———) (or from being taken in execution of a decree or order which had been made on———(*or* which you knew to be likely to be made by a Court of Justice to wit———) in Civil Suit No.———of———], and thereby committed an offence under s. 207 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2218. Principle.—The last section punishes the principal offender, this section reaches his accomplice. In pursuance of the view of law that crime increases with facilities afforded to its commission, the Code rigorously punishes accomplices, aiders and abettors equally with the principal offender. And so, in this very chapter, there are sections in which accomplices of perjurors have been held equally liable to punishment with those who are guilty of the principal crime.[1]

2219. Fraudulent Claim.—This section is supplementary to the last, but it is by no means its counterpart. It deals with a fraudulent receiver, a fraudul nt claimant, as well as one who practises any deception touching any right to any property or any interest therein. A fraudulent receiver must naturally be the *particeps criminis* of the offender of the last section and so would ordinarily be a fraudulent claimant. For, no one is likely to bolster up a false claim unless he is supported therein by the very person to whom the property really belongs, and who is therefore in a position to show up his fraud without difficulty. Similarly, a person cannot safely venture upon the practice of any deception touching any right to any property or any interest therein, without the co-operation and connivance of one who is to be benefited thereby. These three modes of fraud would amply cover any attempt made to enlist the assistance of a confederate, and the latter would certainly be brought within the pale of the rule, if his improper interference has thwarted an order for execution.

2220. This section, of course, does not penalize an innocent transferee of property impregnated with the fraud of the transferor. Indeed, such a transferee for valuable consideration cannot be defeated by any creditor. It is only when the transferee participates in, or is aware of the fraud, that he is defeated in favour of other creditors. Consequently, a fraudulent transferor may be prosecuted and punished for his act under the last section, and still the transfer may be good and valid against the claim which the offender had intended to defeat, only if the transfer was for a valuable consideration and without notice. In such a case, the fraudulent purpose of the transferor would be achieved, though he may himself have to suffer for it. On the other hand, if the transferee or receiver of such property was aware of the fraudulent purpose, not only are they both criminally liable, but the property transferred would then be available to meet the claim which it was their common purpose to frustrate.

2221. But in this respect the rule enunciated in s. 53 of the Transfer of Property Act[2] is wider than that enunciated in this section, under which in order to render a transferee punishable, the transfer must not only be fraudulent, but i t must be also fictitious. On the other hand, the section speaks of a claim or the practice of any deception which may or may not relate to the transfer of property. Even if it does, it carries the principle of fraud much farther than is to be found in s. 53 of the Transfer of Property Act. But, though the section is largely worded still it would not cover a case of every deception, however slight, intending, however remotely, to prevent the property from being seized in execution.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person, or for any property or interest in property to which such person is not entitled, or

Fraudulently suffering decree for sum not due.

(1) *E.g.*, ss. 196, 198, 200.

(2) Act IV of 1882.

fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration.

A institutes a suit against *Z*. *Z* knowing that *A* is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of *B*, who has no just claim against him, in order that *B*, either on his own account or for the benefit of *Z*, may share in the proceeds of any sale of *Z's* property which may be made under *A's* decree. *Z* has committed an offence under this section.

[***Fraudulently***—s. 25. ***Whoever***—s. 206.]

2222. Analogous Law.—This section is again one of those in which the object aimed at is to prevent the employment of the machinery of Court for fraudulent purposes. The Law Commissioners remarked that the section was drafted to prevent an abuse then said to be prevalent of getting some one to file a collusive suit for recovery of the whole property and suffering a decree to be passed. "No one at the time, is either injured or annoyed. It is only in the course of years, when unsuccessful in his speculations, and at the time his creditors press their claims against him, that the original plaintiff, the man of straw, appears, not with a naked claim, but with a decree in his favour, adjudging him with the whole of the defendant's property. This property, he will acknowledge, he has nevertheless left the whole time in the defendant's possession; but he pleads his right under a decree of Court."[1] To put down this and similar abuse of the Court of Justice, this and the next sections punish both the plaintiff as well as the defendant to such a suit. The authors regarded this as an example of false pleading,[2] which encourages the giving of false evidence, and the sections have, therefore, been placed in the chapter relating to that crime. The sections do not make it criminal to sue without probable cause, the consequence of which would have been to expose every unsuccessful civil suit to the risk of a criminal prosecution. The section originally confined the penalties to a decree taken or suffered "fraudulently, or for the purpose of annoyance," but the words "for the purpose of annoyance" were afterwards struck out.

2223. In enacting the rule, the sections make no innovation for provisions against the institution of frivolous, vexatious or groundless suits existing in the prior Regulations,[3] under which the Court in which such a suit was found to have been instituted, was empowered to fine the plaintiff and to commit him to close custody till he paid the fine.[4] The rule here enacted is of course, much narrower, for it only penalizes "fraudulent" suits, and the procedure prescribed is neither summary nor available to the Court trying them.

2224. It may be added that the rule was originally intended to be confined only to a fraudulent plaintiff, but it was added that the defendant instigator of the fictitious suit would be amenable under the law of abetment.[5] This view was, however, subsequently modified and the two sections now deal independently with the two parties.

2225. Procedure and Practice.—No prosecution can be instituted under this section without the previous complaint of the Court in which the fraudulent suit was instituted.[6] The offence is non-cognizable, but warrant may ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate, or Magistrate of the first class.

2226. Proof.—The points requiring proof are :—

(1) That the accused caused or suffered the decree or order to be passed or executed against him.

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(1) 2nd Rep., s. 159.
(2) Note G. Reprint, p. 133.
(3) Beng. Reg. III, s. 12; Mad. Reg II, s. 9; 4 Bom. Reg. II, s. 54.
(4) 2nd Rep., s. 170.
(5) 2nd Rep., s. 171.
(6) S. 195, Cr. P. C.

(2) That he did so for a sum not due, or for a larger sum than due, or in the case of execution, for anything in respect of which it has been satisfied.

(3) That in so doing the accused acted fraudulently.

2227. Charge.—The charge should run thus :—

"I, (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the—— day of——at——fraudulently caused (*or* suffered) a decree (*or* order) to wit——in suit No.——of the Court of——to be passed against you, and which was for a sum not due [(*or* for a larger sum than is due to such person or for any property or interest in property to which the decree-holder was not entitled)] [*or* fraudulently caused (*or* suffered) a decree (*or* order) to wit——decree No.——in suit No.——decided by the Court——on——to be executed against you after it has been satisfied (*or* for anything in respect of which it has been satisfied)] and thereby committed an offence under s. 208 of the Indian Penal Code and within my cognizance.

" And I hereby direct that you be tried for the said charge."

2228. Principle.—Though the primary object of such a suit was to prevent the making of a fictitious claim, for the purpose of securing the property of the defendant, by anticipation, against future creditors, that is against persons to whom he may in course of business become indebted, still, as the section is worded, proof of this intention is by no means necessary, though proof of fraud may involve proof of such or a similar intention. Of course, a person who suffers a decree without owing anything to the decree-holder must have one of two objects in view. It must be either to strengthen his hands against his creditors, or to help the decree-holder in a similar design. In any case, the object inevitably must be to use the decree in defrauding some one. It is not necessary that the fraudulent purpose should be immediately accomplished. Indeed, in the fraudulent practice in vogue in Tanjore and instanced by the Law Commissioners,[1] the fraudulent purpose was neither directed against some one in particular, nor was it intended to be immediately put into execution. But all the same it was the object present in the mind of parties. In such a case, it may not be always easy to connect the two events, and indeed, the longer the interval the greater is the difficulty of associating one with the other. But there are practical difficulties which the rules in practice present, and on account of which they have practically remained a dead letter.

2229. Meaning of Words.—"*Causes or suffers*": Causes on admission, suffers in default.

2230. Suffering Fraudulent Decree.—The presence of fraud is the essential ingredient of this offence. If fraud was absent there is then no offence, though a person may have suffered a decree for a sum not due. Such a decree may be suffered by any one having nothing to do, or one who knows of no defence to resist the suit. For example, the plaintiff may sue for recovery of a barred debt, and the defendant may not know that the suit against him is barred. It will be a suit for a sum not due, and the defendant may suffer a decree in sheer ignorance of his right. The phrase "sum not due" is ambiguous, for it may mean a sum owing, or a sum payable and recoverable. The fact that the sum was owing, does not necessarily make it payable and *vice versa*. For, the debt may be barred by time, tainted by illegality, or it may have been incurred by a person incompetent to contract. Again, a sum may be due in the sense that it was merely promised, as where a person executes a gratuitous agreement to pay a sum of money, in which case the obligee becomes entitled to enforce it irrespective of consideration. Such an agreement may or may not be fraudulent. If it is not fraudulent, it may result in a decree for a sum not due in the sense that it was never borrowed, but it cannot be made the cause of complaint, because though not due in the one sense, it was due in the other sense in that it was recoverable in law, and in any case, the defendant did not suffer a decree to be passed against himself fraudulently.

(1) 2nd Rep., s. 159.

2231. In such transactions, therefore, the first question to ask is, not whether the sum decreed was due but whether the decree was suffered fraudulently. This is a question of fact, and dependent upon a variety of circumstances. Indeed, fraud is hydra-headed and it is not often possible to dive into the motives of men; but if the facts of a case point to circumstances proving that the object of the defendant in suffering a decree was to defraud some one, the rest of the case should be easy, for all that then remains is to prove that the decree was for an imaginary or exaggerated claim. Without proof of this, the defendant commits no offence, howmuchsoever fraudulent his conduct might otherwise have been. For example, the debtor may set up a creditor to file a suit to enforce his heavy claim and his sole object in inciting him to sue him may be to crush another poor creditor in a rateable distribution of his available assets. Such conduct may not be commendable, but it is not criminal.

Dishonestly making false claim in Court.

209. Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

[***Court of Justice***—s. 20. ***Dishonestly***—s. 24. ***Fraudulently***—s. 25. ***Injure***—s. 44.]

2232. Analogous Law.—This section has a larger application than the last section. It applies equally to a dishonest as well as a collusive plaintiff. In short, it will apply whether the object of the plaintiff in instituting the false suit was to benefit himself, to harass the defendant, or to defraud a third party.

2233. Procedure and Practice.—No prosecution can be validly instituted under this section without the previous complaint of the Court concerned.[1] The accused had obtained a decree of the Court of Small Causes in the Central Provinces. The defendant sued him successfully in the Court in Behar for the cancellation of his decree on the ground of fraud. This decree was transferred to the District Court for execution. This Court ordered prosecution of the fraudulent decree-holder under this section, and the question arising whether the Court in Behar had jurisdiction to order prosecution for a fraudulent decree obtained in the Central Provinces, it was held that s. 476 of the Criminal Procedure Code conferred upon the District Court in Behar such jurisdiction.[2] Both under this and the next section, the question of jurisdiction of the Court adjudicating the claim as false, is immaterial,[3] since the offence is completed as soon as the claim is made; it is immaterial who disposes it off and how.

2234. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate, or a Magistrate of the first class.

2235. Proof.—The points requiring proof are :—

(1) That a claim was made in a Court of Justice.
(2) That the accused made it.
(3) That it was a false claim.
(4) That the accused knew it to be false.
(5) That he made it, intending to defraud or to cause wrongful gain or loss, or to injure or annoy any person.

2236. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——at——fraudulently (*or* dishonestly *or* with intent to injure *or* annoy any person) made a claim, to wit——(*specify the claim*) in suit No.——of——in the Court of——and which you knew to be false, and thereby committed an offence under s. 209 of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge."

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(1) S. 195, Cr. P. C.
(2) *Rajkumar Singh*, 1 Pat. L. J. 298.
(3) *Badri*, 52 I. C. (A.) 666.

2237. Principle.—This section affords an apt illustration of the policy of law against lending the machinery of Court for the purpose of fraud or dishonesty or illegal injury or annoyance of another person. The Court is the sanctuary of truth, and law would not allow of its being debased to encourage illegitimate gain or harassment.

2238. Meaning of Words.—"*Makes any claim*": The claim may relate to money or money's worth, title, status, or dignity, or indeed, to any relief whatever. It has, of course, no reference to a document produced in support of the claim.[1]

2239. Dishonestly Making False Claim.—In order to constitute an offence under this section, the first requirement of law is, that the claim made must be false. The fact that the claim had been dismissed, does not necessarily make it a false claim.[2] Since the claim might be dismissed, because the plaintiff failed to discharge the *onus* thrown upon him, or his evidence was discrepant, or considered improbable[3] or for any other reason, such as his omission to summon an important witness, or the like. In order to make it false it must be demonstrably so, and to the knowledge of the claimant. A true case might have been supported by false evidence. In that case the witnesses have perjured themselves but the claim is not false. This section does not strike at perjured evidence, but faked up claims. If it is a false claim, the debtor may have his remedy elsewhere, but it is not under this section. It is not necessary under this section that the whole of the claim be false.[4] Nor is a claim false because it is exaggerated, nor indeed, because some inconsiderable portion of it is wholly false. If a claim is in the main and substantially false, it is then a false claim within the meaning of this section.

(1) Claim must be False.

2240. Again, the mere making of a false claim is not an offence. It must be made with the knowledge that it is a false claim. It is not enough to shew that the claim is one which the plaintiff believed or had reason to believe to be false, or did not believe to be true.[5] It must be shown that the claim was false, and the accused knew it at the time he made it. Knowledge cannot be inferred from mere falsehood, though the fact that a claim was false may reasonably raise an inference that the claimant might and ought to have been aware of it. Sometimes the question is one which may exercise the most trained intellect. At other times it is one upon which there may be no room for a reasonable doubt. It may be, however, safely laid down that where a claim depends upon a question of law or upon the validity of a custom having the force of law, and not upon a question of fact, it will generally be found to be impossible to establish the charge, and it is a case in which the Court might well exercise its discretion in sanctioning a prosecution.[6] For the word "make" is not necessarily restricted only to the plaintiff. If the *principal* was equally aware of the false claim, he would then be equally liable, for, criminal liability under this section depends upon knowledge and the presence of intention to be discussed presently. Where a person knowingly makes a false claim and for that purpose, falsely verifies the plaint, he can only be convicted of one or the other, but not of both. And since false verification was necessary to launch a false claim, this is the only section appropriate to such a case.[7] It must be made with any of the object specified in the section, *i.e.*, it must be made fraudulently, dishonestly, or with intent to injure or annoy any person. The effect contemplated may be produced on *any* person not necessarily his adversary in the suit. For instance, a person may injure *C* who is *B's* creditor by suing him to enforce a false claim.

(2) Knowledge of Falsity Material.

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(1) *Boddu Ramayya* v. *Chitturi*, 28 M. L. J. 486, 29 I. C. 71.
(2) *Chakauri*, 54 I. C (Pat.) 636.
(3) *Hiralal*, 139 I. C (Pat.) 543.
(4) *Bulaki Ram*, (1889) 7 A. W. N. 1.
(5) *Baisakhi*, (1888) 7 P. R. No. 38.
(6) *Ib.*
(7) *Zar Muhammad Khan*, (1901) A. W. N. 187.

2241. When the Offence is Completed.—It will be noticed that while this section speaks of the *making of a claim*, the last section attaches its penalties only to the suffering of a decree or order. Under the present section the offence is completed as soon as a suit is filed; under the last section it is not completed till the decree or order is passed. The obtaining of a false decree or order is made punishable under the next section, which is then the natural counterpart of the last section. The section deals with false claims in which the attack may be as much *inter partes* as directed against a stranger to a suit. The provisions of the section, moreover, apply to "whoever makes a claim," whether he be a plaintiff in which case he intends to secure its benefit for himself or his agent who may not be interested in its pecuniary result. But nevertheless, he may bring himself within the ambit of the rule, if he filed a false suit, with the knowledge of its falsehood, and possessing the requisite intention.

2242. In such a case, both the parties may be animated by the common desire to injure a third party and it may be, that in so colluding to the injury of a third party, both have contravened the law, and made themselves obnoxious to its penalties. The false claim must be made in a Court of Justice, and bv which is intended the Civil Court.[1] The section does not apply to a Criminal Court, nor can a complaint that the person complained against may be punished, can be regarded as a claim within the meaning of this section. So again, an attempt to execute a decree after it has been once satisfied, is not a claim made in a Court of Justice, though it is an offence under the provisions of the next section.[2]

What Intention Necessary.

2243. Then, again, coupled with the knowledge of a false claim there must be either fraud, dishonesty or intention to injure or annoy anybody. A knowingly false claim need not be necessarily dishonest, for the object may be to protect the property against the claims of hostile creditors. It need not be necessarily fraudulent, because the plaintiff may not intend to defraud any one in particular. He may know that his claim is too absurd to be decreed, but his sole object in instituting it may be to injure his creditor or annoy him in the meantime. It may again be a purely fraudulent contrivance to thwart an expected execution or defeat an impending claim. The section is, indeed, so generally worded that it may embrace cases also falling within the comprehension of the next sections.

Fraudulently obtaining decree for sum not due.

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Fraudulently***—s. 25. ***Whoever***—s. 206.]

2244. Analogous Law.—This section is the counterpart of s. 208, and must be read as a continuation of it. It deals with exactly the same offence as affecting the decree-holder, as that section deals with a judgment-debtor. The two sections together have the effect of making both parties punishable as principal offenders, instead of their being merely liable as abettor of each other.

2245. Procedure and Practice.—No prosecution can be instituted under this section without the previous complaint of the Court,[3] in which the fraudulent claim was made. Where, therefore, a part of the claim made by the accused being disallowed by one Court, he filed another suit in another Court and obtained

(1) *Beegum Mahtoon*, 12 W. R. 37.
(2) *Ib.*, p. 38.
(3) S. 195, Cr. P. C.

an *ex parte* decree, the Court which is to complain is the latter Court.[1] The fact that the fraudulent act did not prejudice the representative of the judgment-debtor, is no ground for withholding complaint which should be made if it would be in the interest of justice.[2] But no prosecution is called for if the overstatement of a claim was due to a mistake or negligence but not necessarily imputable to fraud.[3] The offence is non-cognizable, but warrant may ordinarily issue in the first instance. It is bailable but not compoundable, and it is triable by a Presidency Magistrate or a Magistrate of the first class.

2246. Proof.—The points requiring proof are :—

(1) That the accused obtained the decree or order, or permitted or suffered the same to be done in his name;
(2) That the decree or order was for a sum not due,[4] or for a larger sum than is due, or for any property or interest in property to which the accused was not entitled,
(3) Or the accused fraudulently caused a decree or order to be executed against any person after it has been satisfied, or for anything, in respect of which it has been satisfied,
(4) Or the accused permitted or suffered acts as in (2) or (3) to be done in his name ;
(5) That the accused did as above fraudulently.

2247. Charge.—That the charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That you——on or about——day of——, at——, fraudulently obtained a decree (*or* order) in suit No.——of——against——for Rs.——which was not due (*or* was a larger sum than was due, *or* for any property or interest in property to which you are not entitled) [*or* fraudulently caused a decree or order to be executed against——after it had been satisfied (*or* fraudulently suffered *or* permitted any such act to be done in your name)], and thereby committed an offence under s. 210 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2248. Principle.—This section is the counterpart of s. 208, the two together dealing with fraudulent plaintiff and defendant. Section 208 deals with fraudulent defendant and this section deals with fraudulent plaintiff. The crux of the crime is the presence of fraud, and its presence may be detected in many circumstances to which reference has been made elsewhere (§ 2210).

2249. Fraud in Obtaining Execution of Decree.—The gravamen of criminality in an offence under the series, of which this is a section, consists of fraud. Whenever it is shown to enter, whether in obtaining a decree or order, or in suing out an execution, the offence is complete whether the decree or execution was obtained directly or indirectly through the instrumentality of another. There is, however, only one other necessary condition which the offender must fulfil ; the decree or order or execution must be either for a sum not due or for a sum larger than what was due. These two elements naturally re-act upon each other. For a person obtaining a decree for a sum not due may be innocent, but it is just as likely that he was acting fraudulently.[5] On the other hand, there can be no fraud in enforcing one's just demands whatever may have been their effect upon the judgment-debtor.

2250. It is, therefore, essential that the demand should be illegal and it must have been enforced fraudulently. The fact that the demand was excessive or for a sum not due does not dispense with the proof of fraud. For a person may make an improper demand owing to ignorance, or mistake, or misconception of his legal rights. The offence under this section is committed only if a decree or order is passed, or a decree or order is executed. If a false claim is made and dismissed, the offence

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(1) *Wishna Ram*, 6 L. 445.
(2) *Bur Singh* v. *Ishar Singh*, (1917) P.W.R. (Cr.) 4; *Chiman Lal* v. *Ghulam Mohiuddin*, (1911) P. L. R. 59, 10 I C. 646.
(3) *Daya Ram*, (1914) P. W. R. 11, 23 I. C. 471.
(4) *Hikmat Ullah Khan* v. *Sakina*, 53 A. 416.
(5) *Molla Fuzla Karim*, 33 C. 193.

may fall under s. 209 but it does not fall under this section. The " decree or order" must, as a rule, refer to the decree or order obtained in the Civil Court, or a Court performing the functions of the Civil Court. But as the section is worded, there would, at first sight, appear to be nothing against its being inapplicable to an order for any property passed by a Criminal Court, as, for example, an order passed under s. 145 of the Code of Criminal Procedure. But such an order can only be declaratory, and it can only be described as an order *in respect of*, and not *for*, any property. An *order* passed by a Criminal Court could not therefore be regarded as falling within the terms of the section. But as Revenue Courts are empowered to pass a decree or order in cases placed within their jurisdiction, a decree or order so passed would be within the rule, if it fulfils its other requirement.

2251. In establishing a case under this section, all that the Court is concerned with is the passing of a decree or order in execution. Other proceedings of the Civil Court are irrelevant. The fact that the decree was set aside by the Civil Court on the ground of fraud, would be no evidence of fraud, which it would be necessary to establish by independent evidence. But it has been said that the fact that the decree was not set aside, might be admissible as evidence to prove that there was no fraud, though it is no bar to a prosecution.[1] But it is submitted that if it is inadmissible for one purpose, it is equally inadmissible, and for the same reason, for another purpose. The finding that there was no fraud, may appeal to the moral conviction of the Court but it is scarcely evidence in a criminal trial. Indeed, in cases of damages arising out of malicious prosecution of the Criminal Court, it has been held to be wholly inadmissible in the Civil Court; but if so it must be *vice versa*.

2252. As regards the liability of a person for an act permitted or suffered to be done in his name, the question again, is one of fraud. Did he permit or suffer fraudulently or merely innocently? The presence of fraud postulates knowledge of all the attendant circumstances, such as that the sum sued for was not due, or that the litigation had been embarked upon to defraud some one. There is, of course, no fraud, where there was a mistake[2] or misapprehension of the order of the Court.[3]

2253. And in the case of execution, the offence of fraudulently causing a decree, wholly or in part satisfied, to be executed is not completed as soon as an application for execution is presented, or when the judgment-debtor is summoned to show cause why it should not be executed. It is only complete, if the judgment-debtor appears and either makes no objection, or if he makes an objection it is overruled, and the Court has thereupon proceeded to order execution.[4] If upon hearing the judgment-debtor's objection the Court refuses to execute the decree, the decree-holder does not cause *a decree to be executed*, and there is no scope for the operation of this section.[5] Nor would such a case fall under the provisions of the last section. For an attempt to execute a decree cannot be described as false claim.

2254. Again, the order for execution must have been passed in a decree after it has been satisfied. These words are large enough to include any satisfaction whether by payment, adjustment or composition, and whether the satisfaction is or is not certified by the Court. In other words, if there is a satisfaction made and accepted, then it is binding on the conscience of the decree-holder and he should not have applied for execution. As was observed by Mitter and Macpherson, JJ., the words " after it has been satisfied " only indicate the fact of its satisfaction. " Merely because the satisfaction is of such a nature that the Court executing the decree could not recognize it, would not take the case out of the purview of the

(1) *Molla Fuzla Karim*, 33 C. 193.
(2) *Mangat Rai*, A. L. J. 93, 5 I. C. 695.
(3) *Daya Ram*, (1914) P. L. R. 64.
(4) *Naurang Mal*, (1902) P. R. No. 13.
(5) *Shama Charan Das* v. *Kasi Naik*, 23 C. 971 (975).

section."[1] Indeed, the rule[2] that uncertified payments shall not be recognised by any Court executing the decree,[3] has no application to a Court other than the executing Court.[4]

2255. It may then be that in respect of an uncertified payment the judgment-debtor may not be able to claim credit in execution, but he may nevertheless successfully prosecute his dishonest decree-holder under this section.

False charge of offence made with intent to injure.

211. Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

2256. Analogous Law.—This section and section 182 possess many elements in common, and it has sometimes been a question whether the provisions of the two sections do not overlap each other. And the Courts have felt some difficulty in laying down a practical working rule to determine their applicability. It would have been probably a distinction without a difference, if the question had no ulterior effect beyond that involved in suiting their provisions to a given case. But the question assumes a graver complexion inasmuch as, while an offence under s. 182 is triable by a second class Magistrate, one under this section is triable only by a first class Magistrate, and in certain cases exclusively by the Court of Session.

Sections 182 and 211 Compared.

2257. The distinction has consequently attracted the attention of all Courts, though they are not agreed as to the view to take of the two sections. According to the view taken in Calcutta, there is no radical difference between the two sections and it is open to a Magistrate to proceed under either section, although in cases of more serious nature it may be that the proper course is to proceed under s. 211.[5] A distinction was sought to be drawn between the two sections in an old case,[6] but its authority was much shaken by the later cases[7] and it is now regarded as overruled.[8] This view is echoed by the Madras and Patna High Courts[9] in whose opinion the difference between the two sections is only the difference of degree, there being nothing legally wrong in a conviction under either section on the same facts. "It has been held," they observe, "after much consideration, and after a full review of the difficulties felt elsewhere, that, where the evidence discloses an offence of a graver character without the jurisdiction of the tribunal, this Court may quash the conviction and sentence for the minor offence, and direct a trial before a tribunal

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(1) *Beegum Mahtoon*, 12 W. R. 37.

(2) *Madhub Chunder Mozumdar* v. *Novodeep*, 16 C. 126; *Bapuji*, 10 B. 288; *Mutturaman Chetti*, 4 M. 325; *Pillala*, 9 M. 101; *Mula Mal* v. *Rahman*, (1884) P. R. No. 8, F. B.; *Balu*, (1885) P. R. No. 7; *Nawrang Mal*, (1902) P. R. No. 13; *Munshi Ram* v. *Deera Mul*, (1889) 1 U. B. R. 277.

(3) Ord. XXI, r. 2, Sch. 2, C. P. C., old s. 258.

(4) *Bapuji*, 10 B. 288; *Chiman Lal* v. *Ghulam Mohiuddin*, (1911) P. L. R. 29, 10 I C. 646.

(5) *Bhokteram* v. *Heera Kolita*, 5 C. 184; *Russick Lal Mullick*, 7 C. L. R. 382; *Baperam* v. *Gouri Nath*, 20 C. 474; *Ram Logan Lal*, 7 C. W. N. 556; *Sarada Prasad Chatterjee*, 32 C. 180, distinguishing *Girdhari Naik*, 5 C. W. N. 727, holding *Raffe Mahamed* v. *Abbas Khan*, 8 W. R. 67, as impliedly overruled by *Bhokteram* v. *Heera Kolita*, 5 C. 184; *Chinna Gangappa*, 54 M. 68.

(6) *Per* Hobhouse, J., in *Raffe Mahomed* v. *Abbas Khan*, 8 W. R. 67.

(7) *E.g.*, *Bhokteram* v. *Heera Kolita*, 5 C. 184; *Russick Lal Mullick*, 7 C. L. R. 382.

(8) *Saroda Prasad Chatterjee*, 32 C. 180; *Gati Mandal* 4 C. L. J. 89.

(9) *Daroga Gope*, 5 Pat. 33; *Kantir Misser*, 117 I. C. (Pat.) 37.

having jurisdiction for the graver. It has also been repeatedly held, that whether it will do so or not, is a question, not of law, but of expediency on the facts of the particular case."[1] This appears to have been conceded by Straight, J., in an Allahabad case, where, however, he remarked that when a specific false charge is made, this section is the more appropriate.[2] But in a later case it was admitted that the distinction between the two sections was illusory. "We are unable to ascertain," they said, "that there is any restriction imposed by the Indian Penal Code or by the Criminal Procedure Code of 1882 upon the prosecution of an offence either under s. 182 or s. 211. It appears to us that it has been left to the discretion of the Court, to determine when and under what circumstances prosecutions should be proceeded with under ss. 182 and 211."[3]

2258. There is thus a substantial agreement between the two Courts, but a discordant note has been struck by the Bombay High Court where a clear distinction has been held to exist between a false charge which falls under this section, and a false information given to the police, in which latter case the offence falls under s. 182.[4] This view has been assented to in the Punjab.[5] But neither view is free from difficulty, for the view that the two sections are identical, charges the legislature with wanton redundancy, while the view based upon the distinction between "information" and "charge" is at times scarcely perceptible and is never marked. The fact appears to be that the earlier section was intended to apply to a report made to the police or an officer other than a Magistrate competent to inquire into the case, while the present section would seem to apply to a definite accusation preferred in a Court of law. If this was the intention, the language used in the two sections is inapt, but, nevertheless, it would seem to suggest some such distinction, as may probably be better appreciated by examining them as set out below :—

"S. 182.	"S. 211.
"Whoever gives to any public servant *any information* which he knows or believes to be false, etc."	"Whoever, with intent to cause injury to any person *institutes*, or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be etc."

Sections 182 and 211 Distinguished.

2259. Now it will be observed that the two sections do present a marked difference, for while s. 182 speaks of *any information*, this section speaks of the making of a charge or the institution of a criminal proceeding against *any person*, and which suggests institution of proceedings before a Court in which a definite allegation is made against a person more or less specified. If this is not the difference between the two sections, why should there be any difference in the wording of the two offences.[6] It is also noticeable that in the illustration appended to the section, the name of the person informed against is not mentioned, while disclosure of the name of the accused appears to be assumed, in this section. But this does not appear to be decisive, though it is a point which would seem to mark the difference between the two offences.

2260. Again, the amount of criminality in the two cases has to be measured by the fact that knowledge or belief in the falsity of information in the one case

(1) 7 M. H. C. (App.) 5; *Venkata Reddi*, (1897) 1 Weir 120; *Subbanna*, 1 M. H. C. R. 30 in which it has been held that the charge preferred need not have been fully heard and dismissed; followed in *Abdul Hasan*, 1 A. 497; *Salik*, 1 A. 527

(2) *Jugal Kishore*, 8 A. 382.

(3) *Per* Edge, C. J., and Aikman, J., in *Raghu Tiwari*, 15 A. 326; followed in *Ma Paw*, 8 R. 499; *Bhawani Prasad*, 4 A. 182; *Ma Saw Yin*, (1921) 11 L. B. R. 43; *Mg. Pa* v. *Mg. Chaw*, (1928) R. 243; *Ramchand*, 23 S. 225.

(4) *Per* Ranade, J., in *Raghavendra* v. *Kashinath*, 19 B. 717 (725).

(5) *Roora*, (1870) P. R. No. 16, F. B.; *Todu Mal* v. *Mt. Bholi*, (1882) P. R. No. 14.

(6) This must be only presumed out of respect to the legislature. It will not stand the test of closer examination, for the Code is unfortunately in too many places redundant and conta ns two or more sections to describe the same offence; *E.g.*, Cf. ss. 206-209 and ss. 421-424, s. 417 and s. 420.

is sufficient, while knowledge and not mere belief in the falsity of the charge is an essential ingredient of the offence here described. Indeed not only must the offence be false, but there must be no just or lawful ground for the prosecution. An offender against s. 182 need not possess malice or want of reasonable and probable cause except so far as they are implied in the act of giving false information, with the knowledge or likelihood, that such information would lead a public servant to use his power to the injury or annoyance of the person informed against. But in a case, arising under this section the absence of just and lawful grounds or reasonable and probable cause, is an essential element,[1] and so is the intent to injure, or in a word, malice. Looked at from the stand-point, the two offences may be regarded as two aspects of the same crime, and it would be an improvement to coalesce them into one offence.

2261. However, as the sections now stand, the distinction between them should be marked. The present section itself includes two distinct offences, namely, (*i*) making a false charge, and (*ii*) instituting or causing to be instituted, a false criminal proceeding. The former is implied in the latter, but it may be committed when no criminal proceedings follow,[2] that is to say, while the first paragraph applies to an information laid before the police the second paragraph more appropriately applies to a charge made in Court.[3]

2262. Procedure and Practice.—The offence is non-cognizable,[4] but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable exclusively by the Court of Session, if the offence falsely charged be capital or punishable with transportation for life; but if it is punishable with imprisonment for seven years or upwards, then it is triable also by a Presidency Magistrate or a Magistrate of the first class; and in any other case, it is triable by a Presidency Magistrate or a Magistrate of the first class. The offence is not triable summarily.[5] A person acquitted of this charge cannot be retried under s. 182.[6]

2263. Case for Judicial Complaint.—When this offence is committed in, or in relation to, any proceeding in any Court, no prosecution can be instituted under this section without the complaint of the public servant concerned.[7] Such complaints should only be made when the falsity of the charge is clearly established, and when, in the opinion of the Court, there are good and sufficient grounds for holding, that the granting of sanction would be in the public interest, and there is reasonable likelihood of a conviction. No Court should lend itself to the gratification of private malice of a person who may or may not be a party to the proceedings,[8] and in the latter case, the Court should refuse to entertain an application for complaint, and in the other case its action should be prompted solely by the desire to further the ends of justice and not to assist the private ends of interested individuals.

2264. The making of a complaint is, of course, a judicial act, and it does not follow that because a case has failed it is necessarily a false case, and one calling for a judicial prosecution. In considering the necessity of ordering a prosecution the Court should not only apply itself to the merits of the case, but should consider the chances of the prosecution resulting in a conviction. For as the Court said; "It would be disastrous if there were a number of prosecutions ending not in convictions, but in acquittals."[9] It is scarcely necessary to add that the failure of

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(1) *Raghavendra* v. *Kashi Nath Bhat*, 19 B. 717.

(2) *Nobo Kisto Ghose*, 8 W. R. 87; *Jan Muhammad Husen*, (1886) P. R. No. 1; *Rampat*, (1900) P. R. No. 26.

(3) *Ba. katullah* v. *Sadhu*, 10 A. L. J. 429. 17 I. C. 791; *Mahomed Yasin*, 4 Pat. 323; *Gaya Teli*, (1930) A. 818.

(4) A formal complaint is, therefore, necessary. A police charge sheet is insufficient; *Perumal*, 90 I. C. 398, (1925) M. 672.

(5) *Tofazel Hoosein* v. *H. C. Hunt*, (1930) C. 74.

(6) *Ganapathi Bhatta*, 36 M. 308, 19 I. C. 310.

(7) *U. Sein Ywet* v. *U. Mg. Pyi*, 148 I. C. (R) 845.

(8) *Chunder Kant Ghose*, 3 C. W. N. 3; *Shankar Rao* v. *Sheik Daud*, 4 Nag. L. R. 140 (143).

(9) *Ram Prosad Roy* v. *Sooba Roy*, 1 C. W. N. 400; *Jadunandan Singh*, 37 C. 250.

the prosecution to prove the charge is no proof of its falsity which would have to be proved like any other fact when the tables are turned upon the complainant, and that, in order to secure a conviction of this offence, the proof required must clearly establish beyond a reasonable doubt that the circumstances are not merely consistent with the guilt of the accused, but wholly inconsistent with his innocence.[1]

2265. Before ordering a prosecution under this section, the Court must be satisfied that the original proceedings are not pending. This does not mean that the charge should have been fully heard and dismissed.[2] All that is necessary is that it should have been disposed of. The necessity for complaint only arises when the substantive charge is proved to be both false and malicious. The fact that it was held to be false does not necessarily make it malicious, and unless it is shown to be malicious, there can be no conviction under this section. So in a case of bringing a false charge of dacoity under this section, the Sessions Judge concluded his charge to the jury in these words : " If you believe the charge of dacoity to be false, then you should find the prisoner guilty under s. 211, otherwise you should acquit him." It was held that the charge contained a misdirection, inasmuch as it failed to place before the jury, one of the most essential elements of the charge under this section, namely, that in instituting the false charge of dacoity there was no just or lawful ground for the charge, and the jury were not asked to say as they should have been, whether the charge was false and whether in instituting it, there was no just or lawful ground.[3] The charge should specify the exact nature of the false charge for which the accused is to be tried, and it should be also stated in the finding against him.[4]

Complaint without Notice to Accused.

2266. The question has been sometimes raised, whether it is legal for a Court to order a person's prosecution for making a false charge, without giving him an opportunity of establishing it. Should this be invariably permitted before recording the order, or should this be left for the accused to establish in his defence to his prosecution for a charge under this section? Such a question cannot arise where the prosecution of a person under this section is sanctioned by a judicial officer after a judicial inquiry, for that inquiry gives him an opportunity of making good his charge. The question has really arisen in cases in which the charge was only made to the police, who upon inquiry found it to be false. Naturally this question is independent of the question, before discussed, as to the distinction between this section and section 182. For, whether a person inform against or charge a person, the question arising is the same. Is he entitled to an opportunity to prove its truth, before he is prosecuted for making a false charge?

2267. According to the view taken in Calcutta, the accused has an undeniable right to claim, that his charge shall be inquired into by a Magistrate, and that he should not be prosecuted upon the *ipsi dixit* of the police.[5]

2268. This view has been concurred in by the All ahabad,[6] Madras[7] and Lahore[8] High Courts though not by the Patna High Court.[9] But it has been held that, though the complaint for prosecution without giving such an opportunity

(1) *Ram Prosad*, 17 C. W. N. 379, 17 I. C. 993; *Hassan Mirza* v. *Mt. Mabbuban*, 18 C. W. N. 391, 23 I. C. 723; *Bhuan Kohar*, 83 I. C. 701, (1925) Pat. 329.

(2) *Subbanna*, 1 M. H. C. R. 30; *Abul Hasan*, 1 A. 497; *Salik*, 1 A. 527; *Bishoo Barik*, 16 W. R. 77; *Gunamony*, 3 C. W. N. 758: *Gati Mandal*, 4 C. L. J. 88; *Manga Ram*, (1886) P. R. No. 28.

(3) *Tomiji*, 1 C. W. N. 301.

(4) *Arjun*, 1 B. H. C. R. 87.

(5) *Karimdad*, 6 C. 496; *Sokhina Bibi*, 7 C. 87 (88); *Gyan Chunder Roy* v. *Protap Chunder Dass*, 7 C. 208 (211); *Girdhari Mondul* v. *Uchit Jha*, 8 C. 435; *Gangoo Singh*, 2 C. L. R. 389; *Mahadeo Singh*, 27 C. 921; *Sheikh Abdulla*, 137 I. C. (C.) 133.

(6) *Radha Kishan*, 5 A. 36 (38, 39); *Ganga Ram*, 8 A. 38 (39), overruled on a different point in *Jugal Kishore*, 8 A. 382; *Tula*, 29 A. 587; *Tabarak Zaman Khan*, 30 A. 52.

(7) *Sheik Beari*, 10 M. 232 (233, 237, 239).

(8) *Bhawani Sahai*, 13 L. 568.

(9) *Maguni Padhan*, 7 Pat. 408; *Sobarati Sain*, 8 Pat. 734; *Mahabir Baitha*, 133 I. C. (Pat). 172 following Scroop, J. in *Brahmachari*, 116 I. C. (Pat.) 46.

is illegal, still it is not alone sufficient to vitiate a conviction.[1] But in one case where the Magistrate has sent down a complaint made against one police officer to another, for inquiry and report, and upon receipt of his report, he ordered the complainant's prosecution, the High Court set aside his order, holding that the complaint should have been made the subject of a magisterial enquiry.[2] Of course, no such enquiry is necessary where the charge has already been disposed of in a cross or connected case to which the accused was a party.[3]

Complaint when Unnecessary.

2269. But the question of the necessity of inquiry suggests other questions : (*i*) Is an order at all necessary in a case which has ended with the police ; (*ii*) if so, does an order become necessary if it is reported to the Magistrate for orders ; (*iii*) and in the last case is the Magistrate bound to ignore the police inquiry and report, and make an inquiry of his own to give the accused, the requisite opportunity of proving his case and (*iv*) if he does not do so, is his complaint on that account void ?

2270. The last question has nothing to do with the voidability of a conviction in a case of defective order, for, as has been held in the case last cited, a conviction otherwise good cannot be disturbed merely on account of that defect. Now as regards the first question, its determination depends upon the language used in section 195 of the Procedure Code, which makes provision for complaint before institution of a case under this section. It provides that no Court shall take cognizance of an offence punishable (*inter alia*) under this section, *when such offence is committed in, or in relation to any proceeding in any Court*, except on the complaint of such Court, or of some other Court, to which such other Court is subordinate.[4] It is therefore obvious that, if the offence is not committed in or in relation to any proceeding in Court the section does not place the bar of sanction to a valid prosecution. In such cases then a prosecution may be initiated without complaint,[5] and on the mere complaint of the police-officer concerned or the person aggrieved. In such case the accused has no chance of appealing to the Magistrate to re-hear his case, for the Magistrate was not concerned in his prosecution, and all he has to say could then be only proved in his defence.

2271. But the police seldom take upon themselves the responsibility of embarking on a counter prosecution of this nature. They usually report the case for the orders of the District Magistrate, and it is then for him to see whether a prosecution under this section should, or should not be started. He may do so by either taking cognizance of the case under section 190 of the Procedure Code,[6] or he may merely order the prosecution, in which case, his order is open to correction.

2272. It has been held that though the Magistrate may dispense with the necessity of a complaint by acting under section 190 of the Procedure Code, still it would not be the exercise of sound judicial discretion. For, a Magistrate is not well advised in embarking upon a prosecution under this section, upon a mere police-report made in another case, against a person who has not the opportunity of showing cause against it. Such report must necessarily relate to the substantive charge, and the report could only create a suspicion against the person to be tried under this section. The proper course commended by the Full Bench then is to refrain from ordering a prosecution until "some person aggrieved has complained, or until he has before him a police-report on the subject, based on an investigation directed to the offence to be tried, and in cases of alleged false charge, until it is clear that the original charge has been either heard and dismissed or abandoned ; and I should add that, before the order to prosecute for a false charge is made, the person who

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(1) *Ramaswami*, 7 M. 292.
(2) *Mewa Lal*, 18 A. L. J. 620 ; *Rambrose*, 6 R. 578.
(3) *Sheikh Samir* v. *Sajidar*, 53 C. 824.
(4) S. 195, Cr. P. C.; *Jagat Chundra Majumdar*, 3 C. W. N. 491 ; *Muthra* v. *Roora*, (1870) P. R. No. 16 ; *Todur Mal* v. *Mt. Bholi*, (1870) P. R. No. 14 ; *Chedilal*, 2 C. P. L. R. 198.
(5) *Jagat Chundra Mozumdar*, 26 C. 786, distinguishing *Chundra Mohan Bannerjee* v. *Balfour*, 26 C. 359.
(6) *Hari Narayan Biswas*, 3 C. W. N. 65.

made the original charge should be offered an opportunity of supporting it or abandoning it."[1]

2273. This case disposes of the third and fourth questions above raised. For, with reference to the third question, it may be said that the Magistrate is not bound to ignore the police inquiry, but as a matter of sound judicial precaution, he must not allow himself to be controlled by it. He must still keep an open mind, and call upon the person to be charged to show cause, hear him and his evidence, consider the desirability of ordering his prosecution and pass through his mind's eye its probable results. But the fact that the Magistrate does not hear the accused, does not render his order invalid,[2] though it is a point which the appellate Court will not fail to consider in adjudicating upon its propriety. And in such a case, it is open to the accused to file a complaint in the Court of a Magistrate reiterating his charge, and in which case it will be the duty of the Magistrate to examine the complainant and dispose of his complaint according to law.[3] It will then be for the Magistrate to decide, whether the complaint filed was such as justified the complainant's prosecution under this section, and if he is of that opinion, his proper course is to order his prosecution. In such a case it will be wrong to let him off with a fine under section 250 of the Procedure Code.[4] On the other hand, it will be equally wrong to order his prosecution on the mere failure of the charge made by him. For, in order to justify his prosecution, there must be eivdence that the charge he had made was both false and malicious.[5]

2274. The sanctioning of a prosecution against the accused may thus sometimes lead to this awkward result. The District Magistrate may order his prosecution. The accused feeling aggrieved may complain to a Magistrate offering to substantiate his charge. The Magistrate is bound to inquire into his complaint, and while this is being done, what becomes of the complaint against him? Is it to go on, or should it abate? One thing is certain that he cannot be tried for making a false charge, when the charge itself is *sub judice*.[6] In such a case, the prosecution following on the complaint, must pend till the disposal of the main case, or it should be revoked, for the Magistrate before whom the complaint is made, would himself complain if it is justified by the case before him. If, on the other hand, the case is one in which an order for compensation under section 250 of the Procedure Code, would meet the ends of justice, an order under that section would be passed. But such an order does not bar a prosecution under this section, nor does it amount to a conviction under this section in a summary proceeding.[7]

2275. If three persons *A*, *B*, and *C* complain to the police, and then one of them *C* complains to the Magistrate, his complaint is requisite for the prosecution of any or all of them.[8] If a person reports to the police who take no action; he then lodges a complaint in Court; the accused must ask the court to complain, since

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(1) *Per* Sir Comer Petheram, C. J., in *Sham Lall*, 14 C. 707, F. B.; *Mahadeo Singh*, 27 C. 921; *Jogobundhoo*, 30 C. 415; *Makunda* v. *Bhikari*, 1 C. W. N. 452; *Lalji* v. *Girdhari*, 5 C. W. N. 106; *Jogendra Nath Mookerjee*, 33 C. 1; *Po Hlaing* v. *Ba E*, 6 L. B. R. 50, 15 I. C. 981; *Pampappa*, 28 Bom. L. R. 490, 95 I. C. 68, (1926) B. 284.

(2) *Shamlall*, 14 C. 707, F. B; *Mahadeo Singh*, 27 C. 921; *Gunamony*, 3 C. W. N. 758; *Jogendra Nath Mookerjee*, 33 C. 1; *Jijibhai Gobind*, 22 B. 596; *Bhika Lala*, (1890) B. U. C. 525; *Rachappa*, 12 Bom. L. R. 229, 5 I. C. 971; *Topan Chatomal*, 3 S. L. R 189, 4 I. C. 1160; *Gubala*, (1887) Weir 188; *Sheikh Beari*, 10 M. 233, F. B; *Gunga Ram*, 8 A. 38; *Tula*, 29 A. 587; *Tabarak Zaman Khan*, 30 A. 52; *Ghansyam*, 4 Nag. L. R. 136.

(3) *Mahadeo Singh*, 27 C. 921; *Makunda Bihari*, 1 C. W. N. 452; *Gunamony*, 3 C. W. N. 758; *Buth Nath*, 4 C. W. N. 305; *Sahiram*, 5 C. W. N. 254; *Jogendra Nath Mookerjee*, 33 C. 1.

(4) *Kina Karmakar* v. *Preo Nath Dutt*, 29 C. 481; *Tammi Reddi*, 27 M. 59.

(5) *Kina Karmarkar* v. *Preo Nath Dutt*, 29 C. 481.

(6) *Subbana*, 1 M. H. C. R. 30; *Abdul Hasan*, 1 A. 497; *Salik*, 1 A. 527; *Bishoo Barrik*, 16 W. R. 77; *Gunamony*, 3 C. W. N. 758; *Gati Mandal*, 4 C. L. J. 88; *Manga Ram*, (1886) P. R. No. 28.

(7) *Beni Madhub* v. *Kumud Kumar*, 30 C. 123, F. B.; overruling *contra* held *per* Prinsep, J., in *Parse Hajra* v. *Bandhi Dhanuk*, 28 C. 251.

(8) S. 195 (1) (*b*), Cr. P. C.; *Lal Behary Singh*, 1 Pat. L. J. 205; *Hardwar Pal*, 10 A. L. J. 61; *Gurdita*, (1917) P. R. No. 19.

the matter reported to the police has passed into a judicial proceeding.[1] A person who has applied for and failed to secure complaint for the prosecution of his adversary under this section cannot, on the same facts, institute proceedings against him under s. 500 of the Indian Penal Code.[2]

2276. Effect of Defective Complaint.—The accused has the right to be discharged if his prosecution was instituted without complaint, if a complaint was necessary, or if the complaint made has since been revoked. But so long as the sanction exists, the prosecution following upon it is legal. It is, however, open to the Court to consider the legality of the complaint though it is precluded from considering its propriety.[3] That is to say, while no Court is bound to give effect to an order passed without jurisdiction, it cannot examine the correctness or propriety of the order made, if it is once shown to be within the jurisdiction of the Court that passed it. For instance, if the Magistrate decides to complain while the substantive proceedings are pending, or without giving the accused an opportunity of being heard, and without waiting to hear his evidence, the order may be wrong, and may be set aside on appeal, but it is not one which affects the trial of the accused before a Magistrate, nor can the Magistrate refuse to proceed with the trial on that ground.[4]

2277. No Case for Complaint.—It is needless to state that the mere failure of the prosecution is of itself no proof of its falsity.[5] And the fact that there was a conviction by one Court and acquittal by another, the two Courts differing on the merits of the case, showed to the superior Court that it should forbear from directing a prosecution.[6] There is no case for complaint where a person merely expressed his suspicions without making an accusation.[7] Where the Court had disposed of the case, fining the complainant under s. 250 of the Criminal Procedure Code, and three weeks later issued a notice to show cause why he should not be prosecuted of this offence, the High Court quashed the proceedings as improper.[8]

2278. Proof.—The points requiring proof are :—

(1) That a criminal proceeding was instituted or a charge made against some person.
(2) That it was the accused who either instituted such criminal proceeding or caused them to be instituted, or made the a charge.[9]
(3) That the charge or proceeding accused that person of an offence.
(4) That his accusation was both false and malicious.[10]
(5) That he then knew that there were no just or lawful grounds for instituting the criminal proceeding or making the charge.

2279. Of course having regard to the gravity of an offence under this section all the points necessary for constituting the offence must be clearly established by the prosecution, upon whom rests the burden of proving absence of just and lawful grounds for the criminal proceedings. For this purpose the prosecution have to call independent evidence. They cannot rely on the deposition of witnesses recorded in the case in which the substantive charge was the subject-matter of inquiry. These depositions are not evidence in a subsequent case, except for the purpose of contradicting a witness, if necessary.[11] Where facts are as consistent with a prisoner's innocence, as with his guilt, innocence must be presumed, and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of law.[12] It is then the duty of the prosecution to make out at least a *prima facie* case on all the points requiring proof, and which should

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(1) *Brown* v. *Anandalal*, 44 C. 650 ; *Sheikh Beari*, 10 M. 233 F. B.
(2) *Profulla* v. *Harendra*, 21 C. W. N. 253.
(3) *Irad Ally*, 4 C. 869.
(4) *Ib.* ; *Bansidhar*, 74 I. C. 1054.
(5) *Ram Prosad*, 17 C. W. N. 379, F. B. 17 I. C. 993 ; *Chhedi*, 24 Cr. L. J. 316.
(6) *Raghupat*, (1922) Pat. 26, 66 I. C. 336.
(7) *Parmeshwar Lal*, 4 Pat. 472 : *Sano Khan*, 85 I. C. 818, (1925) A. 472 ; *Abdul Ghafur*, 6 I.. 28.
(8) *Lalji Hari*, 49 I. C. 850.
(9) *Mhd. Hayat*, (1922) P. W. R. 6, 65 I. C. 434.
(10) *Nobo Kisto Ghose*, 8 W. R. 87 (93) ; *Mirza Hassan*, 18 C. W. N. 391, 23 I. C. 723 ; *Bhawani Sahai*, 13 L. 568.
(11) *Ib.*
(12) *Ib.*

bring home to the accused the charge that his accusation was not only false but malicious, and that he knew it to be so at the time he made it. When so much is established, it will then be upon the accused to rebut the charge, and for that purpose he may shew that he merely acted upon information, and that he believed in the charge he made.[1] In such case, the difference between the prosecution and the accused is this, the former have to establish by evidence, clear, cogent and consistent, that the charge made by the accused was false, that he knew it to be so, and that he made it in malice. The accused may disprove it by merely shewing that there was no malice, or that if there was malice, the charge was true and not false, or that he did not know it to be false.

2280. Charge.—The accused charged under this section is entitled to know the specific nature of the false charge of which he is accused. It must, therefore, be clearly set out in the charge (§ 2172), which should run thus :—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of accused*) as follows :—

"That you——on or about the day of——at——with intent to cause injury to one——instituted criminal proceedings before——charging the said——with having committed the offence of——[*or* falsely charged the said——before——with having committed the offence of——knowing at the time that there was no just or lawful ground for such proceeding (*or* charge) against the said——] and that you thereby committed an offence punishable under s. 211 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session or the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2281. Principle.—There are three essential ingredients of an offence under this section, and they distinguish it, so far as it is distinguishable, from the other offence described, in s. 182, namely (*i*) intend to injure, (*ii*) falsehood of the charge, and (*iii*) malice. The offence requires the presence of all these three ingredients, and if any of them is wanting it is not complete, though the offence may then fall under the provisions of the earlier section.

2282. As to the offence itself, the section recognizes the two degrees of its gravity, according as the charge relates to offences punishable with imprisonment for seven years or more, or otherwise. The former is punishable with imprisonment which may extend to seven years, the latter with imprisonment which may extend only to two years or with only fine or both. There is yet another distinction made between the offences dealt with in the two paragraphs. An offence under the first paragraph requires only that there should be a false charge or a criminal proceeding. But the second paragraph requires that there should be a criminal proceeding instituted on a false charge. Now as it is not necessary that a criminal proceeding should necessarily be instituted on a false charge, the mere making of a false charge, whatever may be the offence charged, would only be punishable under the first paragraph. It is only where the charge is followed up by the institution of a criminal proceeding that the second paragraph becomes applicable. The gravity of the offence may then depend not only upon the gravity of the offence charged, but also upon, whether the accused did or did not institute criminal proceeding on that false charge. In short, in order to render him liable to the enhanced penalty provided by the second paragraph, it is not only essential that the accused should have made a charge, but also that he should have instituted criminal proceedings on that charge.

2283. Meaning of Words.—"*With intent to cause injury*," that is, intention to injure another must have been the primary and dominant motive of the offender.[2] "*Institutes or causes to be instituted any criminal proceeding*" : Institution simply means filing. It does not require that there should be any further steps taken. A criminal proceeding is merely setting the criminal law in motion, but it must be either before the police or a Magistrate competent to inquire into the case. A mere information to the police in a *cognizable* case is instituting a criminal proceeding,[3]

(1) *Navalmal*, 3 B. H. C. R. (A. C.) 16; *Sankaran Servai*, 113 I. C. (M.) 455.

(2) *Gopal Dhanuk*, 7 C. 96.

(3) *Tofazel Hoosein* v. *H. C. Hunt*, (1930) C. 711 ; *Johri*, 136 I. C. (A.) 277, relied in *Faiz Alam*, 151 I. C. (Pesh.) 816.

but an information to the police in a *non-cognizable* case is not instituting criminal proceeding,[1] though it would be making a false charge. "*Or falsely charges any person*," *i.e.*, accuses any person to a person in authority. A complaint to a private person or to one who has no direct power to set the machinery of criminal law in motion is not a false charge within the meaning of this section.[2] The charge must further desire the authority concerned to use that power to the prejudice of the complainant. Where, therefore, the accused had applied that his complaint should be inquired into by the Magistrate, because the police had ill-treated him, he could not be prosecuted of this offence.[3] Nor can the accused be held liable for this offence if he did not charge, but merely answered questions put to him.[4] "*Knowing that there is no just or lawful grounds*": This is equivalent of the English phrase "without reasonable or probable cause," the meaning of which will have to be presently discussed. This phrase constitutes the *mens rea* and it must be established by the prosecution.[5]

2284. Who "Institutes" or "Charges".—This is the nemesis of offenders who seek to avail themselves of the machinery of criminal law for the gratification of their ill-feeling, and who for that purpose falsely accuse another and expose him to the risk of a conviction. The section requires that the penalties attaching to the offence should only be visited upon him, who (*i*) sets the criminal law in motion, (*ii*) not only falsely but also without any just or lawful grounds; his primary and predominant intention being to cause injury to the person so falsely accused through the medium of criminal law, and not otherwise.[6] In a case arising under this section the first thing to establish is that it was the accused who instituted or caused to be instituted the criminal proceeding or made the false charge in question. This raises the question, what is institution of a criminal proceeding? This phrase has been held to mean nothing more or less than the setting of criminal law in motion. A complaint to the police, in respect of an offence which they are competent to deal with, is thereby setting the police in motion, and it is therefore instituting a criminal proceeding.[7]

2285. As Wilson, J., in delivering the judgment of the Full Bench[8] of the Calcutta High Court, remarked: "There are two modes in which a person aggrieved may seek to put the criminal law in motion. He may make a charge, or in the language of the Procedure Code, give information to the police. If the information discloses a cognizable offence, the proper officer of police may proceed to make an investigation; and if the result of that investigation is adverse to the accused, he is in due course brought by the police before the Magistrate. All this forms the subject of Chapter XIV of the Procedure Code. If the information does not disclose a cognizable offence, the police cannot take any step of their own authority. *Secondly*, a person aggrieved may lay a charge, or as the Code calls it, a complaint before a Magistrate.[9]

2286. These are then the two modes of instituting a criminal proceeding, and in each case the proceedings are instituted as soon as the complaint is made.

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(1) *Abdul Hakim Khan*, 59 C. 334.

(2) *Gaya*, 9 C. L. J. 342, 69 I. C. 81; *Mahadu*, 24 Cr. L. J. 959; *Mathura Prasad*, 39 A. 715; *Banli Pande*, (1930) Pat. 550.

(3) *Ramrao*, 75 I. C. (N.) 158, (1923) N. 313; *Bhawani Sahai*, 13 L. 568.

(4) *Zorawat Singh*, 8 A. L. J. 1106, 11 I. C. 617.

(5) *Gopal Kahar*, 61 I. C. (C.) 61.

(6) *Abdul Hakim Khan*, 59 C. 334; *Bhawani Sahai*, 13 L. 568 and cases in § 2297 *post*.

(7) *Bonomally*, 5 W. R. 32; *Raffe Mahomed* v. *Abbas Khan*, 8 W. R. 67; *Kader Buksh*, 21 W. R. 34; *Karim Buksh*, 17 C. 574, F. B., overruling *contra* in *Karim Buksh*, 14 C. 633; *Dilan Singh*, 40 C. 360; *Karigowda*, 19 B. 51; *Appaji*, 22 B. 517; *Subbanna*, 1 M. H. C. R. 30; *Nanjunda*, 20 M. 79; *Mellappa*, 27 M. 127; *Jonnalagadda*, 28 M. 565; *Sessions Judge* v. *Sivan Chetty*, 32 M. 258, F. B. overruling *Chinna Ramana*, 31 M. 506; followed in *Krishna*, 20 M. L. J. 132, which must be deemed to have been also overruled; *Abdul Hasan*, 1 A. 497; *Salik*, 1 A. 527; *Parabu*, 3 A. 598; *Barkatullah* v. *Sadho*, 19 A. L. J. 429, 17 I. C. 791; *Sobarati*, 8 Pat. 734.

(8) *Karim Buksh*, 14 C. 514; *Bhika Lala*, (1890) B. U. C. 521; *Mi Ngwe* v. *Mi Chit*, (1912) U. B. R. 134, 15 I. C. 992.

(9) *Karim Buksh*, 14 C. 574.

But this view, though taken in Calcutta, Madras and Bombay, has been dissented from in some cases of the Allahabad Court,[1] where the view taken of the meaning of this phrase, is based upon the distinction which the section undoubtedly makes, between a false charge and the institution of a criminal proceeding. According to the Allahabad view, the mere making of a complaint, whether before the police or the Magistrate, is merely making a charge. Following upon that charge there must be institution of a criminal proceeding, and which means the taking of some action against the person so charged.[2]

2287. This much is conceded in Bombay,[3] and was not wholly denied in the Full Bench case of the Calcutta High Court, for Wilson, J., said : " I agree in this reasoning in one sense, and not in another. I agree that we must take it that the Legislature did not regard the two phrases as co-extensive in meaning, but considered that they were, or might be, cases to which the one would apply and not the other. But I do not think that we are to suppose that the Legislature meant the phrase to be mutually exclusive in meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. This cannot, I think, be for two reasons. *First*, because there is no mode by which a private accuser can institute criminal proceedings, except by making a charge ; and if he does not do it by the charge, he never does it at all, to whatever length the proceedings may go ; and *secondly*, because the last part of the section speaks of proceedings instituted on a false charge."[4]

2288. So far as the first part of the section is concerned, the use of the two phrases present no difficulty, for whether a given act amounts to a false charge or the instituting of a criminal proceeding, the penalty is the same, and the difference is thus inconsequential. But the difference between the two phrases becomes material, when we have to consider the applicability of the second paragraph. Here the Full Bench meet the difficulty by pointing to the change of phraseology. But this change is scarcely material, for the language used in the second paragraph, is not merely " proceedings instituted on a false charge," but " *such* proceedings instituted on a false charge," and which connects it with the corresponding phrase in the first paragraph, and from which it follows that the two must be read in the same sense.

2289. But the Calcutta view suggests another difficulty of construction which is not otherwise surmountable. It refers to cases of breach of peace or of good behaviour,[5] which are apparently criminal proceedings, but which do no necessarily involve a charge of any offence. " On the other hand, a charge to the police of non-cognizable offence, may very possibly be a charge within the meaning of this section, but could hardly be called the institution of criminal proceedings. So a charge made to the Judge of a Civil Court ; or to public officers of other kinds, in order to obtain sanction to prosecute, may well be a charge, but is not the institution of criminal proceedings."[6] In this view, a man who sets the criminal law in motion, by making a false charge to the police of a cognizable offence, institutes criminal proceedings within the meaning of this section. But the making of a false charge to the police, of a non-cognizable offence, does not amount to the institution of a criminal proceeding, though it will be so in either case, if the complaint is made to a Magistrate. But there must be a false charge of an offence made to him. For, of a person merely complains of the breach of a civil right, invoking his aid to secure its enforcement, there can be no prosecution, even if the complaint made was false. Such was the case of the accused who prayed a Magistrate to compel the prosecutor

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(1) *Pitam Rai*, 5 A. 215 ; *Parabhu*, 5 A. 598 ; *Bisheshar*, 16 A. 124.

(2) *Parabhu*, 5 A. 598 ; *Bisheshar*, 16 A. 124; *Hardeo Singh* v. *Hanuman*, 26 A. 244; *Jagmohan*, 6 A. L. J. 989, 4 I. C. 812.

(3) *Per* Ranade, J., in *Jijibhai*, 22 B. 596.

(4) *Karim Buksh*, 17 C. 574, F. B.; *Sessions Judge* v. *Sivan Chetty*, 32 M. 258, F. B.

(5) Ss. 109, 110, Cr. P. C.

(6) *Karim Buksh*, 17 C. 574, F. B.; followed in *Sessions Judge* v. *Sivan Chetty*, 32 M. 258 F. B.

to execute a conveyance of a house, which he was alleged to have sold to him, or to return him his purchase money, failing which, he was to be punished criminally.[1]

2290. The word "charge" as used here, means an accusation. But it is not every accusation which attracts the penalty of this section. It must be an accusation to a *person in authority*, that is, one who is bound by law to investigate into the matter, or to take any step in regard to it (§ 2291); *a fortiori* a complaint to a private person or to one who has no direct power to set the criminal law in motion is not a false charge within the meaning of this section.[2] It must, again, be a *definite* accusation and not merely a suggestion or an expression of suspicion. The word "charge" as here used means something different from "gives information."[3] It is something more than reporting what one knows of the facts, stating one's suspicions and leaving the matter to be further investigated by the authorities.[4] (§ 2292). The words "false charge" must be construed with reference to the institution of criminal proceeding. That must be his object, though he may not have expressly prayed for it. (§ 2294).

2291. It is necessary for a conviction under this section that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.[5] So where the accused falsely charged another of an offence before a Military Officer having neither magisterial nor police powers, he could not be held to be guilty of an offence under this section,[6] though he may be prosecuted for defamation[7] and it may even amount to an offence under s. 182.[8] But an accusation of murder made to a village Magistrate, who had under a local regulation[9] authority to arrest any person whom he suspects of having committed the murder of a person, whose body is found within his jurisdiction, is a "charge" within this section, even though it does not amount to the institution of criminal proceedings, and even though no criminal proceedings follow it, owing to the police on investigation, referring the charge as false.[10] Of course, to constitute the offence of making a false charge under this section, all that is necessary is that the false charge is made. It is not necessary that any prosecution should be instituted thereon. The offence consists, not in the prosecution of a false complaint, but in the making of it.[11] It is not, therefore, necessary that summons should be issued upon such complaint,[12] or that if made to the police, it should have reduced it to writing as required by law, for the test is what the accused did and intend, and not what others did or did not do.[13]

Officer must Possess Some Jurisdiction.

2292. No Charge: No False Charge.—There must, however, be a false charge made, or a criminal proceeding instituted against some person. A false charge must be a definite accusation, and not merely the expression of a suspicion. A statement made to the police of a suspicion that a particular person has committed an offence, is not a "charge" within the meaning of this section, nor does it amount to the institution of a criminal proceeding against that person, so as to justify his conviction under this section, on the suspicion being proved to be unfounded.[14] So where the accused reported a case of dacoity in his house by a gang of 30 or 35 men, whom he said he was unable to recognise in the dark, but added: "Mohesh Roy was one of the dacoits, I suspect him because he is my enemy." The police inquired and reported the case as false, whereupon the District Magistrate ordered the prosecution of the accused. It was found that he had falsely

(1) *Raghoo*, (1865) B. U. C. 3.
(2) *Gaya*. 69 I. C. 81; *Mahadu*, 24 Cr. L. J. 954; *Mathura Prasad*, 39 A. 715; *Banti Pande*, (1930) Pat. 550.
(3) *Nga Ba Shein*, 151 I. C. (R.) 185.
(4) *Ib*.
(5) *Chenna Mali*, 27 M. 129; *Chinna*, 31 M. 106; *Mathura Prasad*, 39 A. 715.
(6) *Jamoona*, 6 C. 620.
(7) *Karigowda*, 19 B. 51.
(8) *Thavasiandi*, (1903) 1 Weir 122.
(9) Reg. XI of 1816. s. 13.
(10) *Chenna Mali*, 27 M. 129.
(11) *Abdul Hasan*, 1 A. 497.
(12) *Hardeo Singh* v. *Hanuman*, 26 A. 244.
(13) *Mallappa*, 27 M 127.
(14) *Swaminatha*, (1912) M. W. N. 1125, 14 I. C. 767; *Solaimuthu*, (1915) M. W. N. 272, 28 I. C. 999; *Mathura Prasad*, 39 A. 715; *Nga Bon She*, 10 Bur. L. T. 259, 38 I. C. 334

identified Mohesh's property as his, and had fabricated false evidence, by breaking the staple of a door in his house, in proof of the dacoity. But it was held that the accusation of Mohesh Roy did not amount to a false charge, but only amounted to providing the police with a possible clue for investigating the matter which they might or might not follow up as they considered fit. Moreover, it could not be said that Mohesh was accused, *knowing* that there were no just grounds for the accusation.[1]

2293. In another case the accused has presented a petition to the District Magistrate, for leave to inspect the Municipal file, to enable him to take criminal proceedings against a Municipal employee, for having distributed voting papers to unauthorized persons, with intent to injure him. It was held that as the accused had preferred no charge, but merely adduced a reason for being permitted to inspect the file, he could not be prosecuted under this section.[2] So in another case certain petitions said to emanate from the accused, were received by Government, charging a Deputy Collector of Bijapur with bribery and corruption. The Government sent them to the District Magistrate for inquiry, and he enforced the attendance of the accused through the police. The accused being questioned denied his authorship of the petitions, but on being questioned he stated that he had paid a bribe to the Deputy Collector in a case in which his son had been charged of theft before him. He was disbelieved and the Government permitted the Deputy Magistrate to prosecute the accused for defamation, but the trying Magistrate convicted him under this section. But it was held that the accused could not be convicted under this section, though he might be for defamation, because, by making the statement in answer to the questions put, the accused did not intend to set the criminal law in motion. He had been compelled to appear before the District Magistrate, and what he had stated was in reply to questions put to him by the Magistrate.[3] The case is not unlike one in which a person on conviction urges in his petition of appeal, that the case against him was trumped up by some one in the police. So where the accused who was convicted of homicide, petitioned the Lieutenant-Governor for his release, on the ground that the accusation was a false one, got up by one *S. K.* from enmity, whereupon *S. K.* prosecuted him for making a false charge under this section, but his conviction was set aside by the Chief Court, who held that, to constitute the offence of "falsely charging a person with having committed an offence" within the meaning of this section, something more is necessary than to falsely impute against a person, that he has committed an offence.

2294. The "charge" contemplated in this section means a charge made in order to the institution of criminal proceedings.[4] So where the accused submitted a petition to the Deputy Commissioner, while he was on tour making enquiries into certain matters connected with the management of the Court of Wards, complaining of the manager and the subordinate staff, it was held that the petition being merely filed before him, while he was acting in his executive capacity, could not be regarded as a complaint within the meaning of s. 4 (*b*) of the Procedure Code. There was consequently no charge or institution of criminal proceedings, and that, while the accused might have been convicted of defamation, he could not be convicted of an offence under this section.[5]

2295. Exactly the same view has been taken in Calcutta[6] in a case in which the accused had complained to the Collector, as the Superior Officer of the Court of Wards, of a subordinate of that department having wrongfully confined him for extorting a bribe. The Collector was also the District Magistrate, and he

(1) *Bramanund*, 8 C. L. R. 233; *Solaimuthu* v. *Murugiah*, (1915) M. W. N. 272, 28 I. C. 999.

(2) *Zorawar Singh*, 8 A. L. J. 1106, 11 I. C. 617; *Chhedi Kandu*, 7 A. L. J. 618, 6 I. C. 390.

(3) *Karigowda*, 19 B. 51; *Veruputti Penchalugaddi*, 6 M. L. T. 133, 4 I. C. 1061.

(4) *Ghulam Hussain*, (1879) P. R. No. 14; *Bhawani Sahai*, 13 L. 568.

(5) *Ahmed Khan*, (1904) P. L. R. 397, 1 Cr. L. J. 957; *Chhedikandu*, 7 A. L. J. 618, 6 I. C. 390.

(6) *Jagobundhoo*, 30 C. 415.

took up the petition, judicially examined the complainant, and ordered his prosecution under this section. It was held that the Magistrate had acted arbitrarily, in turning a departmental complaint into a criminal complaint, and that even supposing for a moment that he could do so, he could not order his prosecution without giving him an opportunity of calling his evidence.[1] Even a complaint to a Magistrate is not a charge, unless there is an express or implied request to take judicial action, to the detriment of the person charged. For instance, there is such a thing as giving information to Magistrate, which is distinct from a charge, and is not to be confounded with it.

True Test of a Charge.

2296. The true test is: Did the person complaining do so with the intention and object of setting the criminal law in motion against the person complained against? Where, for instance, the accused petitioned to a Magistrate that the police who had arrested his brother, were tutoring certain persons to be witnesses against him, and that "the Court may be pleased to make inquiries to find out the truth of the above allegations and to take the necessary steps in the matter," it was held that the object of the petitioner was to prevent the further alleged tutoring of witnesses, and that his petition could not be therefore treated as a charge, so as to justify proceedings under this section.[2] It was so held where the accused had requested the Police Superintendent against a Sub-Inspector who was a bribe-taker.[3] A person who, in answer to questions put to him by a police-officer making an investigation under s. 161 of the Procedure Code, falsely mentions the name of another person as the offender, does not thereby make himself liable to a prosecution under this section.[4] So where the accused addressed a letter to the police in which he did not claim any personal knowledge of the facts, but on the authority of information supplied to him by others, stated that a certain person had murdered a woman, and that the petitioner could prove it, it was held that as the accused was merely stating what he had heard, and as he had no motive for preferring a false charge against the person informed against, he could not be said to have made a false charge with knowledge of itsfalsehood.[5]

2297. The mere despatch of a telegram, falsely stating that a dacoity had been committed, without mentioning the names of any persons alleged to have been concerned or suspected of complicity in the offence, does not amount to the institution of a false charge, within the meaning of this section.[6] One Chedi Ram, a peon, wired to the Collector, that the Naib Tahshildar, the Plague Doctor and one Razack, peon, had burst open his house, beat his family and forcibly inoculated them. The Collector sent the wire to a Magistrate who, upon an enquiry made, found the complaint false and thereupon sanctioned his prosecution under this section. But the High Court quashed the proceedings holding that as there was no complaint to a Magistrate, the complainant could not be proceeded against under this section.[7] A charge may be vexatious, but it is not on that account to be considered necessarily false.[8]

2298. Effect of Composition.—The fact that a non-compoundable case was illegally compounded by the complainant with the accused, does not bar a prosecution under this section,[9] though such a case may present other difficulties in proving it. The question, whether the lawful compounding of a compoundable case under section 345 of the Procedure Code, has also the same effect, was referred to the High Court, but the learned Judges refrained from committing themselves to any opinion. The question is certainly not as easy as it looks, but at the same time, it is one which frequently occurs in practice, and it was for this

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(1) *Jagobundhoo*, 30 C. 415. To the same effect, *Dappile Chenchugari*, (1915) M. W. N. 253, 28 I. C. 108; *Chhedikandu*. 7 A. L. J. 618, 6 I. C. 390.

(2) *Ravan Kutti*, 26 M. 640.

(3) *Abdul Hakim Khan*, 59 C. 334.

(4) *Veerapalli*, (1902) 1 Weir 193.

(5) *Karim*, (1905) P. R. No. 12.

(6) *Nandamuri*, (1914) M. W. N. 382, 25 I. C. 630.

(7) *Chhedikandu*. 7 A. L. J. 618, 6 I. C. 390.

(8) *Tatia Hari*, 1 Bom. L. R. 11.

(9) *Atar Ali*, 11 C. 79.

reason that a District Magistrate had referred it for the opinion of the High Court.[1] The policy of law in permitting compositions of certain crimes, is undoubtedly to condone the crime if the party aggrieved is so willing. Such composition may be for a valuable consideration, and composition has the effect of putting an end to the offence as if it had never happened. It would be contrary to the policy of law which permits composition, to tolerate retaliation, when it intends to bury in oblivion the principal wrong, and about the merits of which there can then be no inquiry. It would, therefore, seem that in the case of offences which may be lawfully compounded, the accused cannot, after compounding with the complainant, prosecute him for making a false charge, nor can the police or the Court in which the criminal proceeding may have been instituted.

2299. Knowledge of Falsehood Material.—The fact that the statement was made recklessly, may show that it was made in bad faith. But bad faith is evidence of malice. It is not evidence of the knowledge of falsehood. And what is required is not merely knowledge of falsehood, but also the absence of just or lawful grounds. These are essential ingredients of an offence under this section, and their significance must be appreciated. As Plowden, J., remarked in a case: "It is of great importance to the administration of justice in this country, that this section should be correctly understood and applied. Unless the person making a charge actually knows that there is no just or lawful ground for it, he is not guilty of the offence, and cannot properly be convicted of it. It is not enough to find that he had acted in bad faith, that is, without due care or inquiry, or that he has acted maliciously, or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, or scrutinizing its sources, natural malice towards the person charged—these are all relevant evidence, more or less cogent, but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove this knowledge, but however difficult it may be, it must be proved, and unless it is proved, the informer must be acquitted."[2]

2300. The phrase "no just or lawful ground" would seem to be equivalent to the English phrase "without reasonable and probable cause." Now, a reasonable and probable cause is, in the words of Hawkins, J., "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed. There must be *first*, an honest belief of the accuser in the guilt of the accused; *secondly*, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; *thirdly*, such secondly mentioned belief must be based upon reasonable grounds; by this, I mean, such grounds as would lead any fairly cautious man in the defendant's situation to believe: *fourthly*, the circumstances so believed and relied on by the accuser, must be such as amount to reasonable ground for belief in the guilt of the accused."[3] And this is what is implied by reasonable and probable cause. Its absence is the want of reasonable and probable cause, and of just or lawful ground, the presence of which is a gravamen of the crime. It may then be that the charge made by the accused was wholly false, but if the accused believed it, he is protected, though his belief may have been mistaken.

2301. There must have been reasonable grounds for his belief. If he believed in the facts reported to him, his belief would be reasonable, though the facts reported to him may prove to be false. Of course, in such a case the question would be, had the accused reason to believe the information conveyed to him? But this is

(1) *Atar Ali*, 11 C. 79, p. 80.
(2) *Murad*, (1894) P. R. No. 29, cited and approved *per* Rattigan, J., in *Karim Baksh*, (1905) P. R. No. 12.
(3) *Hicks* v. *Faulkner*, 8 Q. B. D. 167 (171, 172).

an inquiry which does not admit of much scrutiny. For the question about a man's trustworthiness, depends as much upon his position and repute as upon the relation in which he stands to another. For, there is honour even amongst thieves, and one may be a trusted and trustworthy friend of another, though he may be an abandoned villain to the rest of the world. As Lord Hatherley observed in a case: "Information given by one person of whom the party knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information, must depend in a great degree, upon the opinion to be formed of the position and circumstances of the information, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information."[1]

2302. It must be remembered too that the burden of proving absence of just and lawful ground, is upon the prosecution and not on the accused. It is on it to prove affirmatively a negative fact, and for that purpose there must be clear and cogent evidence adduced in the case. It will not do to refer to the record of the former case and to come to the conclusion that that record proves the accused's guilt.[2] And what is to be proved is, that the accused had not just or lawful ground at the time he made the charge or instituted the proceeding. It may be that he instituted in good faith a charge, which on subsequent investigation was found to be false. But this is not for what he is criminally liable. Moreover, in judging of his conduct the Court must take into consideration his feelings and passion, the injury done to him, his education, character and trend of mental thought, his credulity whetted by the wrong done to him or which he fancies, unusually adopted, and the loose method of enquiry and want of critical insight usually displayed by men in his station of life. As has been observed in a case: "It is not enough and not a sufficient ground for charging under s. 211 of the Indian Penal Code, that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence or a statement which is not, or ought not to be sufficient to satisfy a reasonable mind. However rashly he may act in receiving and believing such statement—if in fact and truth he does not know, at the time he makes the complaint, that there are no just or lawful grounds for making complaint, he cannot be convicted of making a false charge under the above section."[3]

Persons Liable.

2303. A false charge may as much be made by a public servant, as it may be by a private individual. So where a head-constable sent a report to his immediate superior, that certain persons habitually received stolen property, in consequence of which they were prosecuted, it was held that the originator of the false report was as much liable to a conviction under this section as if he had himself been the actual complainant. "The criminal information was laid before the Deputy Magistrate entirely on the prisoner's representation to the Inspector. Had it not been for his reports to that official, the charge would never have been made, and the prisoner, although subordinate to all intents and purposes, was the actual and personal originator of the charge, and cannot shift the responsibility. If the mere fact of being in a subordinate position is to shield a man from the consequences of official acts originated by himself, no one will be safe from false and malicious charges."[4] Such a case must be distinguished from one in which the police-officer, being required to make an investigation into an offence, falsely and corruptly reports it as proved. In such a case, it cannot be properly said that he instituted or caused to be instituted any criminal proceedings or made a false charge, and he cannot therefore be convicted under this section.[5]

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(1) *Lister* v. *Perryman*, L. R. 4 E. & I. App. 521 (531).
(2) *Rampat*, (1900) P. R. No. 26.
(3) *Pran Kissen Bid*, 6 W. R. 15; *Ram Prosad*, 17 C. W. N. 379, F. B., 17 I. C. 993; *Mt. Mahbuban* v. *Hassan Mirza*, 18 C. W. N. 391, 23 I. C. 723.
(4) *Rhedoy Nath Biswas*, 2 W. R. 447.
(5) *Thakur Tewary*, 4 C. W. N. 34.

Charge must be of an Offence.

2304. Again, the false charge must relate to an offence, or the proceedings instituted must be criminal, otherwise, the accused cannot be dealt with under this section. Proceedings relating to an offence under this Code are, of course, criminal proceedings. And so are those instituted under the penal provisions of special or local laws. The words "criminal proceedings" have been understood in English Law to be a proceeding before a Magistrate which may (not that they must) end in imprisonment.[1] So a proceeding before a Magistrate for levy of a poor-rate by distress, and in default for commitment to jail for any term not exceeding six months, or until payment of the amount, was held to be a criminal cause or matter within the meaning of s. 47 of the Judicature Act.[2] The question whether a proceeding is civil or criminal has reference rather to the procedure than to the origin and nature of the liability. Indeed, there are many civil liabilities which are criminally enforceable, and in such cases the proceeding resorted to enforce them is a criminal proceeding. It is not necessary that the procedure there resorted to, *must* end in imprisonment. All that is necessary is that it may so end, though imprisonment may be awarded only in lieu of distress or the payment of a penalty.[3] So the service of notice on a person for abetting a nuisance by filling up the ashpit to abandon the privy, and build a pail closet, under the Public Health Act[4] is a criminal proceeding so that its disobedience would be criminal, being punishable with fine, and in default with imprisonment.[5] So proceedings under the Workmen's Breach of Contract Act,[6] for wilfully neglecting to work for the employer, compelling him to perform the work or to repay the advance are criminal, though the only relief to which the complainant is entitled is repayment of the loan or specific performance of the work, since on failure to do the one or the other at the option of the complainant, the Magistrate may imprison the recalcitrant workman with imprisonment up to three months.[7] But a breach of contract is not an offence within the meaning of s. 4 of the Procedure Code.[8]

2305. Charge Partially False.—This section contemplates a charge which is inadmissible in its nature, and therefore, what is to be considered is the nature of the complaint or charge made by the accused: in other words, whether the complaint is substantially true and what is false is a mere fringe to the complaint, or whether the substantial complaint is false and what is true is a mere fringe, or in other words, a mere accessory circumstance.[9] The accused in a case made a report to the police to the effect that one Bechoo had abused and assaulted him and stolen a brass badge and a *chudder* from his person. The police found that the charge of abuse was true, but the charges of assault and theft were false. It was held that the question whether this constituted a case substantially true, or whether it was a false case, depended upon what was the real charge preferred by the accused, and that it was a question for the consideration of the Court of first instance, and upon which the High Court declined to express an opinion.[10] It is, however, apparent that the addition of the false charge was made by the accused, to make the offence cognizable by the police and therefore formed a substantial part of his accusation.

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(1) *Per* Lord Esher, M. R., in *Seaman* v. *Burley*, (1886) 2 Q. B. 344 (347), following *Mellor* v. *Denham*, 5 Q. B. D. 467; *Whitchurch*, 7 Q. B. D. 534; *Schofield*, (1891) 2 Q. B. 428; *Payne* v. *Wright*, 61 L. J. (M. C.) 114; *Southwork and Vauxhall Water Co.* v. *Hampton Urban District Council*, (1898) 1 Q. B. 273.

(2) 36 & 37 Vict., c. 69; *Seaman* v. *Burley*, (1896) 2 Q. B. 344.

(3) *Schofield*, (1891) 2 Q. B. 428; *Payne* v. *Wright*, 61 L. J. (M. C.) 114; *Seaman* v. *Burley*, (1896) 2 Q. B. 344 (349).

(4) 38 & 39 Vict., c. 55, ss. 92, 94.

(5) *Whitchurch*, 7 Q. B. D. 534 (536, 537); *Indarjit*, 11 A. 262, in which, however, the question was about the construction of s. 2 of the Act.

(6) Act XIII of 1859.

(7) *Periasawmy*, (1903) L. B. R. 163; *Karupanna* v. *Mada Nandan*, (1904) L. B. R. 300; *contra* in *Averam* v. *Abdul Rahim*, 4 C. W. N. 201.

(8) *Ram Sarup Bhakat*, 4 C. W. N. 253; *Pollard* v. *Mothial*, 4 M. 234.

(9) *Girdhari Naik*, 5 C. W. N. 727.

(10) *Ib.*

Causing to be Instituted.

2306. A person may be convicted of abetment of an offence under this section, if he had instigated another to make a false charge. But the question in such a case would be whether his act constitutes an abetment, or the principal offence here described. For, a person who causes a criminal proceeding to be instituted against a person, falls into the same category as one who himself institutes the criminal proceeding. At the same time, the question whether he must be treated as the principal or as an abettor must necessarily depend upon the degree of his participation in the crime. If a person makes a charge through his agent, manager or the like, he would be liable in the same way and to the same extent as if he had himself made it. On the other hand, had he merely co-operated with another he may be guilty of merely an abetment. But, of course, in order to support a charge of abetment, there must have been evidence of previous co-operation for there can be no abetment of an act after it has been committed. So a person who gave evidence in support of a false charge, could not be convicted of the abetment of that charge [1] Of course, this clause is intended to apply to a case where a person complains and the criminal proceedings are then instituted by the police, in which case the question would be whether he had or had not caused the proceedings to be instituted, so as to be amenable to this section. The question, again, depends upon the nature and extent of this co-operation with the police in instituting the criminal proceeding. The mere fact that a person informs the police against a certain person, does not thereafter make him liable for anything and everything that the police may choose to do. The question whether the complainant was the real prosecutor must depend upon the degree of interest he took in the case and the extent to which he identified himself with the prosecution. If he engages counsel for the prosecution and assists the police and the official prosecutor, he cannot be heard to say that he was not the prosecutor *de facto*, though he may not be a prosecutor *de jure*.[2]

2307. Civil Remedy.—Of course, it is never a *conditio sine qua non* to the maintainability of a civil suit for damages, that there should have been a previous criminal prosecution. Consequently, a person may sue merely for damages for a false and malicious prosecution, without prosecuting him for an offence under this section.[3]

Paragraph 2.

2308. Enhanced Sentence for Criminal Proceeding.—The first paragraph presents a normal case. The second deals with the aggravated form of the same offence. It, however, requires that in order to render a person liable for the enhanced sentence therein provided, a criminal proceeding should be instituted in consequence of the false charge. In short, it must not be a mere accusation, but some action must have been taken in consequence of it. The question what amounts to the institution of a criminal proceeding, has been the subject of some controversy (§§ 2259-2262). But even those who understand that phrase in accordance with the view of the Calcutta High Court, have to admit that that phrase does not bear the same meaning in this paragraph.[4] It has been contended, on the one hand, that the institution of criminal proceedings here referred to must mean their institution before a Magistrate.[5] On the other hand, the other view is that such proceedings need not necessarily proceed to that extent, and there is no reason why they should, in order to bring the offender within the grasp of this paragraph.[6]

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(1) *Jugut Mohini Dasi*, 10 C. L. R. 4; *Ram Panda*, 18 W. R. 28.

(2) *Gaya Prashad* v. *Sardar Bhagat Singh*, 30 A. 525, P. C.

(3) *Shama Churn Bose* v. *Bhola Nath Dutt*, 6 W. R. (Cir. Ref.) 9; *Viranna* v. *Nagayyah*, 3 M. 6.

(4) *Per* Wilson, J., in *Karim Buksh*, 17 C. 574 F. B.

(5) *Karim Buksh*, 14 C. 633; *Pitam Rai*, 5 A. 215; *Bisheshar*, 16 A. 124; *Sultan*, (1888) P. R. No. 3; *Khan Bahadhur*, (1888) P. R. No. 26; *contra* in *Sulla*, (1884) P. R. No. 17, dissented from.

(6) *Nanjunda*, 20 M. 79, following *Karim Buksh*, 17 C. 574, F. B. (This case has nothing to do with the case of the same name reported in 14 C. 633.

2309. The other view was justified in the Punjab on the ground that the institution referred to in the section must refer to a judicial proceeding on a false charge and it is only in consequence of the charge being tried and found false that the law visits the offender with heavier sentences.[1]

2310. But this view does not combat the difficulty pointed out by Wilson, J., in the Full Bench case,[2] that, if the phrase be restricted to mean a criminal proceeding before a judicial tribunal, what are we to say of false proceedings instituted, say under breach of the peace[3] or bad behaviour[4] sections of the Procedure Code. The fact is that the language of the section lacks in perspicuity, and exponents of neither view stand upon sure ground. To apply the language of Mathew, J., "The difficulty of ascertaining the meaning of the Legislature upon the point, is one of a class with which the Courts are but too familiar, and is due to the fact, that the language of the enactment is neither wholly popular nor altogether technical, and is therefore not to be interpreted readily either by a lawyer or a layman."[5] In this case too the learned judges had to consider the meaning of the same term, and the view of the Court was that a criminal information is as much distinct from a criminal proceeding as the latter is distinguishable from a criminal prosecution. In the words of Brett, M.R., the word "proceeding" is a very different term, and one much wider than criminal "prosecution."[6]

2311. Intent to Cause Injury at What Time Material.—The foundation of the offence under this section is malice, and the section requires that the institution of the criminal proceeding, or the making of the false charge, must have been "with intent to cause injury"—in other words, they should have been actuated by malice. Now malice is a feeling of the mind, and its evidence can only be found in the act and conduct of the prosecutor, in the previous ill-feeling he may have towards the accused and in the nature of the charge as laid and as it was subsequently prosecuted. For, as the Privy Council observed in a case, malice may be shown at any time in the course of the enquiry.[7] So Cockburn, C.J., said in a case: "A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *mala animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."[8]

2312. Measure of Punishment.—Though this is a serious offence and justifies the passing of a substantial term of imprisonment, there may be cases when the mere infliction of a substantial fine would satisfy the requirement of justice (§ 370). The accused, an old man of 65, had falsely charged several persons of rioting. Out of regard for his age, the Magistrate fined him Rs. 1,000, whereupon the High Court, though it refused to interfere, observed that where fine is substituted for imprisonment, it should be equally deterrent and such as would inflict the same suffering on the old delinquent as imprisonment would have inflicted on a younger man.[9]

Harbouring offender.

212. Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment,

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(1) *Per* Roe, J., in *Sultan*, (1887) P.R. No. 3, followed in *Khan Bahadur*, (1888) P. R. No. 26. To the same effect, *Pitam Rai*, 5 A. 215; *Parabu*, 5 A. 598; *Bisheshur*, 16 A. 124.

(2) *Karim Buksh*, 17 C. 574, F. B; followed in *Chhoti Bi*, 2 Nag. L. R. 119.

(3) S. 107, Cr. P. C.

(4) *Ib.*, ss. 109, 110.

(5) *Yates*, 11 Q. B. D. 750 (752); O. A. 14 Q. B. D. 648.

(6) *Yates*, 14 Q. B. D., 648 (654).

(7) *Pandit Gaya Parshad* v. *Sardar Bhagat Singh*, 12 C. W. N. 1017, P. C.

(8) *Fitzjohn* v. *Mackindar*, (1861) 9 C. B. (N. S.) 505 (531); followed in *Pandit Gaya Parshad* v. *Sardar Bhagat Singh*, 12 C. W. N. 1017, P. C.

(9) *Muthia*, (1916) M. W. N. 1, 337 I. C. 638.

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

If a capital offence ;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460 ; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—**This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.**

Illustration.

A, knowing that *B* has committed dacoity, knowingly conceals *B* in order to screen him from legal punishment. Here, as *B* is liable to transportation for life, *A* is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

[***Reason to believe***—s. 26. ***Harbour***—s. 216-B.]

2313. Analogous Law.--The clause defining "offence" in this section was added by the Indian Criminal Law Amendment Act, 1894.[1]

2314. Harbouring escaped prisoners of war[2] and a deserter,[3] have been provided for in other sections. This is another section dealing with what was described in the original Draft Bill as "subsequent abetment." Such an offender will still be classed as an accessory after the fact, under English Law (§ 945).

2315. The exception in favour of husband or wife is on the lines of English Law, which, however, only exempts a *feme covert* from receiving her husband, the husband being liable for receiving the wife.[4] Both under English Law[5] as well as under the section, any other relationship affords no defence to a charge for harbouring.

2316. Procedure and Practice.—This offence is cognizable, but warrant may ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class ; but where the principal offence is punishable with imprisonment which may extend to one year and not to ten years, then it is triable by the Court by which the offence is triable.

2317. Proof.—The points requiring proof are :—

(1) That an offence was committed.
(2) That the accused harboured or concealed some person.
(3) That the person so harboured or concealed had committed the offence.
(4) That the accused then knew, or had reason to believe that the person harboured or concealed was the offender.
(5) That in harbouring or concealing him, the accused intended to screen him from legal punishment.

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(1) Act III of 1894, s. 7.
(2) S. 130.
(3) S. 136.
(4) 2 Hawk c. 29, s. I; 3 P. Wms. 475; 1 Hale P. C. 621.
(5) 1 Hawk P. C., c. 29, s. 34.

And as an aggravating circumstance, prove—

(6) That the accused knew that the offence committed by the person so harboured or concealed was punishable with—

(*a*) death or

(*b*) tranportation for life, or imprisonment which may extend to ten years.

2318. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——the offence of——(*specify the offence*) was committed at——(*specify the place*) by *A B* and that you on or about the——day of ——at——harboured (*or* concealed) the said *A B*, knowing (*or* having reason to believe) at the time of the said harbouring (*or* concealing), that the said *A B* committed the said offence of——and that you thereby committed an offence punishable under s. 212 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2319. Principle.—Four things are essential for the commission of an offence under this section : (*i*) an offence, (*ii*) an offender, (*iii*) his concealment, and (*iv*) criminal intention. The last presupposes knowledge of the rest. The fact that a person is an offender fleeing from justice, does not make a man amenable to this section, for giving him succour and shelter. It is his evil intention to screen him from punishment, that converts his act into an offence. But law punishes none for his evil intention, and it punishes a harbourer of an offender not so much because he harbours him, as because it helps offenders to flee from justice. Consequently, it is no offence to harbour person who are not criminals, but who merely abscond to avoid or delay a judicial investigation.

2320. Meaning of Words.—"*Whenever an offence has been committed*" : The commission of the offence must be complete. It must not be merely *in fieri*. "*Whom he knows or has reason to believe to be the offender*," that is, there must be some facts brought to his knowledge, from which he may infer that the person sheltered is an offender.

2321. Harbouring Offenders.—The criminal responsibility of one for aiding another, rests upon the principle that it is the duty of every good citizen to assist and not to thwart public justice, or the vengeance of the law.[1] The offence of harbouring—whether a deserter,[2] an escaped prisoner of war[3] or an offender—rests upon the same footing. The Court does not prohibit the extension of hospitality to strangers, but it cannot tolerate when it is made a cloak for screening fugitive offenders. So, while every man has a right to receive his relations into the bosom of his family, he has no right to receive one who makes it his hiding place, after the perpetration of crime. In this respect the liability of a relation is the same as that of a stranger. For, they are both subject to the same public duty. So it has been held in England, that if a master receives his servant, or a servant his master, or a brother his brother, they are accesssories in the same manner as a stranger would be.[4] The only exception that the section makes is in favour of the husband or wife, and it is based upon the higher principle which sanctifies the relationship and its covenants and upon the observance of which rests the very foundation of society. In England where the system of joint family is unknown, there is no reason to except other relations, and the Code following as it does the English Law, makes no other exception, though the system of family life is different in this country, and the family ties stronger.

2322. In order to make a person liable under the section there must be, in the first place, the commission of an offence. In England it has been held that the felony must be complete at the time of the assistance given ; otherwise the assistant is not liable as an accessory. So Hawkins says : "A man shall never be construed an accessory to a felony, in respect of the receipt of an offender, who at the time

(1) Commission of an Offence.

(1) 4 Black. 38.
(2) S. 136.
(3) S. 130.
(4) 2 Hawk P. C., c. 29, s. 34.

of the receipt, was not a felon, but afterwards becomes such by matter subsequent; as where one receives another who has wounded a person dangerously that happens to die after such receipt; for, though the offender be for special reason adjudged to some purpose guilty of homicide *ab initio*, yet he shall not be so esteemed in respect of any others but himself, for fictions of law shall never be carried further than the reasons which introduce them necessarily require."[1] There is, of course, no distinction in this country between a felony and a misdemeanour. Both are alike offences, and a harbourer in the case supposed by Hawkins, would be guilty of harbouring an offender, causing grievous hurt, though not a murderer. As the word "offence" includes not only an offence punishable by the Code, but also an offence punishable under a special or local law with imprisonment for at least six months,[2] it follows that the harbouring of even such a person is deemed an offence under the Code. It is not necessary that the offence committed be cognizable or non-bailable, nor is it invariably necessary that it should be committed in British India. But in the latter case, only heinous offenders as described in the penultimate paragraph, are within the rule.

(2) Accused must Harbour.

2323. Secondly, there must be harbouring or concealing the offender. These words are intended to be more precise than the English terms "receives, relieves, comforts or assists the felon."[3] Now even these words have been held not to include a mere omission, as a person knows of a felony and does not discover it,[4] or suffer the principal to escape[5] or if he speak or write in order to obtain a felon's pardon or deliverance,[6] or advise his friends to write to the witnesses not to appear against him at the trial, and they write accordingly[7] or even if he himself agree for money not to give evidence against the felon.[8] The sort of assistance which constitutes accession must be such as helps him to escape from apprehension, as where a person assists him with a horse to ride away with,[9] or with money or victuals to support him in the escape, but not after he is awaiting his trial in confinement. So giving one the consolation of one's company after the deed, may amount to accession, as where the accused received a lad who had robbed a banking house where he was clerk, and where he stayed for twenty minutes, after which both proceeded by coach to Bristol and thence to Liverpool with the intention of embarking for America, where they were apprehended. It was held that this was evidence to go to the jury upon an indictment for harbouring, though the places in the coaches had been paid for by the boy.[10]

(3) Accused must have Knowledge of the Offender.

2324. Of course no harbouring or concealment is punishable unless there was an offence, and the accused knew that the person harboured is the offender. Without such knowledge, a person may be convicted for merely extending his hospitality to a person in distress. It is, therefore, absolutely essential that the prosecution must establish that the harbouring was done with the knowledge or belief that the person harboured had committed the offence. It is not enough that he suspects him to be an offender. It is necessary to shew that he had reason for believing him to be so. So in England, it has been held that in order to render a man guilty as an accessory, he must have notice, either express or implied, of the principal having committed a felony.[11]

2325. As to what facts or circumstances there were to put a man upon inquiry, must depend upon the circumstances of each case. A known offender seeking protection at an unusual hour, possessed of unusual impediments, may put

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(1) 2 Hawk P. C., c. 29, s. 35; 4 Black. 38.
(2) S. 40.
(3) 1 Hale P. C. 618.
(4) 1 Hale P. C. 371, 618.
(5) 1 Hale 619.
(6) 26 A. S. S. 47.
(7) 3 Inst. 139; 1 Hale, 620.
(8) Moo. 8.
(9) 2 Hawk P. C., c. 29, s. 26.
(10) *Lee*, 6 C. & P. 536.
(11) 2 Hawk P. C., c. 29, s. 32. The attainder of a felon was at one time regarded, as such, a notice, but the justice of such a rule has been denied, *ib.*, c. 29, s. 83 *per* Lord Hardwicke in *Chapple*, 9 C. & P. 355.

a man upon inquiry. But, where guests are received at all hours, this fact alone may create no presumption. Of course, the fact that a person is an old offender does not necessarily suggest the commission of any recent crime at the time he seeks assistance. But if having obtained food and shelter he evinces fear of his apprehension by his talk or demeanour, it will be a fact to put the accused upon inquiry Indeed, harbouring is a continuing offence, and it may be, that a person may receive another in ignorance, but afterwards he may be appraised of his offence. It is then for him to beware. For, the dawn of such knowledge is the beginning of his liability.

(4) Intention to Screen.

2326. Lastly, a person may know that he is harbouring an offender, but he may do so to prevent his escape. He is not then guilty for harbouring him. For the crime imputable to the harbourer is the hindrance of public justice, by assisting the offender to escape the vengeance of the law.[1] The intention to screen him must then be apparent or proved. It cannot be presumed, unless such presumption arises from the other proved facts of the case. The intention, again, must be to screen him from *legal punishment, and not merely a legal prosecution*. Of course, there can be no legal punishment, unless the offender was guilty. If, therefore, he was tried and acquitted, the harbourer cannot be convicted of this offence. A person who is guilty but afterwards escapes legal punishment by turning King's evidence, is within the rule, and though he may be pardoned, his accessory may yet be condemned for screening him.

2327. Husband or Wife Excepted.—The exception in favour of the husband or wife is not necessarily restricted only to a husband or wife lawfully married. So where a woman was charged with comforting, harbouring and assisting a man who had committed a murder, and it appeared that she considered herself as his wife, and lived with him as such for years, it was held that she was entitled to be acquitted, even though the marriage was in some respects irregular and probably invalid.[2] But this case would not save a person who was and lived as another man's mistress.

Taking gift etc., to screen an offender from punishment.

213. Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

[*Offence*—s. 40. *Gratification*—s. 161.]

2328. Analogous Law.—This section and the next deal with what is known in English Law as compounding a felony. There can be, of course, no offence where such composition is legal under some other provision of law, as for example, s. 345

(1) 4 Black, 38.

(2) *Mary Good*, 1 C. & R. 185.

of the Procedure Code, which permits the compounding of certain offences. Such cases are saved by the exception to the next section. The present section punishes a person for unlawfully (*i*) compounding or (*ii*) concealing the offence or the offender.

2329. English Law.—The provisions of this and the next section correspond with those of 18 Eliz., c. 5, s. 4, which enacts that if any person "by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward" without the order and consent of some Court, shall suffer the sentence of such fine or imprisonment or both as to the Court shall seem proper.[1] This section, however, only served as a general model to the Law Commissioners who have made a notable departure in enacting the Indian rule. Under the English Statute a person may be convicted for compounding "upon colour or pretence of any matter or offence"—words which are wide enough to include not only an actual offence committed, but also any matter suspected or understood to be an offence.[2] But the actual commission of an offence is the first requisite of criminal liability under this section. For, as was observed by the Madras High Court, "the intention was to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public, in regard to imaginary offences of offenders."[3]

2330. Procedure and Practice.—An offence under this section is non-cognizable, but warrant may ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable exclusively by the Court of Session if the offence be capital—by the Court of Session, Presidency Magistrate or a Magistrate of the first class if the offence be punishable with transportation for life or with imprisonment for ten years—by a Presidency Magistrate or a Magistrate of the first class, or the Court by which the offence is triable if the offence is punishable with imprisonment for less than ten years.

2331. Proof.—The points requiring proof are :—

(1) The commission of an offence.
(2) That the accused attempted to obtain, or agreed to accept or accepted any gratification or restitution of his property.
(3) That he did as in (2) in consideration of his concealing an offence or for screening the offender from legal punishment or for omitting to prosecute him.[4]

To these may be added the following aggravating circumstances :—

(4) That offence so compoundable is punishable with—
  (*a*) death, or
  (*b*) transportation for life, or with imprisonment which may extend to ten years.

2332. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——at——one *A B* committed the offence of—— punishable with——, and that you on or about the——day of——at——attempted to obtain (*or* agreed to accept, *or* accepted) for yourself (*or* another person, to wit——) a certain gratification, to wit——(*or* certain property to wit——) in consideration of your concealing the said offence of——(*or* screening the said——from legal punishment for the said offence, *or* not proceeding against the said *A B* for the purpose of bringing him to legal punishment); and that you thereby committed an offence punishable under s. 213 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2333. Principle.—The punishment of crime is as much necessary for the safety of individuals as it is necessary for the security of the State. No one can, therefore, compound an offence merely because he happens to be the person directly

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(1) The sentence originally prescribed was two hours in the pillory, but the sentence in the text was substituted by 56 Geo. III, c. 138. The 18 Eliz. was made perpetual by 27 Eliz., c. 10.

(2) *Best*, 2 Moo. C. C. 124; *Richard Gotby*, Russ. & R. 84.

(3) *Saminatha*, 14 M. 400, followed in *Girish Mythe*, 23 C. 420.

(4) *Sanalal*, 37 B, 658; *Hem Chandra*, 52 C. 151.

injured. His direct injury may be considerable, but he has also to take into account the indirect injury such offenders do to society. In cases involving only a trifling injury to society and those which do not bespeak a determined hostility to its laws, law allows the party aggrieved to compound with the offender.[1] But in more serious cases, it permits no such indulgence. It then regards the culprit as a menace to social well-being and as one who is a pest upon its happiness. In such cases it punishes those who make a profit out of a public wrong.

2334. Compounding an Offence.—This section punishes the unlawful compounding of a felony. It does not matter by whom the offence is compounded, whether by the person aggrieved, or by a material witness for the prosecution ;[2] if it is compounded for a consideration, it is an offence under this section. The consideration may be either restoration of the property lost, or delivery of other property, or payment of a hush-money for that purpose. That purpose must be the (*i*) concealing of an offence, (*ii*) or screening the offender, or (*iii*) omitting to prosecute him. In short this is a subsidiary offence, depending upon the existence of the principal offence. If there was no such offence, then a person cannot be punished under this section though he may have intended to screen one whom he suspected to be an offender.[3] So where a person complained against another, who was *panch*, that one Ali had stolen his fishing cage and concealed it in a tank near his house, whereupon the *panch* went to Ali's house with the complainant, and on inquiry found the cage in the tank. They then arrested him and threatened to send him up to the police, but let him go on payment of Rs. 5, on which they were both charged for an offence under this section. But the Court held that as there was no evidence of theft by Ali the conviction of the two accused was illegal.[4] Where the accused had previously prosecuted one Manilal of criminal breach of trust in respect of his jewellery, whereof Manilal had been tried and acquitted, the fact that Manilal had previously restored the jewels to the complainant did not expose him to the penalties of this section, because the acquittal of Manilal the only person accused of the offence, was a final adjudication that no such offence had been committed, and which fact could not be re-agitated in a subsequent trial under this section.[5] In other words, the words "concealing an offence" and "screening any person from legal punishment for any offence" in this and the next section presuppose the actual commission of an offence, or the guilt of the person screened from punishment ; if there was no such principal offence, a subsidiary offence under these sections cannot come into existence.

2335. Of course, the existence of consideration is the chief ingredient of the offence. If a person forgives another out of the generosity of his heart for a non-compoundable offence committed against him, he could not be punished under this section, though he may, in doing so, conceal the offence or screen the offender.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

Offering gift or restoration of property in consideration of screening offender,

shall if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

if a capital offence ;

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

if punishable with transportation for life, or with imprisonment.

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(1) S. 345, Cr. P. C.
(2) *Burgess*, 16 Q. B. D. 141.
(3) *Girish Mythe*, 23 C. 420 : *Sanalal*, 37 B. 658.
(4) *Girish Mythe*, 23, C. 420.
(5) *Sanalal*, 37 B. 658.

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description, provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—**The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.**

[***Offence***—s. 125. ***Gratification***—s. 145.]

2336. Analogous Law.—As originally enacted, this section contained the following exception, and illustrations :—

"*Exception.*—The provisions of sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring civil action.[1]

Illustrations.

"(*a*) *A* assaults *B* with intent to commit murder. Here, as the offence does not consist of the assault only irrespective of the intention to commit murder, it does not fall within the exception, and cannot therefore be compounded.

"(*b*) *A* assaults *B*. Here, as the offence consists simply of the act, irrespective of the intention of the offender, and as *B* may have a civil action for the assault, it is within the exception, and may be compounded.

"(*c*) *A* commits the offence of bigamy. Here, as the offence is not the subject of civil action, it cannot be compounded.

"(*d*) *B* commits the offence of adultery with a married woman. The offence may be compounded."

2337. Both the exception and explanations were repealed in 1882, the former by the Indian Penal Code Amendment Act, 1882,[2] which substituted the present exception, and the latter by the Code of Criminal Procedure, 1882.[3] Under the exception as originally framed, two conditions must have co-existed before it could operate, namely, (*a*) the immateriality of the offender's intention, accompanying the act constituting the offence, and (*b*) the maintainability of a civil action by the person injured.

2338. The first purposed the division of all offences into two classes of acts in which the presence of criminal intention was, or was not stated to be necessary to constitute an offence. Hence offences in the description of which the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or the like, expressly entered, were not compoundable. This eliminated a large class of offences, as, for instance, those contained in Chapters VIII and XIII, that is, offences against the public tranquillity and those relating to the weights and measures. The remaining offences must have answered the second test, the language of which was certainly not clear. For the words "may bring a civil action" could not have referred to all cases in which such action was possible, but only to those in which it was substituted as a mode of relief instead of a criminal prosecution. This was, again, an enunciation of a rule, the right interpretation of which depended upon the technical forms of English law, under which, it has been an established principle in cases of serious crimes by which personal injury is sustained, not to permit civil redress for the private wrong unless the criminal law is first set in motion. The exception was thus not one easy of interpretation, and the illustrations appended were misleading, and as remarked by West, J., "they so far from throwing light on its meaning, created the chief difficulties in its construction."[4] The combined effect of the two was to make grievous hurt[5] and defamation, non-compoundable.[6]

2339. The amendments of 1882 were made in deference to the views of West, J., in the case decided in 1876.[7] The deletion of the illustration has eliminated the

(1) This exception was probably suggested by the judgment of Lord Mansfield, C. J., in *Shiply*, 4 Doug. 165, in which the learned Lord explained the meaning of an offence irrespective of the intention of the offender.

(2) Act VIII of 1882, s. 6.

(3) Act X of 1882, Sch. I.

(4) *Rahimat*, (1876) 1 B. 147; To the same effect, *Mudan Mohan*, 6 N. W. P. H. C. R. 302 (305).

(5) *Rahimat*, 1 B. 147.

(6) *Nutty* cited in *Rahimat*, 1 B. 147.

(7) *Rahimat*, 1 B. 147.

conflicting element noticed in that case, and the substitution of the present exception has simplified the determination of cases in which law permits the compounding of offences for a valuable consideration. These offences are now those mentioned in s. 345 of the Procedure Code, which refers to offences made punishable by the following sections of the Code : ss. 298, 323, 334, 341, 342, 352, 355, 358, 374, 426, 427, 447, 448, 490, 491, 492, 497, 498, 500, 501, 502, 504 and 506. Besides these, there are five other offences punishable under sections 324, 325, 335, 337 and 338 of the Code, in which the offence may be compounded with the permission of the Court before which any prosecution of such offence is pending. And the last clause of s. 345 adds : " No offence shall be compounded except as provided by this section."

2340. Procedure and Practice.—An offence under this section is non-cognizable, but warrant may ordinarily issue in the first instance. It is bailable but not compoundable, and where the offence screened is capital, it is triable exclusively by the Court of Session, but if it is punishable with transportation for life or with imprisonment for ten years, then by either the Court of Session, Presidency Magistrate, or a Magistrate of the first class, and in any other case, by the Presidency Magistrate or Magistrate of the first class, or the Court by which the offence is triable.

2341. Proof.—The points requiring proof are :—

(1) The commission of an offence.
(2) That the accused offered or gave or caused or agreed to give any consideration or restitution of his property.
(3) That he did as in (2) in consideration of the others concealing an offence, or for screening the offender from legal punishment, or for omitting to prosecute the accused.

To which may be added the following fact in aggravation :—

(4) That the offence so compounded is punishable with—
(*a*) death, or
(*b*) transportation for life, or with imprisonment which may extend to 10 years.

2342. Charge.—The charge should run thus :—

" I (*name of office of Magistrate etc.*), hereby charge you (*name of accused*) as follows:—

" That on or about the——day of——at——, you offered (*or* caused, *or* gave, *or* agreed to give or cause) a gratification, to wit——, to *C D* in consideration of the said *C D's* concealing the offence of——under s.——of——and which offence is punishable with death [in the Court of——*C D's* or of his screening you (*or* any person)] from legal punishment for the said offence of——[*or* of his screening you (or any person) from legal punisnment for the said (*or* any) offence *or* of his not proceeding against you (*or* any person, to wit——) for the purpose of bringing you (or him) to legal punishment], and thereby committed an offence under s. 214 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session).

" And I hereby direct that you be tried (by the said Court) on the said charge."

2343. Principle.—It has been observed before, that for purposes of procedure, offences are variously sub-divided, as, for example, they have been divided into warrant or summons cases, cognizable or non-cognizable, bailable, or non-bailable, compoundable or non-compoundable. The last division affects not so much the procedure as the principle which regards crime as an offence against society, and therefore one the prevention, no less than the punishment of which, is a concern of the State. The views taken, however, at different times and under different influences, of the inequity of particular wrongs, vary widely ; and there are wrongs which, while they fall within the same general description, may, according to circumstances, be of an extremely pernicious, or of but a slightly pernicious tendency. They may endanger the welfare of society, or they may affect, except in some inappreciable degree only the interest of an individual.

2344. Hence there comes to be recognized a class of cases which may be the subject of private composition. If the person injured desires to obtain compensation, the law does not forbid him ; if he invokes the penal interposition of the

Magistrate, that interposition is not refused.[1] Full competence to accept satisfaction for wrongs done to oneself follows necessarily from the general rule of freedom of transactions. That rule however, and the deductions therefrom are subject to limitation in the interest of the community, in consequence of which some compromises of offences are made penal, and others are so disapproved that the Court will not give effect to them. The last section and this are intended to prevent the suppression of prosecutions in which the public is deemed to be deeply interested in the punishment of the offender. For this purpose, the Procedure Code enacts that no prosecution shall abate in spite of its compromise, if it was unauthorized by s. 345 of the Procedure Code, and these sections provide punishments of both parties to it.

2345. Meaning of Words.—"*In consideration of.....concealing an offence*": The concealment and suppression must be of an offence—that is to say, some offence must have been committed. Where a person has been tried and acquitted of an offence, of which there is no possibility for another to have committed (*e.g.*, criminal breach of trust) the foundation for this offence and that described in the last section fails, it being no longer open to the Court to retry that question, in a prosecution under this section.[2] "*Screening any person from legal punishment for any offence*": There can be no legal punishment for an offence, unless it was committed.

2346. Accused's Liability for Illegal Compromise.—This section is intended to punish the giver as the last is intended to punish the receiver of anything, in consideration of compromising a non-compoundable offence. The two sections are, thus, the counterparts of each other, and deal with all parties, who are likely to be concerned in the illegal composition of an offence. Thus, then in the first place there must be an offence committed, for the intention of the legislature was to suppress malpractices, when offences have really been committed or when persons really guilty are screened and not to ensure general veracity on the part of the public, in regard to imaginary offences or offenders.[3] So where one Saminatha agreed to give Rs. 10 to a witness, in consideration of his not giving evidence against one Kolundavelu who stood charged with the offence of house-breaking by night and theft in a building, but the witness refused the offer and gave evidence against Kolundavelu, but who was nevertheless acquitted, whereupon Saminatha was prosecuted under this section, the Court held that Kolundavelu's acquittal had left no offence, upon which Saminatha's conviction under this section could be supported.[4] If the accused had committed an offence, it would seem to be immaterial if he knew or believed it. Indeed, a person committing a serious offence, cannot be heard to say that he had acted in ignorance. The only excuses admissible in his case are those given in the general exceptions, and in which case he is as good as if he had committed no offence at all.

2347. Any Giver Liable.—It would have been sufficient if the "whoever" referred to as the tempter had been the actual offender. But the section is more general, and would apply equally to whoever gives or offers gratification for the compromise of a case. In such a case the question may arise. Suppose *A* commits a non-compoundable offence and *B* in ignorance of *A's* crime, but anxious to protect him against exposure, offers gratification for the compromise of his case, and which in consequence is compromised. Is *B* liable for compounding *A's* offence, though he was in fact ignorant of it? Clearly not, because *B* had not in his mind the hindering of justice which is the gist of the offence, and he could not be convicted, for what may have been no more than a friendly mediation. As the giver may be the accused or a stranger, so the receiver need not be necessarily the complainant of the party aggrieved. He may be, for instance, the Court trying him, in which case the offer of such gratification will be illegal, and the offence thereby committed will be the giving of a bribe which is punishable under section 261 of the Code. The case may

(1) *Per* West, J., in *Rahimat*, 1 B. 147, decided on the language of the unamended section.

(2) *Sanalal*, 37 B. 658.

(3) *Saminatha*, 14 M. 400; *contra* in *Ya Po*, (1894) 1 U. B. R. 196.

(4) *Saminath*, 14 M. 400; *Girish Mythe*, 23 C. 420.

then present a choice of sections, under which the accused may be punished. So where two of the accused had offered a gratification to a public servant, the consideration for his screening them by not proceeding against them and against the other accused, whose books and papers he had seized for the purpose of bringing them to legal punishment, it was held that the appropriate section applicable to the case was this and not 164/109 of the Code.[1]

2348. It is next necessary that the accused should have given, caused, or offered or agreed to give or cause any gratification to any person. The word "gratification" is here used in its generic sense as signifying anything that appeals to one's senses, whether it be a thing having monetary value or not (s. 161). The accused may give or offer such gratification or agree to give it to him. The word "agree" involves the idea of something of the nature of a demand,[2] but whether there has or has not been a demand is immaterial, for if the accused did not agree to give because there was no demand, he may have offered to give, and which may be unsolicited. In fact, the manner in which the gratification is arranged for is immaterial, because what the Court is concerned with is not how it was negotiated, but if it entered into the transaction, and if it did the result is the same whether it was volunteered or not.

2349. Motive Material.—Thirdly, it is necessary that the object of the gratification tendered or made should be to compromise some offence which is not legally compoundable. Such compromise may be given effect to by "concealing" it from public notice, or by "screening" the offender from legal punishment, or by omitting to prosecute him as required by law. The offence is complete as soon as the gratification is offered and it is then immaterial whether the consideration is executed or not. The fact that the accused is nevertheless prosecuted, does not minimize the offence, though it may be a fact established to disprove payment if it is denied. As to what constitutes concealment and screening, need not perhaps be set out in detail. Any act which is conducive to the prevention of the punishment of the accused, would be construed as a step in concealing the offence, or screening the offender. In this respect, concealment may as much consist of *suppressio veri* as of *suggestio falsi*. The subornation of witnesses and denial of facts by them, which are material to establish the case for the prosecution, the withdrawal of witnesses and keeping them out of the way, all fall within the mischief of the rule.

2350. Lastly, the complainant may take the Court into confidence and suggest the dismissal of the case which he is unable to compound. The Court has, of course, no power to sanction such withdrawal nor has the complainant or his pleader any power to withdraw from the prosecution, which is a power only conferred on a government servant appointed or permitted to prosecute a case.[3] A Court permitting an illegal withdrawal is, of course, not guilty of the abetment of this offence, but its procedure is nevertheless void, though it is sometimes condoned. But these are hard cases which proverbially make bad law.

2351. Offences Lawfully Compoundable.—Neither this section nor the last has any application to cases referred to in exception.

Exception.

In such cases the acceptance of consideration is both legal as it is a matter of course. Indeed, the very fact that law allows such offences to be compounded, suggests that the person against whom the offence has been committed, has received some gratification to act as an inducement for his desiring to abstain from a prosecution.[4] The composition of a compoundable offence has the effect of an acquittal of the accused.[5] The Court has then no jurisdiction to try it, and the accused may claim his acquittal as a matter of right. But, for that purpose, the party relying on a compromise must establish it if it is denied, and it

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(1) *Megraj*, (1881) P. R. No. 13.
(2) *Maka*, (1895) 1 U. B. R. 158.
(3) S. 495 (2), Cr. P. C. "Any such officer" of course only refers to "other officer generally or specially empowered by the Local Government" to prosecute in a case. Others are described as *persons* so permitted, and they have not the same power of withdrawal.
(4) *Murray*, 21 C. 103.
(5) S. 345 (6), Cr. P. C.

is then for the Court to decide, whether the arrangement or composition made amounts to a composition, and whether it was deliberately arrived at, free from the influence of every kind, and when the parties were fully aware of their respective rights. So where an ignorant coolie stranger to the land had been prevailed upon to sign a composition in favour of a European of some education, and it was written in Bengali language which he did not understand, and it had been, moreover, arrived at with the assistance of the police, itwas held that the composition was not binding on the complainant and that the Magistrate was consequently not ousted of his jurisdiction over the case.[1]

2352. In one case the accused, in breach of the Forest Rules, worked two saw-pits, instead of only one for which he had a license, and when detected by the Forester, he offered him Rs. 5 for not proceeding further with the case. He was convicted under this section, but on revision his conviction was quashed, on the ground that the amount must be taken to have been offered for compounding the offence, though to a person who had no authority to compound it.[2]

Taking gift to help to recover stolen property, etc.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[*Offence*—s. 40.]

2353. Analogous Law.—This section is drawn in accordance with English Law, which enacts as follows[3] :—

"S. 101. Whoever shall corruptly take any money or reward directly or indirectly, under pretence, or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanour have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of as in this Act, before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude not exceeding seven years, or to be imprisoned, and if a male under the age of 18 years, with or without whipping.

"S. 102. Any person advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost without seizing or making any inquiry after the person producing such property or promising to return to any pawnbroker or other person who may have brought or advanced money upon any property stolen or lost, the money so paid or advanced or any other sum of money or reward for the return of such property, or any person printing or publishing such advertisement shall forfeit pounds 50 to be recovered by action of debt."

2354. Under this Statute it has been held that it is not necessary to show that the accused had any connection with the commission of the offence. All that is necessary is that he had some corrupt and improper design when he received the money, and did not *bona fide* intend to use such means as he could for the detection and punishment of the offender.[4] So where *A* was charged with corruptly and feloniously receiving from *B* money, under pretence of helping him to recover his stolen property, and with not causing the thieves to be apprehended, three questions were left to the jury :—

(1) Did *A* mean to screen the guilty parties, or to share the money with them ?
(2) Did *A* know the thieves and intend to assist them in getting rid of the property by promising *B* to buy it ?
(3) Did *A* know the thieves, and assisted as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bringing the thieves to justice ?

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(1) *Murray*, 21 C. 103.
(2) *Kya Sone*, 6 L. B. R. 48, 15 I. C. 990 (*sed quere*, why not s. 1611 ?)
(3) 24 & 25 Vict., c. 96, s. 101.
(4) *King*, 1 Cox. 36.

2355. The jury answered the first two questions in the negative and the third in the affirmative. It was held that the receipt of the money under the above circumstances was a corrupt receiving of the money by *A* within the Statute.[1]

2356. It is needless to add that in closely following the wording of the English Statute, this section intends to extend its provisions to this country. It may be added that the Code contains no provision corresponding to section 102 of the English statute already reproduced, but persons offending against that section would be punishable for abetment of the offence punishable under this section.

2357. Procedure and Practice.—This offence is non-cognizable, but warrant must ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency or a First Class Magistrate. As this section applies to a person other than the principal offender (§ 2361), a conviction in the alternative of this offence and s. 379 or s. 411 is bad.[2]

2358. Proof.—The points requiring proof are :—

(1) That a person was deprived of some property by an offence committed under the Code,[3] which must be independently proved,[4] though the offender may not have been convicted.
(2) That the accused took, agreed or consented to take, some gratification.
(3) That he did so under pretence or on account of helping some person to recover such property.
(4) That he failed to use all means in his power to cause the offender to be apprehended and convicted of the offence.[5]

2359. Principle.—This section protects a *bona fide* detective, but it reprobates one who is in league with thieves and holds stolen property up to ransom. There is nothing dishonest or criminal in receiving gratifications as a recompense for honest work done to recover the property and to trace out the thief. But the offence begins the moment there is any attempt at screening the thief, though there may have been an honest attempt made in recovering the property. This follows the policy of law that it is from the public stand-point as important that the thief should be punished as that the property stolen should be found. And one who achieves one purpose without the other, is guilty of a public wrong, not only because he fails in his duty, but because in doing so he probably compromises with the thief.

2359-A. Meaning of Words.—"*Takes or agrees or consents to take*" : This does not apply to a mere demand of a gratification, but it applies to the acceptance of an offer. "*Under pretence or on account of helping any person*" : There is pretence when a person promises to help another without intending to help him. In any other case, there may be no pretence, but nevertheless no effort to secure the offender. "*He uses all means in his power,*" which must depend upon the circumstances of each case.

2360. Taking Money to Restore Stolen Property.—Though this section is generally worded and may even extend to the actual thief, still there are reasons why it extends only to one other than the actual offender,[6] for the offence requires that the receiver should endeavour to discover the thief, which, of course, would be an impossible ideal to place before the thief, for it would then compel a thief to betray himself, which is, of course, absurd. Consequently, if the thief himself makes terms with the owner for delivery of the property, he could not be convicted both of theft as well as under this section.[7] Again, in order to constitute this offence, it is obviously necessary that the person who is willing to take and the person who is willing to give the illegal gratification, must agree not only as to the object for which the gratification is given, but also as to the shape or form the gratification is to take.[8]

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(1) *Pascoe*. 18 L. J. (M. C.) 186.
(2) *Nalli Veera Thevan*, 26 M. L. J. 598, 24 I. C. 351 ; *A Lu*, 9 I. C. (Sindh) 421.
(3) *Sharpa*, (1915) P. R. Cr. 9 ; 29 I. C. 669; *Bageshwari*, 11 Pat. 392.
(4) *Godha*, 8 L. 263
(5) *Ram Naresh Rai*, 133 I. C. (A.) 800.
(6) *Kehr Singh*, 88 I. C. 353, (1925) L. 563; *contra* in *Mukhbara*, 46 A. 915, overruling contra *Muhammad Ali*, 23 A. 81.
(7) *Muhammad Ali*, 23 A. 81 ; *Kudumban*, (1895) 1 Weir 196 ; *Nalli Veera Thevan*, 26 M. L. J. 598 ; 24 I. C. 351 ; *Nga Nyan*, (1914) U. B. R. 4th Qr. 43; 28 I. C. 997.
(8) *Chittar*. 20 A. 389.

If, therefore, there was a demand of a larger sum for the return of stolen property, and the owner offered a smaller sum, which the former refused, it could not be said that there was any agreement or consent to take the gratification. But would this constitute an attempt within the meaning of section 511 of the Code? In the opinion of the Allahabad Court "an attempt to take a gratification..... necessarily includes the idea of a concurrence of wills between the giver and taker, with this much superadded thereto that some act was being done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking."[1]

2361. In this view a negotiation which falls through, as in the case last supposed, would not even amount to an attempt within the meaning of section 511. But this view has been controverted by the Chief Court of Lower Burmah in a case arising out of identical facts. There one *A* had lost his buffalo and it was found by *B* who had also lost his cattle. Four or five days after, *A* asked *B* to return it, but *B* demanded Rs. 40; *A* offered Rs. 20 which *B* declined to take. *B* knew that the buffalo was stolen and belonged to *A* and he was thereupon prosecuted under this section, and the question was whether he could be convicted for an attempt under section 215 read with s. 511 of the Code. The Chief Court held, dissenting from the Allahabad case,[2] that the facts were sufficient to constitute an attempt. Bigge, J., observed that the question may be considered in the following manner:—

2362. Section 2 of the Indian Contract Act[3] defines what is a proposal and how far it is distinguishable from a contract. "When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."[4] The assent of a proposal amounts to a promise.[5] In the words of Bigge, J., "proposals as above defined which are inseparable from the establishment of contractual arrangements, are attempts to complete an agreement, or in other words, to arrive at the mutually expressed view of two wills whereby the legal bond called a contract is constituted.....The learned judge who decided the Allahabad case has.....failed to appreciate the distinction as regards an agreement to take, and I am of opinion that when once a proposal has been made for the payment of an illegal gratification, whether it fructifies into an agreement or not, the offence of an attempt to commit an offence under section 215 is complete.[6]

2363. This case, however, took no note of another essential requirement of the offence, namely, that the accused is only punishable if he does not use all means in his power to cause the offender to be apprehended and convicted of the offence. In other words, the mere opening of the negotiations to sell the stolen property would only amount to an attempt, if it can be shown that the accused had no intention to detect the offender, and that it was the expressed or implied term of the proposal. But how is this to be proved? In ordinary cases where the accused is shown to be in league with the thief, this may be presumed, but where he disputes that the property offered is stolen, and offers it for sale as his own, he could not be convicted of this offence, merely because the property was shown to be stolen, and the accused had charged for it. Such a transaction could not amount to the taking of a gratification on account of helping any person to recover it. The accused must not then lay a claim to the property, but must only profess to charge a remuneration for discovering it, or as a price of its delivery.

2364. Legal Reward.—This section merely prohibits the acceptance of reward for restoration of goods of which the owner has been deprived "by any offence punishable under this Code." Consequently, when no such offence is proved,

(1) *Chittar*. 20 A. 389 (391).
(2) *Ib*.
(3) Act IX of 1872.
(4) *Ib*., s. 2 (*a*).
(5) *Ib*., s. 2 (*b*).
(6) *Per* Bigge, J. (White, C. J., concurring) in *Nga Nyo*, (1904) 2 L. B. R. 310, 1 Cr. L. J. 1116.

the acceptance of reward cannot be penalized under this section. Such was the case of the accused who was found in possession of the complainant's cow which he had lost from the grazing ground. Accused took Rs. 12 from the complainant for its return which he subsequently refused. He was convicted of this offence but his conviction was quashed on the ground that the complainant had failed to prove that in depriving the complainant of his cow the accused had committed any Code offence.[1] On the other hand, where the buffaloes of one *S* were stolen, which the accused agreed to find if he was paid money and promised to say nothing about the payment and took no steps to trace the thieves, he was rightly convicted of an attempt to commit this offence as he was attempting to hold the owner's lost cattle up to ransom.[2]

Harbouring offender who has escaped from custody or whose apprehension has been ordered.

216. Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

If a capital offence;

if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

If punishable with transportation for life or with imprisonment.

if the offence is punishable with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine, and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India, which, if he had been guilty of it in British India, would have been punishable as an offence and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881,[3] or otherwise, liable to be apprehended or detained in custody in British India; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—**This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.**

[***Public servant***—s. 21. ***Offence***—s. 40. ***Harbours***—ss. 212, 216-B.]

2365. Analogous Law.—The explanation of the term "offence" was inserted by the Indian Criminal Law Amendment Act, 1886.[4] This section extends the provision of section 212 which applies only to harbouring an offender, who after the commission of an offence, absconds before his conviction. This section extends the same provisions to an offender escaping from lawful custody.

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(1) *Sharpa*, (1915) P. R. (Cr.) 9, 29 I. C. 669; *Hemraj*, 6 I. C. (A.) 250; *Ram Naresh Rai*, 133 I. C. (A.) 800; *Haji Jan Mhd.*, (1935) S. 105.

(2) *Hargayan*, 45 A. 159 (160), dissenting from *Chittar*, 20 A. 389, on the meaning of "attempt" as implying an agreement or the concurrence of the giver and taker of such money.

(3) 44 & 45 Vict., c. 96.

(4) Act X of 1886, s. 23.

2366. Procedure and Practice.—The offence falling under this section is cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable as follows :—

If the offence be captial or is punishable with transportation for life, or with imprisonment for ten years.	By the Court of Session, Presidency Magistrate, or Magistrate, 1st class.
If it is punishable with imprisonment for one year, and not for ten years.	By the Presidency Magistrate, Magistrate, 1st class, or the Court by which the offence is triable.

2367. Proof.—The points requiring proof are :—

(1) That some person was charged with or convicted of an offence,
(2) That he was in custody for the same.
(3) That his custody was legal.[1]
(4) That he escaped from it.
(5) That the accused knew of such escape.[2]
(6) That with such knowledge he harboured or concealed such offender
(7) That he harboured or concealed him with the intention of preventing him from being apprehended.[3]

Or instead prove the following points:—

(1) That a person had been ordered to be apprehended.
(2) That such order was by a public servant.
(3) That it was in the exercise of the lawful power of such public servant.
(4) That the accused knew of such order for apprehension.[4]
(5) That with such knowledge he harboured or concealed such offender.
(6) That he did so with the intention to prevent him from being apprehended.[5]

In either case the following may be proved as aggravating circumstances :—

(*i*) That the offence for which the person was in custody, or was ordered to be apprehended, was punishable with death; or
(*ii*) That it was punishable with transportation for life, or imprisonment for ten years.

2367-A. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——, at——one *A B* was charged with or convicted of an offence under section——by the Court of——[and which offence is punishable with death, (*or* with transportation for life, *or* imprisonment for ten years)] [*or* one *A B* was ordered to be apprehended for an offence to wit——by——a public servant in the exercise of his lawful powers as such public servant) and that you knowing of the escape of the said *A B* from such custody (*or* knowing of the said order for apprehension)] on or about the——day of——at——harboured or concealed the said *A B* with the intention of preventing the said *A B* from being apprehended, and that you thereby committed an offence punishable under section 216 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2368. Principle.—This is but an aggravated form of the offence dealt with in section 212. There the offender escapes to avoid his possible arrest. Here he escapes from an arrest, or at any rate, after his arrest has been ordered. In the one case, he was hiding to avoid a contingency, here he hid himself to avoid a fact. As such, law deems it an aggravated offence, and for which this section provides a comparatively heavier sentence.

2369. Meaning of Words.—"*Harbours.....such person*" : "Harbours" means shelters, protects, or offers food[6] or asylum to the offender.[7] It is said that the term "harbour" in this section should be construed liberally, so that

(1) *Shripad Chandavarker*, 52 B. 151.
(2) *Ib.*
(3) *Harnam*, 84 I. C. (L.) 1055.
(4) *Shripad Chandavaikar*, 52 B. 151.
(5) *Ib.*
(6) *Hukum Singh*, 84 I. C. (L.) 1050.
(7) *Sarwan Singh*, 73 I. C. (L.) 691, (1923) L. 223; *Muchi Mian*, 21 C. W. N. 1062, 40 I. C. 731; *Balkaran*, 89 I. C. 152, (1925) O. 423; *contra* in *Husain Baksh*, 25 A. 261, in which offence was held limited to supply of food, etc.

even a friendly visitor might be so punished.[1] But there is no justification for this view (§ 2372). "*Is punishable with death*" : This is merely descriptive of the offence and has no reference to the offender who may or may not have been already punished,[2] or may have been acquitted.[3]

2370. Harbouring an Escaped Offender.—Whether an offender escapes to avoid his possible apprehension, or whether he escapes after his apprehension is ordered, the offence is in its nature the same,—though the fact that in the one case that law had made no movement against him, makes a difference as regards the degree of his crime. A person who absconds to avoid his certain arrest has certainly to be distinguished from one who absconds before his arrest is ordered. In the former case, he is really guilty of evasion of the process of law, and this section consequently visits him with its heavier penalties. Between him and one who breaks jail, law makes no distinction as regards his accessory, for, in either case the result is the same—hindrance of justice by his intervention. But merely harbouring such an offender is neither an offence under this section, or section 212, for the essence of criminality lies in the intention to prevent his apprehension. The existence of this intention must be affirmatively proved by the prosecution, and if it cannot be proved the accused cannot be convicted, though he may have harboured a dacoit, knowing him to be a dacoit.[4]

2371. It is said that the word "harbour" in this section must be liberally construed, so that even one who pays frequent friendly visits to an escaped convict might be convicted of this offence.[5] In this case one *A*, a convicted robber, had escaped from jail and hid himself in the house of *B*. His friend *C* used to pay him frequent visits, whereupon his conviction under this section was held to be justified. But it is submitted that there is no justification for construing a word describing an essential ingredient of a highly criminal offence liberally, and unless there is evidence of offering shelter, protection or asylum to the offender, a mere visitor cannot be held guilty of this offence. The essence of this offence lies in harbouring a man with the object of preventing his apprehension,[6] which must be strictly proved.

2372. This section contemplates the offender as escaping during three stages of his prosecution : (*i*) after his apprehension is ordered by a public servant in the exercise of his legal power ; (*ii*) after he has been charged ; and (*iii*) after he has been convicted. Like several other sections, this section does not state whether the offender would have been guilty of an offence, but inasmuch as it adopts the phraseology of section 212, it would probably be held that the harbourer cannot be punished, unless the person harboured is shown to have committed an offence (§ 2333).

2373. But, of course, this is only a legitimate inference, though it is by no means justified by the express provisions of the section. Assuming, however, this to be established, the section requires that a definite order must have been passed for his arrest by public servant in the exercise of his lawful powers, as such public servant. Such order may be passed by a police-officer or by a Magistrate, but in either case it must be in the exercise of his legal powers. There is some difference between the *legal exercise* of his powers, and the exercise of his *legal powers*. In the one case, not only must the order be within jurisdiction, but it must also be legal as an order. In the other case, the order itself may be illegal, though it must be within jurisdiction. The question has been considered elsewhere (s. 438), and it will probably suffice, to state here, that the phrase is here used in the former sense, as implying both jurisdiction as well as legality of the warrant. It is not necessary that there should have been made any attempt to serve the process, or that the accused should have been aware of it. If it is recorded, it is sufficient, though the accused may not have been apprehended and charged with the offence. The word "charge"

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(1) *Bhujabali*, 14 Bom. L. R. 583, 16 I. C. 509.
(2) *Satanji Koer*, 5 I. C. 311.
(3) *Rangaswami*, 52 M. 73.
(4) *Nga Myat Gyi*, (1883) S. J. L. B. 174.
(5) *Bhujabali*, 14 Bom. L. R. 583, 16 I. C. 509.
(6) *Balwant Singh*, 23 I. C. 701; *Sarwan Singh*, 73 I. C. 691, (1923) (L.) 223; *Akbar Ali*, 72 I. C. 949.

here must not be understood to mean the formulation of a charge after recording eivdence under Chapter XIX of the Code of Criminal Procedure. It rather means a formal accusation made in Court, that a certain person has, or is reasonably suspected to have committed an offence. This section could scarcely apply to an offence while it is under investigation.

2374. The case of an offender escaping from lawful custody presents no difficulty, for the question of custody is one of fact and the question of its legality must depend upon the authority for his arrest. If his arrest was illegal, his harbourer could no more be punished, than he could himself be punished for escaping from it. The word "legal" has, of course, been used in contradiction to "illegal" defined in s. **43** (§ 328). The rest of the section uses terms, for the meaning of which reference must be made to the commentary under s. 212.

216-A. Whoever, knowing or having reason to believe that any person are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Penalty for harbouring robbers or dacoits.

***Explanation.*—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.**

***Exception.*—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.**

[***Reason to believe***—s. 26. ***Harbours***—s. 216-B. ***Robbery***—s. 391. ***Dacoity***—s. 391.]

2375. Analogous Law.—This section is new, and was inserted by the Indian Criminal Law Amendment Act, 1894.[1] It is evidently intended to cut off robbers and dacoits from all assistance in their nefarious mission (§ 2381).

2376. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Court of Session, Presidency Magistrate, or a Magistrate of first class.

2377. Proof.—The points requiring proof are :—

(1) That certain persons had recently committed, or were about to commit robbery or dacoity.
(2) That the accused knew or had reason to believe it.
(3) That he harboured all or any of such persons.
(4) That he did so with the intention of—
  (*a*) facilitating the commission of such robbery or dacoity; or
  (*b*) screening them or any of them from punishment.

2378. Charge.—The charge should un thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you ——on or about the——day of——knew (or having reason to believe) that *A B* was about to commit robbery (or dacoity) [or that he had recently, that is to say, on or about the——day of——committed robbery (or dacoity) in——] harboured him with the intention of facilitating the commission of robbery (or dacoity) by the said *A B* [*or* (*in the case of robbery or dacoity already committed* add) of screening him from punishment]; and that you thereby committed an offence punishable under section 216-A of the Indian Penal Code, and within my cognizance (*or* the cognizance of Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2379. Principle.—This section deals with the special case of robbers and dacoits or would be robbers and dacoits. The harbouring of those who have already committed such offences would be as much punishable under this section as it is under the more general provisions of section 212. But this section is then, of course, the more appropriate, not only because it is special section applicable to

(1) Act III of 1894, s. 8.

the case, but also because it indicates the intention of the Legislature that such offenders should be awarded the enhanced punishment here provided.

2380. The explanation and exception here follow the analogy of the corresponding provisions of sections 212 and 216.

2381. Meaning of Words.—"*Facilitating the commission*" refers to persons about to commit robbery or dacoity. "*Screening them..... from punishment*" refers to those who have recently committed those offences.

2382. Harbouring Robbers.—This is a special section applicable to persons harbouring robbers and dacoits and thereby affording them facilities for the commission of those crimes, or screening them from punishment after their commission. In order to render a person liable to the penalties of this section, the mental attitude of the accused towards the principal offender must be (*i*) that he must know or have reason to believe, and (*ii*) his intention must be to facilitate or screen. There must not be merely knowledge or intention, for they must be both present.[1] That knowledge or intention must relate to the commission of robbery or dacoity; and those offences must be either (*iii*) *about* to be committed, or (*iv*) must have been *recently* committed. So far as regards a harbourer before the fact, he must know that the person whom he is harbouring is about to commit robbery, and his intention in harbouring him must be to afford him facility for the commission of robbery. Of course, if no robbery is committed, his harbouring would come to nothing, for the section does not punish two wicked men for their wicked intentions. If there was an attempt, the case is, of course, different. But in this connexion the distinction between a mere preparation and an attempt has to be kept in view (§ 970).

2383. Then again the facility offered may not have actually facilitated the commission of the crime owing to unforeseen circumstances, but it must be such as would under ordinary circumstances facilitate its commission. The facility here spoken of must be some direct aid in the direction of the crime. A person who feeds a hungry tramp, whom he believes to be a notorious footpad, may facilitate the commission of the crime which he afterwards commits, but, it is neither harbouring, nor is the harbouring with the intention of facilitating his crime, nor indeed, can it be said to facilitate it. But the providing of food and shelter to a person about to commit robbery, would be such an offence. So if he is provided with a horse to ride, or a weapon to rob with, or, indeed, any assistance which makes the commission of the offence easier for that help—it is sufficient. But the robber must be then *about* to commit the offence. This means that the robbery must have been already planned and be imminent. The fact that one provides a robber shelter to study the situation, which he avails himself of sometime afterwards, would not condemn the former to the penalties of this section. The time between the accused's act and the deed must be such as to lead the Court to a reasonable inference that the harbouring and the robbery were both a part of the same plan. For, the harbourer is, in such a case, fully an abettor though he is punishable under this section as an independent offender. The same remarks apply to the harbouring of persons who have recently committed robbery. This is the case of subsequent abetment, or to use the term of English Law, accession after the fact (§ 945). In either case the requirements of this section are *mutatis mutandis* the same. In the one case there is facility given to commit the offence. In the other case there is facility given to escape apprehension.

216-B. In sections 212, 216 and 216-A, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension.

Definition of "harbour" in sections 212, 216 and 216-A.

(1) *Sakharam*, (1895) B. U. C. 775 (no facts reported).

2384. Analogous Law.—This section is merely explanatory of ss. 212, 216 and 216-A which refer to the harbouring of offenders. It was added by the Criminal Law Amendment Act, 1894[1] to define the sense of "harbour" as used in those sections. The definition is in accordance with English Law under which an accessory after the fact is defined to be one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.[2] A person who assists another with food, drink, shelter, money, clothes, arms, ammunition or means of conveyance may harbour a person within the meaning of sections 212, 216 and 216-A, but such harbouring is not an offence, unless it is accompanied by criminal knowledge and intention. In such a case, even assisting a person would be harbouring him. For example, the harbouring spoken of in section 216-A, may be with the intention of facilitating the commission of an offence, in which case assisting one to evade apprehension is not necessary. Where, however, any assistance is rendered after the commission of an offence, it must have been to enable the offender to evade his apprehension. Such assistance may consist of any act done, or omitted to be done, which has for its object the protection of the offender from apprehension.

Meaning of "in any way."

2385. According to Blair, J., the words "or assisting a person in any way to evade apprehension" must be meant to point to some method *ejusdem generis* with those that have been specified in the section. So where the police, being informed that a dacoit by name Subba had visited the accused and others, and was at that moment in their company, proceeded to arrest him. At that time Subba, the accused and others were sitting near a well. They saw the police approach whereupon Subba withdrew and hid himself in an adjoining sugarcane field. The police inquired from the accused as to who the man was who had just left them, and he swore that it was not Subba, who was, however, afterwards arrested in the field. The accused was prosecuted for harbouring a dacoit under section 216 of the Code, and the question was whether the false statement made by the accused, constituted such assistance as is here defined. But Blair, J., having read the words *ejusdem generis* held that it did not.[3]

2386. It is submitted that this view is unsound and has been dissented from in Calcutta, where the words have been held to be words of general enlargement and should not be read *ejusdem generis* with supplies of food or of other necessary articles. In this case the offender lived with his undivided brother. The police ordered the accused to produce him for which he went inside, soon afterwards returning with the officer's son, whom he said he had mistaken for his brother. The Police searched the house and found the offender concealed therein. He was held rightly convicted of this offence.[4] The same view was taken in another case, where the accused had warned a proclaimed offender of the approach of the police and had done his best to assist him to make good his escape.[5]

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save any property from forfeiture or any charge to which it is liable by law, shall be punished with

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.

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(1) Act III of 1894, s. 8.
(2) 1 Hale P. C. 618; 4 Black., 37.
(3) *Husain Buksh*, 25 A. 264; *contra* in *Muahi Mian*, 21 C. W. N. 1062, 40 I. C. 731; *Balharan Singh*, 89 I. C. 152, (1925) O. 423; *contra* in *Tara Singh*, 7 L. 30.
(4) *Muchi Mian*, 21 C. W. N. 1062, 40 I. C. 731.
(5) *Akbar Ali*, 72 I. C. 949.

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Public servant***—s. 21.]

2387. Analogous Law.—This section belongs to the class of offences dealing with the duty of public servants towards the public. As such, this and the next three sections should have formed part of Chapter IX, for they relate to offences by public servants. All the four sections (ss. 217-220) refer to disobedience by public servants, its nature determining the applicability of the several sections. This section deals with official partiality, involving disobedience of any direction of law. The next section punishes the incorrect preparation of record, while sections 219 and 220 deal with judicial vagaries, resulting in the passing of illegal orders or making illegal commitments.

2388. Procedure and Practice.—In a case falling under section 197 of the Procedure Code, no prosecution can be instituted under this section without sanction, as thereby provided. An offence under this section is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by a Presidency Magistrate, or a Magistrate of the first or second class.

2389. Proof.—The points requiring proof are :—

(1) That the accused is a public servant.
(2) That there was a direction of law as to the way in which he was to conduct himself.
(3) That he disobeyed that direction of law.
(4) That he disobeyed it knowingly.
(5) That such disobedience was in the conduct of himself as such public servant.
(6) That he did so intending thereby to save or knowing to be likely that he would thereby (*a*) save any person from legal punishment, or (*b*) subject him to less punishment than what he is legally liable, or (*c*) save any property from forfeiture, or (*d*) any charge to which it is liable by law.

2390. Charge.—The accused has a right to know exactly the direction of law for the violation of which he is charg d. It should, therefore, be distinctly set out in the charge,[1] which should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——at——you were a public servant, and, as such, you then knowingly disobeyed the direction of the law as to the way in which you were to conduct yourself as such public servant, to wit——(*here specify the direction of law disobeyed*) intending thereby to save——(*or*, knowing it to be likely that you will thereby save) from legal punishment [(*or* subject him to a less punishment than that to which he was liable) *or* (*in the case of property*, add) with intent to save or knowing that you were likely thereby to save some property, to wit——from forfeiture (*or* any charge to which it is liable by law)], and that you thereby committed an offence punishable under section 217 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2391. Principle.—Public servants are, in the discharge of their official duties, entrusted with large powers which they are enjoined to exercise in a certain way and subject to certain rules. So long as the exercise of those powers are within those limits, the public servant is out of the reach of criminal law. But the moment he transgresses them, his action becomes illegal, and it may then be a question whether it is so on purpose or through ignorance. In the former case if it is due to a mere official perversity unconnected with favouritism or partiality, he may yet escape clutches of criminal law, however illegal his action might be. But if that perversity was on purpose, and the purpose was to save some one from legal punishment or any property from forfeiture or charge, then the public servant has subordinated his public office to a private end, and as such, he is liable under this section. Of course, his act may not be the outcome of corruption or malice, but may even be due to benevolence,

(1) *Baban Khan*, 2 B. 142.

but that makes no difference, for law expects every public servant to do his duty, and while it condones many irregularities and even some illegalities, it cannot uphold unrighteous act in defiance of the law.

2392. Meaning of Words.—"*Disobeys any direction of law.*" The direction of law here means express provision of law[1] or of rules or regulations having the force of law.[2] "*Intending thereby to save*": That intention need not be corrupt or malicious. It may arise from a mistaken belief as to that person's liability to "legal punishment." "*Save any person from legal punishment*": Legal punishment here means a judicial sentence, and not merely a departmental punishment.[3] "*Or any charge to which it is liable by law*": The charge includes a mortgage, as well as a charge properly so called.

2393. Intentional Disobedience by Public Servant.—This section punishes a wilful and intentional disobedience of a direction of law, when the disobedience was wilful and was intended to screen a person from legal punishment, or some property from forfeiture or a charge to which it was liable. In the first place, disobedience must be "knowingly" which excludes all cases of ignorance or mistake. Then there must have been disobedience of any direction of law, and it must prescribe the way in which the public servant was to conduct himself. The direction of law must, obviously, be an express direction, and not merely one which imposes the more general obligation on every subject, not to stifle a criminal charge. Such a direction is to be found in sections 44 and 45 of the Procedure Code.[4]

2394. By "law" is here meant positive or statute law or some rules or regulations which are declared by or under statute to have the force of law.[5] Where such law creates an obligation, it must be strictly construed. For instance, section 45 of the Procedure Code creates a legal obligation upon village accountants and those engaged in the collection of the public revenue, to supply to the police certain information relating to the commission of certain offences including theft. Therefore, the accused who was merely a village accountant and village munsiff's peon, could not be convicted under this section for hushing up a case of theft committed in their village.[6]

2395. The direction must then not only be express and positive, but it must also be one which applies to a person in connection with the act, the legality of which is questioned. His disobedience must then be directed to a certain purpose—that purpose being to save a person from legal punishment or a property from forfeiture or a charge. If that was his intention the offence is complete, and it is not then further necessary to show that in point of fact the person so intended to be saved had committed an offence, or was justly liable to legal punishment. It is immaterial for the purpose of this section, that the intention which he had for saving a person from legal punishment, was founded upon a mistaken belief as to that person's liability to punishment.[7]

2396. So where the accused, a police-officer in charge of a police-station, induced the complainant who had come to report against one Adhari of cutting off his ear, to compromise the case, and the complainant having died of the injuries so received, the police-officer was prosecuted both under this and the next section in that he had failed to take down the complaint and had compromised the case. Adhari was also committed for the murder of the complainant, but he was acquitted, and the accused thereupon contended that, after Adhari's acquittal, it was not possible to say that he had saved him from legal punishment, but it was held that that fact was immaterial so long as the intention was clear, and as there was

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(1) *Raminihi Nayar*, 1 M. 266 (267).
(2) *Ram Prasad*, (1902) A. W. N. 16.
(3) *Per* Pontifex, J., in *Jungle Lall*, 19 W. R. 40 (41); *Naranbai*, 15 Bom. L. R. 578.
(4) Cr. P. C., 1898; ss. 89 and 90 of Cr. P. C., 1882.
(5) *Ram Prasad*, (1902) A. W. N. 16.
(6) *Raminihi*, 1 M. 266. But a village accountant is now liable under s. 45 (1), Cr. P. C., 1898.
(7) *Per* Jackson, J., in *Amiruddeen*, 3 C. 412.

this evidence against him, his conviction was upheld.[1] The same view had been previously taken in another case of the same Court[2] in which it was laid down that in such case the real issue to be tried is not whether such alleged offenders were in fact guilty or not, but merely the belief and intention of the prisoner in respect of their guilt.[3]

Intention Material.

2397. The intention of the accused at the time of the disobedience is material. It must be to save a person from legal punishment, or a property from forfeiture or charge. Where the intention was neither, the accused could not be convicted under this section. The preparation of a false diary by a police-officer investigating into a case suppressing therefrom facts unfavourable to the accused, is an example of an intentional disobedience, intended to save a person from legal punishment.[4] But his tying up a number of persons apprehended at night time, on suspicion that they had committed culpable homicide, and keeping them in the village in which they had been arrested, instead of at once taking them to the nearest police-station, the object being to wait until it is more convenient to start, would be a disobedience shorn of the intention required to make it criminal under this section.[5] Such was held to be the case of an old and illiterate Police Patel who, on receiving a complaint of rape against two persons, made some investigation, arrested the accused and sent them off to the Police Station House, but on the way the relatives of the girl came to a settlement with the accused, and requested the Patel to drop the proceedings whereupon he tore up the *Panchnama*. It was held that the Patel had not torn up the *Panchnama* with any intention of saving any person from legal punishment.[6]

2398. The words "to save any property from forfeiture or any charge" are sufficiently wide to embrace the case of a police constable who retains for himself a piece of gold found in the course of a search, and fails to report it to his superior officers.[7]

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

2399. Analogous Law.—This section punishes the intentional preparation of a false record—the intention being to cause loss or injury to any person or the public.

2400. Procedure and Practice.—In cases falling under section 197 of the Procedure Code, no prosecution can be instituted under this section without sanction as therein provided. This offence is non-cognizable but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

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(1) *Amiruddeen*, 3 C. 412, distinguishing *Joynarain*, 20 W. R. 66.

(2) *Hurdut Surma*, 8 W. R. 68, the facts of which were the same as of *Amiruddeen*, 3 C. 412.

(3) *Per* Seton-Karr and Macpherson, JJ., in *Hurdut Surma*, 8 W. R. 68.

(4) *Hurdut Surma*, 8 W. R. 68.

(5) *Ootum Chand*, (1871) P. R. No. 18.

(6) *Naranbai*, 15 Bom. L. R. 578, 20 I. C. 601.

(7) *Dasappa*, 29 C. (M.) 85.

2401. Proof.—The points requiring proof are :—

(1) That the accused framed a record or writing.
(2) That he framed it incorrectly.
(3) That he was then a public servant.
(4) And as such he was charged with its preparation.
(5) That in framing an incorrect record, the accused intended—
(*a*) to cause loss or injury to any person or the public, or that he knew such loss or injury to be likely, or
(*b*) he intended to save or knew that it was likely to save some person from legal punishment, or
(*c*) any property from forfeiture or charge.

2402. Charge.—The word "charged" in this section is not restricted to the narrow meaning of "enjoined by a special provision of law."[1] It is not, therefore, necessary to particularize the law under which the public servant was enjoined the duty of preparing the record. The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——you——being then a public servant and being as such charged with the preparation of a record to wit——(*or* a writing to wit——) framed the said record (*or* writing) in a manner which you knew to be incorrect, in that it contained an incorrect statement, to wit——(*here specify the incorrect statement*) and which you made with intent to cause, (*or* knowing it to be likely that you will thereby cause) loss (*or* injury) to the public [(*or* to any person to wit——) *or* with intent thereby to save, or knowing it to be likely that you will thereby save any person from legal punishment, or with intent to save or knowing that you are thereby likely to save any property, to wit——from forfeiture to which it was liable by order of the Court in Case No.——of——(*or* other charge to which it was liable by law that is to say——(*mention why it was so liable*)], and that you thereby committed an offence punishable under section 218 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

2403. Principle.—The section deals with the intentional falsification of an official record by a public servant with the object of saving or injuring any person or property. The Court presumes that all judicial and official acts are regularly performed, and it is in the highest degree necessary that this presumption attaching to public records, should be in consonance with fact. Their correctness, is, therefore, insured in two ways, by legal sanction and departmental punishment. The intervention of the former becomes only necessary when the incorrectness is intended to cause loss or injury to some member of the public or the public generally. Without such intention criminal law is not concerned with the punishment of official misconduct.

2404. Meaning of Words.—"*Record or other writing*" : A paysheet drawn in the Railway office to show the sums due to coolies is such a record.[2]

2405. Falsification of Record.—Public servants amenable to this section, are only those who are "charged" with the preparation of any record or writing. Such persons need not necessarily be enjoined to prepare it by a special provision of law.[3] Nor should the duty be within the ordinary legitimate scope of their duty. But all the same, it must have been their duty to prepare it. Persons who are mere custodians of public records are not charged with their preparation, so that a falsification by them cannot be punished under this section. So where the record-keeper of a Municipality was called upon to produce a certain document placed in his custody, and finding it missing, he fabricated another, and produced it as the genuine document in Court, his offence was held not to fall under this section as he was only the custodian of the record which it was not his duty to prepare, and the fabrication was not intended to cause loss or injury, but only to screen himself from punishment. It was, however, held that such a case might be conceivably met by section 192.[4] The same view was taken in Madras in the case

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(1) *Deodhar Singh*, 27 C. 144.
(2) *Kesri Mal*, 1 O. L. J. 200, 24 I. C. 590.
(3) *Deodhar Singh*, 27 C. 144; *Nathu Mal* v. *Abdul Haq*, (1930) L. 159.
(4) *Mazhar Hussain*, 5 A. 372.

of a Village Munsiff who had submitted a false calendar in which he purported to have convicted certain persons of theft.[1]

2406. The fact that one public servant assists another in the preparation of a record, does not necessarily make him liable if he makes it falsely, though in such a case, he may be held liable for abetment of the other, if it was the latter's duty to prepare it. And in such a case the former may be held guilty of abetment, though the latter may be wholly innocent of the offence.[2] The mere preparation of a false record is not then an offence punishable under this section. To be punishable it must not only be false but so made with the intention of causing gain or loss to the public, or any person, or save any property from forfeiture or other charge. So where a Police Inspector was charged with having falsely entered in his diary that certain cartmen told him that "they were not beaten by dacoits," it was held that this was not of itself sufficient for a conviction under this section; but where, without endeavouring to inquire into the truth of the entry in his diary, he destroyed certain records which falsified it, and substituted fresh note books, his *bona fides* were open to question and he must be deemed to have framed an incorrect public record intentionally.[3]

2407. It is not necessary that the incorrect document should be submitted to another person, or be otherwise used by the writer. The requirements of the section are satisfied as soon as the document is shown to have been prepared by a public servant charged with its preparation, in a manner which he knows to be incorrect, and with the knowledge that he is thereby likely to cause loss to the public.[4] If after such preparation he uses that document, he may be guilty of another offence, but the fact that he used it for a certain purpose and failed, does not make his offence under this section any the less complete. If, for example, he first prepared a false statement and then used it to procure credit for payment of more than, to his own knowledge, is due to him, all the attempts to cheat in its simple[5] or aggravated form,[6] would be present; but it does not follow that, because there was not a complete attempt to cheat, there was no complete offence under this section.[7]

2408. Remote Injury.—The loss or injury intended must, however, be caused by the document itself or by some transaction with which it is essentially connected. The loss must so naturally flow from the record, that the Court may justifiably infer that it was the cause of its falsification. As was remarked by West and Nanabhai, JJ., the accused must not be convicted on a remote and speculative chain of possibilities, otherwise the most innocent acts might, by the exercise of a little ingenuity, be perverted into initial steps of great crimes.[8] So where the only evidence adduced against the accused was that he had prepared false work bills in which he had transposed some men's work from certain days to other days, it was held that though the record was incorrect, it was not by itself sufficient to convict him under this section for after the falsification, the question of criminal intention still remained, and it could not be presumed from the mere fact that in some conceivable contingencies, the error might be used along with other circumstances, to the detriment of the public.[9] So where a chowkidar was charged under this section, with having made a false entry in a chowkidary attendance book, with a view to support a charge which was made against a Sub-Inspector, of having made a false report regarding the length of absence from duty of another chowkidar, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within this section.[10]

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(1) *Chinnakannu*, (1899) 1 Weir 197.
(2) S. 110; *Brij Mohan Lal*, 7 N. W. P. H. C. R. 134.
(3) *Ramaswamy*, (1911) 2 M. W. N. 44, (202). 11 I. C. 799.
(4) *Megraj*, (1881) P. R. No. 13.
(5) S. 417.
(6) S. 418.
(7) *Megraj*, 1881 P. R. No. 13.
(8) *Ram Chandra*, (1884) B. U. C. 201
(9) *Ib.*, p. 202.
(10) *Jungle Lall*, 19 W. R. 40.

2409. But, so far as regards the injury to the public, there is scarcely any standard by which its remoteness can be judged. For example, take the case of the Police Officer in charge of a station-house, who falsifies a first information of a heinous crime, such as a dacoity, by recording it as a report of a common theft, his sole object being to keep the information of such a heinous crime from his superior officer, the Police Superintendent. That the falsification of such a record was injurious to the public cannot be denied; but, at the same time, it could not be predicated that the particular falsification had caused any such injury, or was proximately likely to cause it Still, the accused was convicted, because the concealment of such crimes was injurious to the public.[1] This case illustrates the difference between the intention and knowledge of likelihood as applied to such transactions. In the case last supposed, the intention of the accused was merely to present a clean record, but he knew that it was likely to cause injury to the public. But if suppose that in that case the accused had correctly taken down the facts as reported to him, but only registered it as a case of theft instead of one of dacoity, then, there would probably have been no case for a conviction, for, the recording of a false opinion may be an error of judgment, but it does not amount to the preparation of a false record, which is the gist of the crime.

2410. The distinction between a false statement of fact and an expression of incorrect opinion, is well marked and the section only deals with the former, and not with the latter. For, while people differ in their honest convictions, there can be no room for difference, when the record is of a statement made, and which the public servant concerned is to faithfully and fully record. Here again, if the obligation be merely to record a memorandum of the statement made by another, it might be difficult to prove that it was incorrect, unless the record made is materially different to the statement made. This may be illustrated by comparing the provisions of sections 154 and 155 of the Procedure Code. In the case of an information relating to a cognizable case, it is the duty of the police-officer to take it down, to read it over to the informant, who is then required to subscribe to it. In the case of a report of a non-cognizable offence, all that he is required to do is to enter the substance of such information. But in either case, if the police-officer frames the first information in such a way as to save a person from legal punishment, he is equally guilty under this section. For instance, if the report was that *A* assaulted the complainant and the police-officer records it as an assault by *B*, or takes down the statements of witnesses examined by him so as to exonerate *A*, his offence would fall within this section, though his diary may be privileged.[2] So, a Kulkarni in Bombay, whose duty it was to submit a report of offences committed in his village, was held to have brought himself within the terms of this section, by making first a report that one Barkia had committed an offence, and then submitting another report which was untrue and was calculated to make the charge appear untrue.[3]

2411. "Any Person."—The words "any person" referred to in the section need not necessarily be another person. For, it may well be the accused himself. So where a police-officer who had suppressed a document entrusted to him to forward to his superior officer, made a false entry in his official diary that the document had been so forwarded, intending that, if he were prosecuted under the Police Act for suppressing the document, he could use such entry as evidence on his behalf that he had so forwarded the document, it was erroneously held that the offence of the accused did not fall within this section, inasmuch as the false entry was made not to shield another but himself from punishment.[4] No reason was given for maintaining this view which is clearly untenable, and it was afterwards overruled by the Court which observed

(1) *Muhammad Shah Khan*, 20 A. 307.
(2) Cf. *Deodhar Singh*, 27 C. 144.
(3) *Semble* in *Malhar Ramchandra*, 7 B. H. C. R. 64. The case was remanded for a fresh decision, the Court only having held that the accused's prosecution had been sufficiently sanctioned.
(4) *Per* Straight, J., in *Gauri Sankar*, 6 A. 42, overruled in *Nand Kishore*, 19 A. 305.

that there was no justification for reading the word "other" between "any person" in the section.[1] The word "person" is used in its generic sense as meaning not only an individual, but also a juridical personage, such as a corporation, company or Government.[2] So the preparation of a false travelling allowance bill by a public servant, would thus amount to an offence, because, the loss thereby intended is to the Government.[3]

2412. Injury Immaterial.—It is not necessary that the falsification should in fact cause loss or injury. As remarked before, the offence is complete the moment the falsification is made. Other things may rest in intention, but so long as they are, there the offence is complete. So again, in the case of saving a person from legal punishment, it is not necessary that the person intended to be so saved should be in fact guilty, though it is necessarily material and essential that the accused must then believe or have reason to believe him, to be guilty.[4] It is only then that he can be said to save any person from legal punishment. If, therefore, his intention was not save but to incriminate him, he could not be convicted under this section whatever other offence he may then be guilty of. Such was the case of a cattlepound moharrir who having sold a mare to the complainant, made a false entry to extort from him a bribe.[5]

2413. Intention to Save from Legal Punishment.—The intention, again, must be to save a person from legal punishment, which again postulates a belief on the part of the accused, that the person saved was so liable, and that his record will have the effect of saving him therefrom. As observed under the last section, the term "legal punishment" means only a judicial sentence, as distinguished from a mere departmental punishment.[6] If that was the only risk a person was likely to run, it could not be said that in framing a false record the intention of the accused was to save him from legal punishment. Of course in such a case other considerations may arise, for, the section is not confined only to the saving of persons from legal punishment and the misconduct of the accused may be injurious to the public, or again, it may save any property from forfeiture, or a legal charge. If, for instance, a person described a certain property liable to forfeiture as "ancestral" of the condemned convict, whereas it was self-acquired, it might be inferred that the object was to save it from seizure in execution of the sentence. So where it is liable to any other charge, the offence may be complete if the falsification is known to be likely to exonerate it. An attachment of property by an execution-creditor may be said to create a "charge" within the meaning of this section, though, of course, it does not create any charge within the sense now assigned to that term.[7] If therefore a bailiff falsely reports that the property so attached was non-existent, he would be guilty of an offence under this section.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Public servant in judicial proceeding corruptly making report, etc., contrary to law.

[***Public servant***—s. 21. ***Judicial proceedings***—s. 193.]

2414. Analogous Law.—This and the next section deal with two aspects of the same crime, they both relate to corrupt or malicious exercise of the power in

(1) S. 11.
(2) *Per* Edge, C.J. & Blair, J., in *Nand Kishore*, 19 A. 305; *Giridhari Lal*, 8 A. 653; *Muhammad Shah Khan*, 20 A. 307.
(3) Cf. *Ramchandra*, (1884) B. U. C. 201.
(4) *Hurbut Surma*, 8 W. R. 68; *Amiruddin*, 3 C. 412; followed in *Krishnaji*, (1888) B. U. C. 405; *Moti Ram*, 86 I. C. 661, (1925) L. 461.
(5) *Krishnaji*, (1888) B. U. C. 405.
(6) *Jungle Lall*, 19 W. R. 40.
(7) *See* the subjects discussed in Gour's Law of Transfer (5th Ed.), pp. 593-595 §§ 933-935.

the one case ending in any report, order, verdict or decision, the other, in an order for commitment or confinement. Indeed, as such, this section really embraces all the cases that could arise under the next section, for the word "order" is comprehensive enough to include such cases as have been expressly provided for under the next section. But, there is this difference between them, that while this section relate only to a judicial proceeding, the next section is more general as regards the persons subject to it, though it is more limited as regards the iniquities thereby made punishable.

2415. Procedure and Practice.—A case falling under section 197 of the Code of Criminal Procedure would require sanction, otherwise no sanction is necessary. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable and is exclusively triable by the Court of Session.

2416. Proof.—The points requiring proof are :—

(1) That the accused was a public servant.
(2) That he was in any stage of a judicial proceeding.
(3) That, as such, he made any report, order, verdict or decision.
(4) That he did so corruptly or maliciously.
(5) That the report, order, verdict or decision was contrary to law.
(6) That the accused was then aware of it.

2417. Principle.—This and the next section deal with judicial and executive vagaries in which the public servant prostitutes his office to private spite or gain. The essence of the crime is not that the order is illegal, but that it was made "corruptly or maliciously." But the fact that it was so made is not alone sufficient, for in the one case, the accused may be guilty of receiving a bribe and in the other case malice is immaterial if his order is right. His order must then have been made not only corruptly or maliciously, but it must be also illegal—and he must be aware of it.

2418. Meaning of "Corruptly" and "Maliciously".—The word "corruptly" is easily understood. It means an order induced by illegal gratification. But the word "maliciously" has to be defined, for it has nowhere been explained in the Code. The term, however, is of common application in Criminal Law and means a wrongful act done intentionally without just cause or excuse.[1] So the term is used in the case of "malicious prosecution." It does not mean in law, as does in common parlance, any spite or ill-will against a person. All it means here is an illegal act done perversely, and to the knowledge of the accused. So Littledale, J., said : "Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse."[2] "The legal import of this term," said Best, J., "differs from its acceptation in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary in support of such indictment to show that the prisoner had any enmity to the deceased ; nor would proof of absence of ill-will furnish the accused with any defence when it is proved that the act of killing was intentional and done without any justifiable cause."[3] "He that doth a cruel act voluntarily, doth it malice prepense."[4] "I have always thought," said Blackburn, J., "a man acts maliciously when he wilfully does that which he knows will injure another in person or property."[5]

2419. In a case, the prisoner with the intention of causing terror to person having a theatre, put out the gas on a staircase and placed an iron bar across a doorway, in consequence of which several persons were injured. It was held that he was rightly convicted of unlawfully and maliciously inflicting grievous hurt

(1) *Bromage* v. *Prosser*, 4 B. & C. 247 (255).
(2) *Macpherson* v. *Daniells*, 10 B. & C. 272; *Piare Lal*, 15 A. L. J. 106, 39 I. C. 495.
(3) *Harvey*, 2 B. & C. 268.
(4) *Per* Holt, C. J., in *Mowbridge*, Kelyn. 174.
(5) *Ward*, 41 L. J. M. C. 69.

upon two of the crowd who had been so injured. "He acted," said Lord Coleridge, C.J., "unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injury, and by which others were in fact injured."[1] To which Stephen, J., added: "If the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it 'wilfully,' that is 'maliciously' within the meaning of the Statute."[2] Accordingly, the word "maliciously" when applied to the doing of an illegal act means nothing more than that it was done wilfully or intentionally.

2420. This is the sense in which the term has been understood by the Bombay High Court[3] who said: "Given the unlawful character of the confinement, it would be for the defendant to prove the justification or excuse; and failing that, the law would imply that he had acted maliciously or with criminal intent, so that whether his purse or his liberty were in peril, unless the defendant could establish, as a matter of fact, reasonable and probable cause, he would stand condemned as a matter of law of an illegal confinement. Mr. Murphy has ruled that the penal enactment under consideration[4] contemplates some wilful excess of authority; in other words, a guilty knowledge superadded to an illegal act; and in coming to this conclusion we think that he has rightly interpreted the intention of the Legislature;[5] whether or no that knowledge exists, must be inferred from the circumstances of each case. It is a question of fact, and not of law.[6] Malice must then be proved—it cannot be presumed.[7]

220. Whoever being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.

2421. Analogous Law.—This section is really a continuation of the last and refers to the same wilful excess of authority, though it is more general in its applicability to any person in lawful authority, whether he is or is not a judicial officer. His liability is, however, more limited, for it does not extend to any "report, order, verdict or decision" but is confined only to an illegal commitment and confinement. It would have unduly strained the legitimate exercise of discretionary powers, necessarily vested in executive officers, if they were exposed to the same risk of a criminal prosecution as judicial officers whose duties and responsibilities are different.

2422. Procedure and Practice.—In cases to which section 197 of the Procedure Code applies, no prosecution can be instituted under this section, without the previous sanction of Government as therein required. The offence is, therefore, non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is exclusively triable by the Court of Session.

2423. Proof.—The points requiring proof are:—

(1) That the accused held some office.

(2) That as such, he had legal authority to (*a*) keep persons in confinement, (*b*) to commit persons to confinement, or (*c*) to commit persons for trial.

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(1) *Martin*, 8 Q. B. D. 54. To the same effect, *per* Brown, L. J., in *Mogul Co.* v. *Mcgregor*, 58 L. J. Q. B. 477; *per* Lord Blackburn in *R.* v. *Pembleton*, 43 L. J. M. C. 91; *Piare Lal*, 15 A. L. J. 106.

(2) 24 & 25 Vict., c. 97, s. 51.

(3) *Narayan Babaji*, 9 B. H. C. R. 346; followed in *Amarsang Jetha*, 10 B. 506.

(4) S. 220.

(5) *Per* Lloyd & Kemball, JJ., in *Narayan Babaji*, 9 B. H. C. R. 346.

(6) *Narayan Babaji*, 9 B. H. C. R. 346.

(7) *Ib.* This is the difference between express and implied malice. The one must be proved as a matter of fact, the other may be presumed and is a matter of legal inference.

(3) That he confined or committed a person as in (2) in exercise of such authority.
(4) That he did so corruptly or maliciously.
(5) That his act was contrary to law.
(6) That he was then aware of it.

2424. Principle.—This section is primarily intended to check executive abuses in illegally confining and committing innocent persons, who may have resisted their being made victims to their cupidity or oppression. It will be noticed that the language of this section, though in some respects similar to that of the last section, differs from it as regards the acts in respect of which a person in legal authority is liable to a criminal prosecution under this section. This is intentional and well justified (§ 2421). For the rest, the two sections have the same object in view, namely, suppression by punishment of abuse of authority.

2425. Criminal Confinement.—The essential element of an offence under this section, consists in the malicious or corrupt intention of the official. There must be either corruption or malice, superadded to which there must be knowledge of the illegality of the confinement or commitment. Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice.[1] For, as has been before observed (§§ 2418-2420), malice in law implies knowledge of illegality, and there must be evidence not only that the act was illegal but that at that time known to be illegal to the accused, or as it is put in the section, "knowing that in so doing he was acting contrary to law." If, therefore, the act itself was legal, there can then be no question of malice, for, whatever may have been the accused's intention he could not then be punished for what was legal.

2426. This section only applies to persons "in office" and not to those who may otherwise possess legal authority to confine or commit for confinement. For instance, the Procedure Code has in certain cases conferred such power on private persons.[2] They do not thereby become amenable to the penalties of this section if they abuse their power.

2427. The word "commit" here means making over to a Court for trial. The Police possess such power, as also the power to keep in or commit persons to confinement.

Intentional omission to apprehend on the part of public servant bound to apprehend.

221. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say—

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death, or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be

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(1) *Amarsang Jetha*, 10 B. 506; *Narayan Babaji*, 9 B. H. C. R. 346; *Behary Singh*, 7 W. R. 3.
(2) Ss. 59, 60, Cr. P. C.

apprehended for, an offence punishable with imprisonment for a term less than ten years.

[***Public servant***—s. 21. ***Offence***—s. 40. ***Legally bound***—s. 43.]

2428. Analogous Law.—This and the next two sections deal with the omission to apprehend, and negligent escape of offenders. This section refers to criminal omission to apprehend one so liable, the next section refers to the same omission in relation to a convicted person, while section 223 refers not to an omission in apprehension, but to a negligent escape, while section 224 punishes the prisoner himself for escaping from custody. All these offences have the same object in view, namely, the prevention of escape of an offender from justice.

2429. Procedure and Practice.—Previous sanction for a prosecution under this section is necessary in a case falling under section 197 of the Procedure Code. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and if the offence charged with is a capital offence, the accused is exclusively triable by the Court of Session; if it is punishable with transportation for life or imprisonment for ten years—then it is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class—in any other case, the accused may be tried by a Presidency Magistrate or a Magistrate of the first or second class.

2430. Proof.—The points requiring proof are :—

(1) That a person was charged with, or liable to be apprehended for an offence.
(2) That the accused was a public servant.
(3) That as such he was legally bound to apprehend, or confine the persons as in (1).
(4) That accused (*a*) omitted to apprehend, or (*b*) suffered him to escape, or (*c*) aided him in escaping or attempting to escape.
(5) That he did so intentionally.

To which may be proved the following aggravating facts :—

(6) That the person confined or to be apprehended was charged with or liable to be apprehended was an offence punishable—
  (*a*) with death ; or
  (*b*) with transportation for life or imprisonment for a term which may extend to ten years.

2431. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—
"That you——on or about the——day of——at——, being——(*state the office held*) and as such a public servant legally bound to apprehend (*or* keep in confinement) one—— who was charged with an offence to wit——(*or* liable to be apprehended for an offence to wit——) intentionally omitted to apprehend him (*or* intentionally suffered him to escape, *or* intentionally aided such person in escaping, *or* attempting to escape from such confinement); and that you thereby committed an offence punishable under section 221 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2432. Principle.—Three degrees of criminal liability are contemplated by this section, depending on the nature of the offence of the principal offender, as well as on the degree of the accused's participation in the crime. The former alone are recognized as affecting the *quantum* of punishment, but it is evident that the latter are no less important in determining it. For, there is undoubtedly a marked difference between a mere omission and an intentional aid, while the intermediate stage by sufferance is no less distinguishable from the other two. In any case, however, there must be intention, otherwise there is no offence, whether the escape be due to aid, sufferance or omission.

2433. Intentionally Aiding, Suffering or Omitting to Apprehend or Escape.—This section applies to two classes of persons : (*a*) those who have yet to be arrested, and (*b*) those who have already been arrested. In the former case the section punishes for intentional omission to apprehend, in the latter case, the section applies when the accused intentionally suffers or aids him to escape. There can, of course, be no omission in the latter case, such omission as there may be being spoken of as "suffering" and which implies the idea of not opposing the

escape and which may be due to carelessness or negligence, but not to consent. Where escape is by consent there is then aiding his escape.

2434. In order to render the accused criminally liable whether for intentional omission, aid or sufferance, there must be in the first place the legal obligation to apprehend or confine another. When there is no legal obligation, no omission can be criminal. The question whether a person was or was not under a legal obligation, depends upon the consideration of other laws which create and define such obligations. For instance, certain persons, including a village watchman, are required by the Procedure Code to report to the police the commission of certain cognizable offences including murder.[1] Such persons are not then bound to apprehend such persons and their omission to apprehend them is not therefore punishable under this section.[2] So while a private person may arrest any person who, in his view, commits a non-bailable and cognizable offence or who has been proclaimed as an offender,[3] it is a power which does not create any legal obligation, so that the omission to exercise it cannot be punished under this section.

2435. As to what amounts to intentional omission, the question is one of fact, and depends upon the circumstances of each case. It has been held in the Punjab that, on a proper case being made out under this section, the accused should be punished under this section, though his offence may also fall under section 29 of the Police Act,[4] the provisions of which are more general, extending as they do to "any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority." Of course, if an act does not fall within the terms of this section then it will have to be dealt with under the Police Act.

222. Whoever, being a public servant, legally bound as such public servant to aprehend or to keep in confinement any person under sentence of a Court of Justice for any offence, or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

Intentional omission to apprehend on the part of public servant bound to apprehend persons under sentence or lawfully committed.

with transportation for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of justice, to imprisonment for a term not extending to ten years, or if the person was lawfully committed to custody.

[*Court of Justice*—s. 20. *Public servant*—s. 21. *Offence*—s. 40. *Legally bound*—s. 43.]

2436. Analogous Law.—This section was amended by the Indian Penal Code Amendments Act, 1870,[5] by the addition of the words " or lawfully committed

(1) S. 45, Cr. P. C.
(2) *Kallu*, 3 A. 60 ; *Bhagwan Din*, (1929) A. 935.
(3) S. 59, Cr. P. C.
(4) *Dooloo Mul* v. *Dewa Singh*, (1868) P.R. No. 2.
(5) Act XXVII of 1870. s. 8.

to custody" in the first paragraph, and "or if the person was lawfully committed to custody" at the end of the section. As originally worded, this section applied only to a person lawfully convicted of an offence;—or a person lawfully committed to custody[1] being then punishable under the last section. The latter is, however, now in consequence of the amendment liable to the enhanced punishment here provided (§ 2436).

2437. Procedure and Practice.—In a case falling under section 197 of the Procedure Code, sanction is necessary for a prosecution under this section. The offence is non-cognizable, but warrant should ordinarily issue in the first instance. If the omission was to apprehend an offender under the sentence of death or transportation for life or for imprisonment for ten years or upwards, the offence is non-bailable, otherwise it is bailable. In either case it is, however, non-compoundable, and as regards trial, where the offence is non-bailable it is exclusively triable by the Court of Session, otherwise, it is also triable by a Presidency Magistrate or a Magistrate of the first class.

2438. Proof.—The points requiring proof are :—

(1) That the accused was a public servant,
(2) That, as such, he was legally bound,
(3) To apprehend or keep in confinement,
(4) Some other person who was under sentence of a Court of Justice, or had been lawfully committed to custody.
(5) That that sentence was for some offence.
(6) That the accused omitted to apprehend him, or intentionally suffered him to escape, or intentionally aided him in escaping, or attempting to escape.[2]

To which may be added the following aggravating facts :—

(7) That the person who ought to have been apprehended was—
  (*a*) under sentence of death, or
  (*b*) under sentence of transportation for life or imprisonment for ten years.

2439. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows: —

"That you——on or about the——day of——were——(*state the office*) and as such a public servant legally bound to apprehend (*or* keep in confinement) one *A B*, a person under the sentence of——of the Court of——for the offence of——under section——of the Indian Penal Code (*or* who had been lawfully committed to custody by——) intentionally omitted to apprehend the same *A B* (*or* intentionally suffered the said *A B* to escape, or intentionally aided the said *A B* in escaping or attempting to escape from such confinement), and that you thereby committed an offence punishable under section 222 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2440. Principle.—This is only an aggravated form of the offence made punishable under the last section, the aggravation consisting in the fact that the person to be apprehended, had already been convicted or committed for an offence: otherwise the two sections are exactly identical.

2441. Leaving out of consideration the common elements which this section presents with the last, the only points that call for notice here are (*i*) was the principal offender under the sentence of Court ? or (*ii*) was he lawfully committed to custody ? If this is proved, the criminality of the accused then depends upon his intentional omission, sufferance or aid in the other's escape. It will be noted that the section enjoins on a public servant the duty to confine any person under the sentence of a Court. Such sentence may or may not be legal, but his liability to confine him remains the same. Of course, his obligation rests on the sentence remaining unreversed. As soon as it is reversed or modified, he is then bound to shape his course accordingly. A jailor no less than a policeman would be guilty of wrongful confinement, if he detains a prisoner one moment after his sentence is reversed or has expired. He is then no longer *under* sentence of a Court. In the case of unconvicted offenders, law takes a still more lenient view of the keeper's responsibilities. For, they are only liable for suffering, or permitting the escape of a person who was lawfully committed to custody. This does not mean that he

(1) For the meaning of this phrase, *see* s. 223. (2) *Maula Baksh*, 119 I. C. (L.) 762

incurs no liability whatever, for suffering a person not committed to custody to escape, for his liability under the last section still remains. In such cases, the questions that arise are—(*a*) was the person escaping liable to be apprehended for an offence? (*b*) was he charged with an offence? and (*c*) had he been lawfully committed into custody? The first two cases are punishable under the last section, while the last case is punishable under this section.

Escape from confinement or custody negligently suffered by public servant.

223. Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

[***Public servant***—s. 21. ***Offence***—s. 40. ***Legally bound***—s. 43.]

2442. Analogous Law.—This section like the last has been amended, and by the same Act,[1] the words added being the same.

2443. Procedure and Practice.—In cases falling under section 197 of the Procedure Code, sanction is necessary for a prosecution under this section. The offence is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

2444. Proof.—The points requiring proof are:—

(1) That the accused was a public servant.
(2) That as such he was legally bound to keep in confinement any person who was—
  (*a*) charged with, or
  (*b*) convicted of any offence, or
  (*c*) who was lawfully committed to custody.
(3) That he suffered such person to escape.
(4) That the escape was due to his negligence.

2445. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That you——on or about the——day of——were——(*state the office*) and as such a public servant legally bound to keep in confinement one *A B* who was charged with the offence of——under section——of the Indian Penal Code (*or* convicted of, or lawfully committed to custody) negligently suffered the said *A B* to escape from confinement, and that you thereby committed an offence punishable under section 223 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2446. Principle.—This section is supplementary to the last two sections, which deal with intentional omission, whereas this section deals only with negligence. Such a case may arise where a sentry kept to guard a prisoner, falls asleep and the prisoner escapes from his custody. This section only applies to persons arrested under a criminal process, those arrested under the civil process being punishable under s. 225-A.[2]

2447. Negligent Escape from Custody.—This section deals with negligently suffering the escape of a person: (*a*) lawfully *committed* to custody; (*b*) confined as *charged* with an offence; (*c*) confined as *convicted* of any offence; and the question may arise what did the Legislature imply by this verbal variation especially in the first two cases. The case of a person convicted of an offence is, of course, simple and presents no difficulty. But what did the Legislature mean by "lawfully committed to custody?" It would seem that in these sections the terms "confinement" and "custody" have been used in the same sense, though

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(1) Indian Criminal Law Amendment Act (XXVII of 1870) s. 8, by which the words "or committed into custody" were added.
(2) *Tafaullah*, 12 C. 190.

probably regarded from different points of view.[1] But a person charged with an offence is necessarily different from one lawfully committed to custody. The latter may be confined, and yet not charged with any offence, as, for instance, if he is committed under section 109 or 110 of the Procedure Code.[2]

2448. Again, the section is only confined to persons actually confined, and not to those who are still at large. And the liability attaches for negligently suffering escape from confinement. Now a prisoner cannot be said to have escaped from confinement until he has regained his liberty. The fact that the prisoner had escaped from one enclosure into another preliminary to escape, does not expose the jailor to the penalties of this section. So where the accused were keeping guard on certain cells in a jail where certain condemned prisoners were confined, and when they were relieved it transpired that the prisoners in their charge had escaped from their cells and were found crouching on their roofs where they were recaptured. It was held that, as the prisoners had not "escaped" within the meaning of this section, the guard could not be convicted.[3]

2449. The word "confinement" does not, however, mean merely incarceration, or imprisonment within circumscribed limits. A prisoner on the march is as confined as one secured within the four walls of the prison-house. As much as has been before observed in sections 220-225, the Legislature appears to have used the words "confinement" and "custody" as co-extensive.[4] But, whether there is confinement or custody, the accused cannot be convicted under this section, unless it is shown that he was legally bound to confine the person, for whose escape he is held liable.

2450. In order to create a legal obligation it is not enough that the accused should have been authorized to confine another. It is essential that such authorization should be legal. For example, a village policeman in the Bombay Presidency is nowhere authorized to take charge of convicted persons; where, therefore, a convicted prisoner escaped from the custody of a village policeman, it was held that he was not guilty of this offence.[5] So while there may be the general authority to confine, it may be inapplicable to a particular case. Such will be the case where the arrest of the prisoner was illegal and made without jurisdiction. The accused, in a case, was a resident of Kot Kapura in the Faridkot State. The police of that State suspected him of having committed an offence in that state, and of having escaped into British territory. The State Police thereupon sent a note to the British Police of Ferozepur District, to arrest the accused, and a British constable arrested and made him over to a constable of the Faridkot State. The latter took him into custody; while in such custody and when a British constable was present to assist the State constable, the accused made good his escape, and the question was whether his custody was lawful; but it was held that it was not, because unless he was extradited, he could not be arrested by the State police, and there was no evidence to shew that he was a British subject so that the British Police could not arrest him.[6]

2451. But there is a tendency in the Courts to construe a magisterial order as one within his jurisdiction. If it is so, the fact that it was irregular or erroneous does not affect the liability of the accused. So where while an Assistant Magistrate was in camp, a report was brought to him of the murder of one *A*, and a petition was presented to him that one *B* had compassed his death, it was added that *B* was present and might be arrested and sent to the police. The Magistrate passed no order for the arrest of *B*, but sent the petition filed against him to the Police Superintendent for disposal. *B* was arrested by the police on the strength of this order, and he was made over to the accused Ashraf Ali, police Sub-Inspector with the petition filed against him. Ashraf

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(1) *Per* Plowden, J., in *Imam Din*, (1891) P. R. No. 2, F. B.
(2) *Shasti Churn Napit*, 8 C. 331; *Kandhaia*, 7 A. 67; 7 M. H. C. (App.) 41.
(3) *Albel Singh*, (1890) P. R. No. 32.
(4) *Imam Din*, (1891) P. R. No. 2, F. B.
(5) *Jaglia Raysing*, 1 Bom. L. R. 349.
(6) *Choghatta*, (1891) P. R. No. 20.

Ali concluded the inquiry, and apparently released *B*, who was afterwards arrested by the police of another district. Ashraf Ali was then prosecuted under this section for having negligently suffered *B's* escape, and his conviction was upheld by Straight, J., who held *B's* detention as impliedly ordered by the Magistrate under section 167 of the Procedure Code, and whose release by the accused was therefore punishable under this section.[1] But the soundness of this decision is not quite apparent. In the first place, if the order of the Magistrate has been correctly set out in the report, it could not be construed to be an order for arrest, and it could certainly be not construed to be an indefinite remand to police custody under section 167 of the Procedure Code. To hold it otherwise would be carrying the doctrine of legal presumption too far.

2452. Measure of Negligence.—Lastly, what constitutes negligently suffering an escape? It would seem that the escape must be somehow or other directly due to the negligence, so that it might be possible to say that were it not for the negligence there would have been no escape.[2] The question whether an escape was or was not due to negligence, depends upon the absence of vigilance required to keep the prisoner in confinement. Such vigilance, as the rules prescribe, may be sufficient in the case of imprisoned convicts, but in the case of those otherwise confined, the measure of vigilance must be the necessity of each case. For instance, a person confined in the open would require greater vigilance than one confined in a room, and the vigilance required at night is not the same as will suffice during the day. But, at all times, it is the duty of all those responsible for the safe custody of prisoners, to regulate their vigilance according to the requirements of each case.

2453. The accused, a *duffadar*, in charge of one of the postern gates of a jail, suffered certain convicts to pass out of the gate at which he was stationed, not intending that they should escape, but to allow of their having an interview with their friends. The convicts taking advantage of accused's over-confidence, effected their escape. It was held, that though the accused could not be convicted under section 225 of the Code, still his offence fell within the terms of this section.[3] But the mere fact, that contrary to orders, the accused had marched the prisoner at night, and in consequence of which the latter was rescued, is not negligence for which the accused could be convicted under this section.[4] Here there was no doubt negligence, but it was not so great as to be criminally punishable. The case was held different where the jail warder in charge of the prisoner told off to do agricultural work, had been diverted to water trees in a distant cemetery from where, for lack of supervision, they effected their escape.[5]

2454. Indeed, this section is not intended to punish all escapes following upon negligence, but only such negligence as would reasonably create an apprehension in the mind of an ordinarily cautious person that the prisoner might escape. In the case last cited, the accused was undoubtedly guilty of violating both a departmental rule as well as the rule of ordinary caution; but, he could not have anticipated the surprise that awaited him. Such indeed was the predicament which befell the police escort of a dangerous prisoner whom they were carrying doubly handcuffed and tied to a rope round his waist. The prisoner being allowed to alight to answer the call of nature, gave a false alarm crying "Snake" and broke away from the constables. They were acquitted.[6]

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of

Resistance or obstruction by a person to his lawful apprehension.

(1) *Ashraf Ali*, 6 A. 129.
(2) *Durga Prasad*, 7 A. L. J. 907, 7 I. C. 411.
(3) *Ghulam Ali*, (1883) P. R. No. 19.
(4) *District Magistrate, Nellore*, 6 M. L. T. 247, (1909) 3 I. C. 460.
(5) *Ashan Ali*, (1919) P. R. No. 11, 50 I. C. 830.
(6) *Girdhari*, 15 A. L. J. 883, 43 I C. 110.

either description for a term which may extend to two years, or with fine, or with both.

Explanation.—**The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.**

[***Offence***—s. 40. ***Illegal***—s. 43.]

2455. Analogous Law.—This section punishes a person for escaping from custody or illegally opposing his arrest. The gist of the crime is again "intention" and the legality of his arrest or detention.

2456. Procedure and Practice.—This offence is cognizable, but warrant must ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class. The offence of having escaped from custody may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged may be found.[1] In passing a sentence under this section, the provision of section 396, cl. 2 of the Procedure Code should not be overlooked.[2]

2457. Proof.—This section deals with two offences: (*a*) resistance to apprehension and (*b*) escape from custody. The points requiring proof in each case are these :—

I. *In case of resistance or illegal obstruction to one's apprehension* :—
(1) That the accused is charged with an offence.
(2) That the accused offered resistance or obstruction.
(3) That the resistance or obstruction offered was to one's apprehension.
(4) That the resistance or obstruction offered was illegal.
(5) That the accused offered it intentionally.

II. *In case of escape or attempted escape from custody* :—
(1) That the accused had been charged with, or convicted of an offence.
(2) That he was detained in custody.
(3) That such detention was lawful.
(4) That it was for the offence which he had been charged with or convicted of.
(5) That he escaped from such custody, or attempted to escape from such custod
(6) That he did so intentionally.

2458. It will be observed that the two offences under this section may be committed by the same person, either in the course of the same transaction, or independently of each other. For instance, a convict may escape from custody, and may, on being apprehended, offer resistance. It will then be a question whether the offences committed by the accused are two independent offences, or only a single offence.

2459. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——you while——charged with the offence of——under section——of the Indian Penal Code, intentionally offered resistance or illegal obstruction to your lawful apprehension by——(*mention the apprehending officer*), and that you thereby committed an offence punishable under s. 224 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

In case of custody the charge should run thus :—

"That on or about the——day of——you while lawfully detained in custody (of——*or* by——*or* at——) for the offence of——under s.——of the Indian Penal Code, (*or any other law*) of which you were charged (or convicted) intentionally escaped (*or* attempted to escape from the said custody) (and that you further offered resistance or illegal obstruction to the lawful apprehension of yourself for the said offence of which you had been convicted) and that you thereby, etc."

2460. Principle.—Sections 221-223 have been dealing with the offence of those who fail to apprehend, or confine those liable to be apprehended, or confined. The section punishes such persons themselves, the policy of the law being to

(1) S. 181 (1), Cr. P. C.
(2) *Chinna Madakudumban*, (1882) 1 Weir 203; *Dhoonda Bhooya*, 8 W. R. 85.

regard all intentional disobedience to its behests in such matter, as criminal. The only thing postulated is the unlawfulness of the resistance or escape. This raises, again, the important question as to when is one's apprehension illegal and when not; and what resistance is justifiable in the case of an unlawful apprehension. The subject has been already discussed elsewhere, to which reference must be made for more particular information.[1]

2461. Escape or Resistance to Apprehension.—As has been sufficiently made clear elsewhere, this section deals with two distinct offences, committed independently of each other and under circumstances not always uniform. The first branch of the section deals with what it calls "resi tance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged, or of which he has been convicted." This implies that the person to be apprehended is at large, whether because he has escaped from custody after his conviction, or because he has never been arrested since he was charged with the offence. In short, such resistance may be either to one's capture or recapture, and in either case the questions arising are the same: (*i*) Was he charged with an offence? (*ii*) Was his apprehension legal? (*iii*) Was obstruction illegal? and (*iv*) Did he obstruct intentionally?

2462. It will be noticed that this section only contemplates the case of a person who is to be apprehended for any offence, or who escapes from custody in which he is detained for an offence. The case of a person "lawfully committed to custody" is not then punishable under this section, for such person may be required to keep the peace, in which case, as has been already remarked, the accused cannot be said to have been charged with any offence.[2] But such a person cannot escape unpunished, for the cases not otherwise provided for are now punishable under s. 225-B—a section which was added to the Code to fill up such *lacunae*.

2463. Persons "Charged."—The first question that arises under this section is: Was the accused charged with or convicted of an offence? The word "offence" in this connexion, of course, means a thing punishable under the Code, or any special or local law.[3] Escapes by parties detained for offences not punishable under the Code, are therefore not punishable under this section.[4] Such was held to be the case of a person who was confined under s. 123 of the Criminal Procedure Code for failure to furnish security.[5] This was not quite obvious before the amendment of section 40 which clearly defined the term "offence," still the view taken even in the earlier cases was identical, though it was then the outcome of laboured ratiocination.

2464. Again, the person must have been "charged" with or convicted of the offence. The word "charged" here has been used in the popular sense as implying an imputation of the alleged offence[6] as distinguished from the judicial charge formulated after the recording of evidence in Court. A policeman arresting another on a suspicion of an offence accuses or charges him with an offence so that his resistance to his apprehension or his escape from custody would constitute an offence punishable under this section.[7] The "charging" must, of course, be by a person duly empowered, and under circumstances justifying it. If the charge was illegal, so would be the apprehension, and an illegal apprehension may in certain cases let in the right of private defence.[8] The fact that the charge is legal, does not necessarily imply that the apprehension was legal; for, it suppose the offence charged is bailable or non-cognizable, a police-officer has no right except in exceptional cases, to arrest the suspected offender.[9] In such a case, again, the apprehension being illegal, the accused would have the right to resist it.

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(1) S. 199, Comm.
(2) *Shasti Churn Napit*, 8 C. 331, *Kandhaia*, 7 A. 67, 7 M. H. C. (App.) 41.
(3) S. 40.
(4) (1866) 3 M. H. C. (App.) 11.
(5) *Mooli*, 18 A. L. J. 1039, 58 I. C. 831.
(6) *Kutia Alu*, (1886) B. W. C. 298.
(7) *Ib.*
(8) S. 99.
(9) *Ram Saran Tewary*, 24 W. R. 45; *Chakua*, (1896) A. W. N. 151.

2465. But if the apprehension was legal, then the person to be apprehended must offer no opposition, but must peacefully deliver up his body to the arresting officer. The latter, however, must not use more than the force necessary to effect arrest. Resistance or obstruction implies some active display of force, as distinguished from mere evasion of arrest.[1] And it has been held that trivial resistance to unlawful force on the part of an arresting officer, does not constitute an offence under this section.[2] (§ 2466.) Indeed, in such cases when blood is hot, law is feign to condone trivial application of force, on the principle of *nimine non curat lex*.[3]

2466. Apprehension Lawful and Unlawful.—The constitution of offences punishable in this and the next three following sections, depends upon the legality of the arrest; and it is therefore necessary to see when an arrest is lawful and when it is not; for, the legality of resistance or obstruction varies conversely with the lawfulness of apprehension or otherwise. The summary of the law here attempted is necessarily inexhaustive, but it illustrates the view the Courts are inclined to take, as regards the controlling qualification of these offences. In this connexion it will be observed that the provisions of these sections may appear somewhat in conflict with those of s. 99 which protects a public servant to the extent therein stated, even as regards an apprehension which though illegal, is yet made "in good faith under colour of his office, though that act may not be strictly justifiable by law." But there is really no conflict between the two, whatever uncertainty might otherwise pervade the rule there enunciated (§§ 871, 877). These sections constitute special offences and are therefore to be treated as independent of s. 99, the effect of which is that a resistance or obstruction not justifiable under that section is not necessarily punishable under this and any of the next three following sections, unless it conforms to its terms though it might be punishable otherwise if it constitutes any other offence.

2467. For instance, such a resistance may amount to an assault, in which case, it might be punishable under s. 353, or s. 342[4] though it could not be punished under this or any of the three following sections. But it is only logically possible though it would be practically impossible, since the language of s. 353 is equally rigid on the subject. Moreover, it would be urged that when law does not punish a resistance except as provided in these sections, it does not intend to punish otherwise at all, for, on the subject of resistance these sections must be regarded as exhaustive.

2468. The power of the arresting officer not acting upon his own initiative, must then depend upon the authority under which he purports to act. In this respect, his immunity from a prosecution for making a wrongful arrest, is not co-extensive with the powers of the other to offer resistance. For, while the former possesses exceptional immunities in this respect (§§ 868-899), still it does not thence follow that the arrest so made is legal, or such as will make all resistance or obstruction to it illegal. A police-officer executing a warrant of arrest, is bound to notify the substance thereof to the person to be arrested, and if so required, to show him the warrant.[5] But this is not the procedure obligatory in all cases, and a person to be arrested under section 56 of the Procedure Code, cannot insist that the arresting officer shall inform him of the authority under which he is acting, nor does an omission to supply that information make the arrest illegal.[6] Of course, it may be desirable, and even obligatory, that if called upon, the police-officer making such an arrest, should show the person arrested, the authority under which he is acting; but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and

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(1) *Narjan*, (1888) 1 Weir 205.
(2) *Tan Sein*, (1901) 1 L. B. R. 173.
(3) "Law does not concern itself about trifles"—*see* s. 95 and its commentary for further illustration of the principle.
(4) *Kartik Chandra Maity*, 138 I. C. (Pat.) 844.
(5) S. 80, Cr. P. C.
(6) *Basarat Lall*, 27 C. 320.

the detention lawful, would be to extend the law beyond what the legislature has thought proper to declare it.[1] (§§ 2498-2505).

2469. Lawful Custody.—The second branch of the section deals with the offence of escaping or attempting to escape from lawful custody for any such offence, that is to say, for the offence with which the prisoner is charged, or of which he has been convicted. The prisoner may, of course, be wrongly charged for an offence, but that does not make his custody illegal.[2] All that the law requires is that, in order to render a person liable for escape, his detention must have been lawful. For, if it was unlawful, he commits no crime in preventing the doing of an unlawful act. In considering whether his custody was or was not lawful, regard must be had to the nature of the custody itself, as well as to the circumstances under which the authority to arrest and keep in custody arises.[3] A person cannot be said to be in lawful custody unless both his apprehension and detention are lawful. So where the prisoner had stolen a cow and a calf and hearing of a report made to the police the village watchman arrested him and with the assistance of the village servant kept him in custody from which he escaped and for which he was prosecuted, the Court held that as the watchman could not have legally arrested the accused except when the offence was committed in his presence,[4] his arrest was illegal, and the accused could not then be convicted for escaping from lawful custody.[5] So where a person was arrested lawfully by a private person under s. 59 of the Criminal Procedure Code and was made over to a *chaukidar* to be taken to the Police Station, the custody of the *chaukidar* is not lawful custody, and escape from him is not an offence under this section.[6]

2470. Under s. 10 of the Regulation XI of 1816 Pariah villagers in Madras are liable to be imprisoned in stocks for using abusive language. The accused being so imprisoned had escaped from custody, whereupon he was convicted under this section, but the High Court quashed his conviction on the ground that there was no evidence to show that the custody of the village servants was lawful—that is, being a substantial tenant he was not at all liable to be put into the stocks.[7] So the Madras Salt Act, 1889, only authorises searches for contraband salt, and arrests of the parties concerned in the keeping of such salt, to be made by officers of the Salt Department without search-warrant in cases where the delay in obtaining such search-warrant will prevent the discovery of such contraband salt. It was held that where the circumstances did not justify the officer in believing that the delay in obtaining a search-warrant would prevent the discovery of contraband salt, he had no power to search or arrest without such warrant, and the escape of the persons so arrested from custody was no offence under this section.[8] So where a person was arrested under what purported to be an extradition warrant, and he escaped from custody, and it was then discovered that the Commissioner who had countersigned it had not the powers of a Political Agent of the State requiring the prisoner, it was held that the latter could not be punished for escaping from what was not a lawful custody.[9] There is no escape from lawful custody of a judgment-debtor arrested in execution of a civil process, if he is released by the process server at the instance of the decree-holder.[10]

2471. The question whether a custody was or was not lawful, depends upon the authority and the manner of its execution. For this purpose, there are certain irregularities which law regards as venial, and others which vitiate the exercise of the power altogether. For instance, it is provided by law that a

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(1) *Basarat Lall*, 27 C. 320.
(2) *Mahomed Kasi*, 43 C. 1161.
(3) 1 Weir 199.
(4) S. 59, Cr. P. C.
(5) *Bojjigan*, 5 M. 22 ; following *Sinnadu Padivachi*, *ib.*, p. 22 *note*, 1 Weir 66.
(6) *Kalai* v. *Kalu*, 27 C. 366 ; *Purna Chandra*, 41 C. 17 ; *Jafar*, 14 A. L. J. 789.
(7) *Uppala Kotayya*, 18 M. L. T. 310, 30 I. C. 656.
(8) *Kalian*, 19 M. 310.
(9) *Rur Singh*, (1885) P. R. No. 21.
(10) *Public Prosecutor*, 8 M.L.T. 286; 7 I. C. 392.

warrant directed to any police-officer may also be executed by any other police-officer whose name is indorsed upon the warrant by the officer to whom it is directed or indorsed.[1] Such indorsement must be naturally signed by the officer, but if instead of being signed it is only initialled, that alone does not vitiate the warrant.[2]

2472. But the case would be different if the warrant was not signed at all,[3] or if the arresting officer had no power of arrest,[4] or having had the power, no proper attempt was made to arrest a person.[5] A private person may arrest a person who in his view commits a non-bailable and cognizable offence, or has been proclaimed an offender.[6] The legality of such an arrest must then depend upon the strict compliance with the rule. If, therefore, the accused was arrested by the village watchman because he was wanted by the police for theft, his arrest being unjustifiable, the person arrested could escape from such custody without being liable to a conviction under this section.[7] But the case would have been different, if the person arrested had committed the theft in view of the watchman.[8] And a person arrested as he was running away after committing a theft, would for this purpose be deemed to have been arrested while committing the offence within the meaning of s. 59 of the Procedure Code.[9] And the fact that the arrest was justifiable does not necessarily make the escape unlawful. Suppose the warrant directed the arrest of a person bearing a certain name, say Ganga Charan Singh, and the police arrested altogether another person bearing the same name, the arrest may be a *bona fide* mistake, and therefore justifiable, but it does not make the apprehension lawful, nor the accused's escape unlawful.[10]

2473. Again, the mere fact that the apprehension was lawful, does not render escape from the custody unlawful. For the section is confined only to punishing the lawful apprehension or detention for any offence. Where, therefore, the accused had been arrested, and was being taken before a Magistrate for being bound over to be of good behaviour, when he escaped, he was held not to be guilty either under this section or under section 225-A of the Code.[11] But a committal for contempt of Court is a committal for an offence, and the escape of the accused ordered into custody by the presiding Magistrate would then be punishable under this section.[12] So while section 226 punishes an offender, of the offence of escaping from transportation, that section has been held only to apply when the convict escapes after he has been actually sent to a penal settlement, and returns before his term of transportation has expired or been remitted.[13] Where, therefore, the offender escapes while under the sentence of transportation, the appropriate section to convict him under is this section, and not section 226.[14]

2474. The fact that the accused escaped because he was left unguarded does not affect his liability under this section, for his custody does not necessarily come to an end, merely because the custodian absents himself for a few minutes. "A man, legally arrested for an offence, must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of escape. It has long since been established that, even when the escape is effected by the consent or neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law."[15] So where a process-server went to the village of the accused, and

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(1) S. 79, Cr. P. C.
(2) *Abdul Sikdar* v. *Mathu Singh*, 5 C.W,N. 447.
(3) *Rur Singh*, (1885) P. R. No. 21.
(4) *Bojjigan*, 5 M. 22; *Pandaram*, 1 Weir 205; *Kalian*, 19 M. 310; *Rur Singh*, (1885) P. R. No. 21; *Lajje Ram*, (1898) P. R. No. 12.
(5) *Nooruboobu*, 1 Weir 205.
(6) S. 59, Cr. P. C.
(7) *Bojjigan*, 5 M. 22; *Simadu*, 1 Weir 166, 5 M. 22, *note*.
(8) *Potadu*, 11 M. 480.
(9) *Fakira*, 17 M. 103.
(10) *Ganga Charan Singh*, 21 C. 337.
(11) *Shasti Churn Napit*, 8 C. 331; *Kandaia*, 7 A. 67; *Abdul Kadir*, 9 A. 452.
(12) *Mahomed Kasim*, (1882) 1 Weir 204.
(13) *Ramaswamy*, 4 M. H. C. R. 152.
(14) *Ib.*
(15) *Muppan*, 18 M. 401; *Sarabaiya*, 1 Weir 124; *Nallan*, 1 Weir 125.

told him that he had a warrant for him and took him before the Village Magistrate, who read out the warrant to the accused, and the process-server then informed him that he should pay up the amount. The accused offered to compromise the warrant by paying a less sum in satisfaction of the claim, but this was refused, and he then ran away. He was prosecuted under this section, and it was held that he was under arrest and in the custody of the process-server when he made his escape.[1]

2475. The Allahabad High Court has condemned the procedure of treating an escape of prisoners as merely an offence against the jail discipline. Such an escape is an offence under this section, and should be made over for trial to the regular tribunal established for the purpose. It could not be summarily disposed of by the Inspector-General of Prisons, though he may be a first class Magistrate.[2]

Resistance or obstruction to lawful apprehension of another person.

225. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

[*Offence*—s. 40. *Illegal*—s. 43.]

2476. Analogous Law.—This section, dealing with the offence of rescue, does not stand alone in the Code. For there are two other sections relating to the same offence. The rescue of prisoner of State or war is punishable under s. 130, and in any other case rescue is punishable as an obstruction under section 186.

2477. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is only bailable, if the offence falls under the first paragraph, in any other case it is non-bailable. It is in any case non-compoundable and is triable as follows :—

First Clause—By the President Magistrate or Magistrate of the first or second class.

Second Clause—By the Court of Session, a Presidency Magistrate or a Magistrate of the first class.

In any other case—Exclusive by the Court of Session.

(1) *Venkatachela*, (1892) 1 Weir 206.

(2) *Hasan Ali*, (1894) 1 N. W. P. 76.

2478. It has been held in Madras that the word " or " as used in the second paragraph should not be read distinctively as denoting transportation for life, or imprisonment for ten years in the alternative. A second class Magistrate has, therefore, no jurisdiction to try an offender under section 225, if the person to be apprehended or attempted to be rescued is liable to be apprehended for, or is charged with an offence punishable with transportation for life, or an offence punishable with imprisonment for ten years.[1]

2479. Proof.—The points requiring proof are :—

(1) That some person other than the accused was detained in custody.
(2) That his detention was lawful.
(3) That the accused rescued or attempted to rescue him.
(4) That the accused did so intentionally.

To which the aggravating circumstances are furnished by the second to fourth clauses in accordance with the gravity of the offence of the person rescued.

2480. Charge.—The charge should run thus :—

" I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

" That on or about the——day of——you——intentionally offered resistance (*or* illegal obstruction) to the lawful apprehension of *A B* for the offence of——under section—— of the Indian Penal Code (*or* rescued or attempted to rescue the said *A B* from the custody to which the said *A B* was lawfully detained from the offence of——), and that you thereby committed an offence under section 225 clause——of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

" And I hereby direct that you be tried (by the said Court) on the said charge."

2481. Principle.—Offenders offering resistance or illegal obstruction to their own apprehension are punishable under the last section. Others who do the same to rescue them are punishable under this section. They are looked upon as being, in a manner, abettors of the other's escape.

2482. Rescuing an Offender.—What is offering a resistance or illegal obstruction to the lawful apprehension of another person has been the subject of discussion under the preceding section. This section deals only with the resistance or obstruction as used to prevent the apprehension of another person. The section then goes on to speak of whoever rescues or attempts to rescue any other person. The word " rescue " has not been defined in the Code, but it is evidently used in the sense it has been used in English Law,[2] as implying the act of forcibly freeing a person from custody against the will of those who have him in custody.[3] Assisting another to escape from lawful custody is, in short, rescuing him. Rescue implies intention and the use of violence to effect the object desired.[4] Merely suffering another to escape from custody is not rescuing him from custody. For example, where the accused, a jail daffadar in charge of one of the postern gates of the jail, suffered certain convicts to pass out of the gate at which he was stationed, not intending that they should escape, but to allow of their having an interview with their friends, and the convicts taking advantage of the accused's over-confidence effected their escape, it was held that he could only be convicted under s. 223 and not under this section.[5] Now as the use of force is a necessary ingredient of causing the rescue, it follows that a person could not be convicted both of rescuing a prisoner and of using force for the purpose.[6] A person could not be punished for rescuing another from custody unless he was then aware that the person rescued was in custody. If he was in the custody of a private person, the accused may have nothing to show that the other was in custody, and he could not then be convicted of this offence, unless it is proved that he had notice that the person rescued was in custody.

(1) Meaning of " Rescue."

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(1) *Venkata Subbier*, (1890) 1 Weir 210.

(2) So 25 Geo. II, c. 37, s. 9, declared that if any person shall by force set at liberty or rescue any person out of prison guilty of certain offences shall be guilty of felony.

(3) Steph. Dig., Art. 162.

(4) *Ghulam Ali*, (1883) P. R. No. 19.

(5) *Ib.*

(6) *Kalisankar*, 12 W. R. 2.

(2) Rescue must be Intentional.

2483. Of course, the section is not restricted to official custody, but extended to any custody, provided only it is lawful,[1] of which the accused must then be cognizant, for otherwise, his rescue cannot be deemed to be "intentional." For, if suppose *A* sees *B* committing a theft, and upon which he arrests him. *B* shouts for help, and *C* a passer-by comes to his rescue. *B* and *A* are seen struggling, in which *A* charges *B* with theft, *B* denies it. *C* rescues *B*, believing him to be innocent, could he be convicted of this offence, if it afterwards appear that *A* had arrested *B* *flagrante delicto*, and that his custody was therefore lawful. In such a case, *C's* intervention would have been well justified if *A* had arrested *B* when he did not see him committing the theft in his presence.[2] And it would be excused, as not intentional because he was misled by *B*. There was no intention to justify a conviction under this section, where the accused attacked the police for another reason and the accused took advantage of it and escaped.[3]

(3) Arrest or Custody must be Lawful.

2484. Lawful Arrest or Custody.—Again, in order to be punishable the rescue must be from lawful apprehension or custody (§§ 2498-2504). For instance, if a constable is charged with the duty of apprehending a person on a warrant which is bailable, it is his duty to state that a bail would be taken. If, therefore, he did not intimate that fact and proceeded to arrest him, the arrest would be illegal, and the arrested person would be justified by the law of private defence in rescuing him, even by committing a common assault upon the constable, if necessary.[4] The Criminal Procedure Code confers no power on a police officer to depute persons who are not police officers to make an arrest which he himself could lawfully make.[5] Hence where the police-officer deputes villagers,[6] or a village chaukidar[7] to arrest a person and resistance is offered, it is equally justifiable. So again section 75 of the Code of Criminal Procedure makes it obligatory that a warrant of arrest shall bear the seal of the Court. Consequently, one sent out for execution without such seal is not a legal warrant and resistance to his execution would not be resistance to a lawful arrest.[8]

2485. The legality of an arrest or custody must thus be judged with reference to the law invoked for the purpose. If the arrest is illegal, the resistance is justifiable. Law, however, condones certain irregularities which do not render an arrest illegal. For example, a civil warrant for arrest addressed not by name, but merely to "the Bailiff of the Court" is not necessarily illegal so as to justify a resistance offered to its execution under this section.[9] Where, however, the accused were arrested under an unsigned warrant purporting to be issued by the Police Superintendent it was held the arrest was illegal and he was guilty of no offence for escaping from custody, though the persons who forcibly rescued him were punishable under s. 323.[10] A person who escapes from the jail in which he was confined for his failure to furnish security to be of good behaviour would be punishable under this and not the last section.[11]

Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.

225-A. Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in s. 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

(1) *Kutti*, 11 M. 441; *Degumber*, 21 W. R. 22; *Kalai* v. *Kalu Chowkidar*, 27 C. 366.
(2) *Kalai* v. *Kalu Chowkidar*, 27 C. 366; *Alawal*, 64 I. C. 731, (1922) L. 73.
(3) *Kallu*, 67 I. C. 721, (1922) L. 31.
(4) *Shyama Charan Majumdar*, 16 C. W. N. 549, 15 I. C. 1006.
(5) *Purna Chandra Kundu*, 41 C. 17; *Taik Pyu*, 5 L. B. R. 21, 2 I. C. 619.
(6) *Taik Pyu*, 5 L. B. R. 21, 2 I. C. 619.
(7) *Purna Chandra Kundu*, 41 C. 17; *Dhirajaddi*, 33 I. C. (C.) 644; *Jafar*, 14 A. L. J. 689, 36 I. C. 577.
(8) *Mohajan Sheik*, 42 C. 708.
(9) *Abdul Rahiman Sahib*, (1914) M. W. N. 498, 24 I. C. 175.
(10) *Mousi Lal*, (1918) Pat. 285, 48 I. C. 340.
(11) *Mooli*, 18 A. L. J. 1039, 58 I. C. 831.

(*a*) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

[***Public servant***—s. 21. ***Legally bound***—s. 43.]

2486. Analogous Law.—This section was first inserted by the Amending Act of 1870,[1] and it then ran as follows :—

Escape from custody for failing to furnish security.

"225-A. Whoever escapes or attempts to escape from any custody in which he is lawfully detained for failing under the Code of Criminal Procedure, to furnish security for good behaviour, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

This section was added to supplement s. 224 which, as remarked before, only extended to escape from custody for an offence. As such, it only dealt with a special case of escape, which is now met by the more general provisions of the next section. Following the same policy, this section was substituted in 1886[2] for the one generally inserted, and it provides for intentional or negligent omission to apprehend not punishable under sections 221, 222, or 223, or any other law. The section is thus confessedly supplementary, and before it is applied, it will be necessary to see that there is no other provision in the Code or elsewhere applicable to the case. Such a case may be rare, but nevertheless it is conceivable. The chapters of the Code relating to General Exceptions (Ch. IV), Abetment (Ch. V) and Attempts (Ch. XXIII) apply to offences falling under this Chapter.[3]

2487. Procedure and Practice.—The prosecution of Judges and other public servants not removable from their office save by or with the sanction of a local Government is subject to its sanction.[4] The procedure applicable to this offence differs according as the omission or sufferance is intentional or merely negligent. But in either case it is non-cognizable, bailable and non-compoundable ; but if the omission or sufferance was intentional warrant should ordinarily issue in the first instance, otherwise a summons should so issue. Again, in the former case, the offence is triable by the Court of Session, Presidency Magistrate or Magistrate of the first class, in the latter case, it may be tried by a Presidency Magistrate or Magistrate of the first or second class.

2488. Proof.—The points requiring proof are :—

(1) That the accused was a public servant.
(2) That he was lagally bound to apprehend or keep in confinement the person in question.[5]
(3) That he omitted to apprehend that person, or suffered him to escape from confinement. That he did so either (*a*) intentionally or (*b*) negligently.
(4) That the offence does not fall under ss. 221, 222, 223, or any other law.

2489. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused* as follows :—

"That on or about the——day of——, you being a public servant legally bound as such public servant to apprehend (*or* to keep in confinement) one *A B* intentionally (*or* negligently) omitted to apprehend the said *A B* (*or* intentionally or negligently suffered the said *A B* to escape from confinement), and that you thereby committed an offence punishable under secion 225-A of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said Court) on the said charge."

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(1) Act XXVII of 1870, s. 9.
(2) Act X of 1886, s. 24 (1).
(3) Indian Penal Code Amendment Act, 1870 (Act XXVII of 1870) s. 13, as amended by the Repealing and Amending Act (Act XII of 1891).
(4) S 197 (1), Cr. P. C.
(5) *Ramanandan Singh*, (1930) O. 103.

225-B. Whoever, in any case not provided for in s. 224 or s. 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

[*Illegal*—s. 43.]

2490. Analogous Law.—This section absorbs the old section 225-A as it stood between 1870 and 1886, in which year this section was added and the last section substituted as it now stands.[1] The chapters of the Code relating to General Exceptions (Ch. IV), Abetment (Ch. V), and Attempts (Ch. XXIII) apply to offences falling under this section.[2]

2491. The section was added to supply a glaring omission in law, noticed in consequence of two reported cases,[3] in which it had been held that a person escaping from custody when being taken before a Magistrate and for the purpose of being bound over to be of good behaviour not being punishable either under section 224 or section 225 of the Code, was not punishable at all. That such a person is as guilty as one charged for a specific offence was manifest, and the insertion of this section now enables the Court to punish such absconders.[4] It also provides for the punishment of those who escape from arrest before they are delivered into custody, for which there was no appropriate provision before.[5]

2492. Procedure and Practice.—This offence is cognizable, and warrant may ordinarily issue in the first instance. It is bailable, but non-compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class. Ordinarily, a complaint under this section must be made by the public servant aggrieved by the resistance or obstruction, though there is nothing to prevent a volunteer from doing so.[6]

2493. Proof.—The points requiring proof are :—

I. *In case of apprehension*—

(1) That either the accused or some other person was apprehended.[7]
(2) That such apprehension was lawful.[8]
(3) That the accused offered some resistance or illegal obstruction.
(4) That such resistance or illegal obstruction was intentional.[9]
(5) That he did so to prevent the lawful apprehension of himself or of some other person.
(6) That the case is one not provided for by s. 224 or s. 225.

II. *In case of escape from custody or rescue*—

(1) That the accused (*a*) escaped, or (*b*) attempted to escape from custody ; or (*c*) rescued, or (*d*) attempted to rescue any other person from any custody,
(2) That the custody was in any case lawful.

2494. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

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(1) Act X of 1886, s. 24 (1).
(2) Indian Penal Code Amendment Act, 1870 (Act XXVII of 1870), s. 13, as amended by the Repealing and Amending Act, 1891 (Act XII of 1891).
(3) *Shasti Churn Napit*, (1882) 8 C. 331 ; *Kandhaia*, (1884) 7 A. 67 (72).
(4) *Khanu Kori*, 77 I. C. 814.
(5) *Ramaswami Konan*, 31 M. 271. In *Muppan*, 18 M. 401, a conviction under s. 224 of the Code was held to be right ; and the same view was taken in *Sarabaiya*, 1 Weir 124, *Nallan*, 1 Weir 125, cited in *Muppan*, 18 M. 401.
(6) *Meher Singh*, 146 I. C. (L.) 387.
(7) *Dewa Singh*, (1918) P. R. 33, 48 I. C. 832.
(8) *Madho Singh*, 47 A. 409 (it is not lawful to detain the judgment-debtor in the custody of the peon after he has been given time to pay up) ; *Kala*, 89 I. C. 400, (1925) L. 623; *Dasondhi*, 9 L. 424; following *District Board, Sialkot* v. *Sultan Mhd. Khan*, 9 L. 340.
(9) *Homes*, 107 I.C. 772.

"That on or about the——day of——you——intentionally offered resistance (*or* illegal obstruction) to the lawful apprehension by——of yourself [(*or* of *A B*) *or* escaped from the custody of——in which you were lawfully detained or rescued or attempted to rescue one *A B* from the custody of——in which the said *A B* was then lawfully detained], and that you thereby committed an offence punishable under section 225-B of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2495. Meaning of Words.—"*Resistance or illegal obstruction*" implies an active opposition by show of force,[1] such as when a person sits down to prevent his removal[2] but does not include a mere avoidance or evasion, such as where a person runs into his house to avoid his arrest, which is not punishable under this section.[3]

2496. Resistance Not Otherwise Provided for.—This section provides a punishment for resistance or illegal obstruction to arrest or for escape or rescue from custody, in cases not already met by the provisions of section 224 or 225. In this respect this section is merely supplementary to those sections, from which it borrows its phraseology, and in the light of which it must be construed. The only distinguishing feature this section offers is in the maximum punishment, which is only six months as against the two years or more awardable under s. 224 or 225. As this section then deals with a comparatively lighter offence, its provisions should only be resorted to when those of sections 224 and 225 are inapplicable. Such would be the case where the apprehension or detention is not for an offence, but for any other purpose. Obviously, the section was intended to overrule the two cases[4] in which the Code was held to contain no provision for punishing a person proceeded against for good behaviour, added to which there may be cases of arrest under civil process, resistance to which would also be punishable under this section.[5] But whatever may have been the occasion for the arrest, two things are essential to make the section applicable—(*a*) that the arrest must not be for an offence, and (*b*) that it must be lawful. Thus a resistance to apprehension on a warrant issued by a Collector for non-payment of land revenue or other miscellaneous public dues, as for example, ferry dues, would be punishable under this section.[6] So in cases of contempt a person may be arrested, and punished under this section.

2497. It has already been noted (§ 2495) that the phraseology employed in ss. 224, 225 and this section is resistance or illegal obstruction—words which imply active opposition by show of force and not merely a verbal challenge or a passive resistance, as where a person runs away or into his house to avoid his arrest which is not punishable under this section,[7] which contemplates an overt act of resistance or obstruction by use or show of force in defiance of the exercise of lawful authority of a public servant. Consequently, where a person is merely defiant and challenges with words "Arrest me if you can: I won't go" or that "if he is taken, a fight would ensue" or other words to that effect there is no obstruction or resistance such as the law here reprobates and punishes. For other cases, *see* s. 183 comm.

2498. The only question in such cases then remaining is: was the arrest legal, which, of course, means not only that the arrest was duly authorized by the lawful authority of a public servant, but also that it was carried out in a lawful manner. If the arrest is under a process issued under the Code of Criminal Procedure, then it must be effected in accordance with its provisions.[8] Even if the arrest be under Civil Process the same procedure must be observed.[9] Where, therefore, the bailiff of a Civil Court met the accused in the street, showed his staff, told him

Arrest must be Legal.

(1) *Aijaz Hussain*, 38 A. 506.
(2) *Santa Singh*, 146 I. C. (L.) 222.
(3) *Gajadhar*, 7 A. L. J. 1174, 8 I. C. 823.
(4) *Shasti Churn Napit*, 8 C. 331; *Kandhaia*, 7 A. 67.
(5) *Muhammad Baksh*, (1904) P. R. No. 16.
(6) *Debi Singh*. 28 C. 399.
(7) *Gajadhar*, 7 A. L. J. 1174, 8 I. C. 823; *Aijaz Husain*, 38 A. 506.
(8) S. 46 (1), Cr. P. C.
(9) *Aludomal*, (1916) 9 S L. R. 141, 32 I.C. 679; *Gopal Singh*, 116 I.C. (L.) 709.

he was under arrest but did not touch him, and the accused instead of going with him, walked away and entered a shop, it was held that he had never been arrested at all and therefore, he could not be convicted for escaping from lawful custody.[1] Again, the arrest of a judgment-debtor in execution of a decree must be made within the jurisdiction of the Court. If, therefore, a person being without jurisdiction is illegally brought within it and then arrested, the arrest is illegal,[2] and the escape of such a person would then be not punishable under this section.

2499. Again, the Code of Civil Procedure prescribes certain restrictions limiting the right and mode of arrest.[3] The legality of the arrest would then depend upon their observance. It is the duty of the officer arresting in execution of a decree to be in possession of the warrant, for the judgment-debtor is entitled to see it, and to avert his arrest by paying up the decretal amount. If, therefore, he is arrested by one without a warrant in his possession, he cannot be punished for escaping from such custody.[4] There is, however, no provision in the Code entitling the judgment-debtor to inspect the warrant. His arrest cannot, therefore, be held to be illegal merely because the bailiff refused to shew him the warrant. But if he is not bound to shew the warrant, it is the duty of all officers effecting an arrest whether they be bailiffs or police-men to disclose the contents of their warrants, and an arrest otherwise made cannot be deemed lawful.[5] A warrant without the seal of the court issuing it, or without proper endorsement[6] or incomplete without the name to whom it is given for execution[7] or made out in a wrong name or for the arrest of a person whose father's name is wrongly given would be one in which the arrest made would be illegal.[8] The case is, of course, worse where the warrant omits to mention the name of the person to be arrested.[9]

2500. Section 90 of the Code of Criminal Procedure empowers the Code to substitute a warrant instead of a summons "after recording its reasons in writing"—which implies that such reasons must be particular to each and so considered. If, therefore, the Magistrate adopts a stereotyped printed form as in compliance with this section it would be an abuse of power against the execution of which resistance would be justifiable.[10] Where however, an officer has a discretion in the matter, and he uses it after exercise of some judgment, his erroneous exercise of it does not render his act illegal. For instance, a process for recovery of the arrears of revenue, should according to the rules of the United Provinces Board of Revenue, ordinarily issue against the Lambardar in the first instance; but if the Collector finds it expedient to issue process in the first instance against the defaulter himself, ordering his arrest and detention, the arrest is legal, and escape from custody is an offence punishable under this section.[11]

2501. So where the Collector ordered the arrest of one Debi Singh, son of Gunraj Singh, and the police arrested one Debi Singh, son of Rang Lal Singh, the Court held that it lay on the prosecution to prove that the person arrested was the same person whose arrest had been ordered, in the absence of which the accused could not be dealt with for escape.[12] Of course, in such a case it was open to the prosecution to prove that in spite of the father's wrong name the accused had been rightly arrested. The fact that there is an error on the face of the warrant is not then conclusive, unless it had led to the arrest of a wrong man, or led the person arrested astray. If, for instance, there had been two Debi Singhs in the

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(1) *Aludomal*, (1916) 9 S. L. R. 141, 32 I. C. 679.
(2) *Shearwood*, 2 Tay, and Bell 71.
(3) S. 55, C. P. C. (Act, V of 1908).
(4) *Amar Nath*, 5 A. 318; *Baroda Kanta*, 25 C. W. N. 815, 66 I. C. 1003.
(5) *Rajani Kanta Pal*, 5 C. W. N. 843; *Shyamacharan Majumdar*, 16 C. W. N. 549, 15 I. C. 1006; *Abdul Gafur*, 23 C. 896; *Satis Chandra Rai* v. *Jadu Nandan Singh*, 26 C. 748.
(6) *Jaggannath*, 140 I. C. (A) 118.
(7) *Fathu*, 55 A. 109.
(8) *Debi Singh*, 28 C. 399.
(9) *Jogendra Nath* v. *Hira Lal*, 5 I. C. 902.
(10) *Sukheswar*, 38 C. 789.
(11) *Gulab Singh*, 32 A. 116.
(12) *Debi Singh*, 28 C. 399.

same village with their father's name as Gunraj and Rang Lal, Debi, son of Gunraj, might well have complained that, though a defaulter, it was the other Debi and not he whose arrest had been ordered.

2502. The desertion from His Majesty's Army amounts to an "offence" and a person who intentionally resists or illegally obstructs a Police officer in the apprehension of a person so deserting is guilty of this offence.[1]

Arrestor must Possess Authority.

2503. Again, the warrant of arrest must be executed by a person duly authorized to do so. The warrant of arrest of a Civil Court must be addressed to the bailiff of the Court,[2] and an arrest made by a person not so authorized would be illegal, so that there could be no punishment for an escape.[3] If the person deputed to effect an arrest was incompetent to do so, the fact that there was authority for the arrest would not make the arrest legal. For instance, under the provisions of the Procedure Code an officer in charge of a police-station is only empowered to requisition an officer subordinate to him to effect an arrest. The legality of an arrest so effected would then depend upon the subordination of the arresting officer to the officer ordering it.[4] In Bengal, a *chowkidar* appointed under the provisions of the Village Chowkidar Act[5] was in one case said to be a subordinate of the officer in charge of the police-station, so that a requisition addressed to him under that section to arrest a person was held legal, and escape from such custody punishable under this section,[6] but other cases lay down the contrary, holding that the custody by a chowkidar is not a legal custody, and resistance to it is justifiable.[7]

2504. An insane criminal detained in jail escaping therefrom on recovering sanity would bring himself within the provisions of this section, though he could not be convicted under section 224.[8] The intentional resistance or obstruction here punishable implies active opposition accompanied by use or threatened use of force. Mere evasion is not such resistance. There, for instance, the accused, seeing a process-server accompanied by the decree-holder coming in his direction with a warrant for his arrest in execution of his decree, ran into his house and would not come out when called upon to do so, he could not be said to resist or obstruct the process-server within the meaning of this section.[9] A debtor is under no obligation to wait till he is arrested, or to offer himself for arrest when he is once out of the reach of the bailiff. He is perfectly entitled to make his escape if he can but if once he is arrested he is not then free to escape whenever he gets a chance.

2505. For, once a person is in lawful custody, he commits the offence of "escape" even though the escape may be effected by the consent or the neglect of the custodian, for neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law.[10] So the fact that the accused escaped because the peon who had him in custody had fallen asleep does not in any way put an end to the custody or affect the accused's duty to submit to the judgment of the law.[11] Nor is his escape any the less an escape from custody because he was independently of him rescued from the police custody,[12]

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(1) S. 54 (1), "Sixthly," Cr. P. Code; *Rahim Ali*, (1911) P.R. (Cr.) 20; 14 I. C. 426.

(2) Form 154, Sch. IV, C. P. C. (Act XIV of 1882); now App. E. No. 12 (Act V of 1908).

(3) *Muhammad Baksh*, (1904) P.R. No. 16, 1 Cr. L. J. 1091; *Ghasital Mal*, 3 L. L. J. 346, 66 I. C. 848. The arrest is, however, not illegal by reason of the bailiff not showing the warrant provided he had it with him and was ready to show it.—*Barodakanta*, 25 C. W. N. 815, 66 I. C. 1003.

(4) *Bahubal Sircar*, 10 C. W. N. 287.

(5) Beng. Act, VI of 1870, s. 39.

(6) *Bahubal Sircar*, 10 C. W. N. 287.

(7) *Kalai* v. *Kalu Chowkidar*, 27 C. 366; *Bolai Dey*, 35 C. 361; *Purnachandra Kundu*, 41 C. 17; *Dirajaddi*, 33 I. C. (C.) 644.

(8) M. H. C. 620, dated 25th Nov. 1862.

(9) *Gun Pal*, (1906) 4 Cr. L. J. 287.

(10) *Sennimalai*, (1919) M.W. N. 695, 49 I. C. 656.

(11) *Public Prosecutor* v. *Ramaswami Konan*, 31 M. 271.

(12) *Attiya*, 9 Bur. L. J. (1923) R. 133. In *Annawdin*, 1 R. 218, resistance or show of force held essential, and mere escape held to constitute no offence. But it *does*.—*See* the section.

or because he took advantage of an attack made upon the police by persons unconnected with his rescue.[1]

2506. Resistance to Unlawful Arrest.—It has been held by a single Judge that though the warrant for arrest was illegal still the use of criminal force to effect rescue of a person so arrested by a police constable would be punishable under s. 352.[2] The reason given in support of this view is (it is submitted) unsound. It is said that the accused did not know that the warrant was illegal and that therefore they were guilty of assault. But the right of private defence does not depend upon such knowledge. Though under s. 100 of the Criminal Procedure Code, it is open to a Magistrate to issue a general search warrant, still where he issues it for the search of a person confined in a house, a police constable, cannot take charge of the person not found in the house, but whom he met in the field. A rescue of such a person is not illegal so as to expose the accused to the penalty of this section.[3]

2507. No Offence.—Of course, a child under seven cannot be convicted of this offence.[4]

226. Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Unlawful return from transportation.

[*Transportation*—ss. 53, 263-266.]

2508. Analogous Law.—This was clause 203 in the Bill, but the sentence of imprisonment for three years here provided did not exist in the original where the only additional sentence awardable was that of fine. The provisions of this section are taken from the Georgian Statute relating to the transportation of convicts,[5] section 22 of which, dealing with the offence here enacted, provides as follows :—

"S. 22. If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former Act, shall be afterwards at large within any part of His Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transferred or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; and such offender may be tried either in the County or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue any such offender from the custody of such superintendent, or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting or reconveying him or her, or shall convey or cause to be conveyed, any disguise, instrument for effecting escape or arms to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted."[6]

2509. This section provides only the punishment for unlawful return from transportation, the other matters referred to in the above Statute being dealt with elsewhere.

2510. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is neither bailable nor compoundable, and is exclusively triable by the Court of Session.

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(1) *Gokal*, 45 A. 142; *contra* in *Jogendra Nath* v. *Hiralal*, 39 C. L. J. 452, *Audinarayana Reddi*, 142 I. C. (M.) 288.
(2) *Ib.*
(3) *Cheppa Mehton*, (1928) Pat. 550.
(4) S. 82; *Santa Cruz*, (1915) M. W. N. 543, 30 I. C. 154.
(5) Geo. IV, c. 84.
(6) *Ib.*, s. 22.

2511. Proof.—The points requiring proof are :—

(1) That the accused had been transported.
(2) That his transportation was lawful.
(3) That his transportation had not expired.
(4) That his sentence had not been remitted,
(5) That the accused had returned from such transportation.

2512. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——, at——were sentenced to transportation in case No.——of——by the Session Judge of——for the offence of——(*specify the offence*), and that on the——day of——at——you returned from such transportation, the term of which had not expired, and your punishment not having been remitted, and that you thereby committed an offence punishable under section 226 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

2513. Meaning of Words.—"*Returns from.....transportation*": Returns means that the prisoner had been actually transported. A prisoner who escaped from a jail where he was confined before he was transported cannot be convicted under this section.[1]

2514. Unlawful Return from Transportation.—This section only applies to persons lawfully transported, that is to say, to persons upon whom not only has the sentence of transportation been lawfully passed, but who in execution of that sentence have been actually sent to a penal settlement. It has obviously no application to a convict who escapes from custody whilst on his way to undergo the sentence of transportation. Such a person may be punished under s. 224, but he could not be punished under this section.[2] So a person serving out his sentence of transportation in the jail without being transported is not a person "lawfully transported" and his escape from confinement would then be only punishable under section 224, though, of course, it will then be open to the executive to direct his transportation in execution of his original sentence.[3] This section was construed by the Law Commissioners to refer only to a person transported for a term of years *not* by way of commutation, there being another section in the Bill prescribing the penalty for returning from the commuted sentence of transportation.[4] But as the section is now worded, it extends to all transportation whether it was the primary or the commuted sentence. It does not however, extend to deportation, which is not transportation, though a person deported may also be transported. Indeed, the section only deals with escapes from a judicial sentence, which deportation is not. The transportation may have been for life or only for a number of years, but unlawful return therefrom exposes the delinquent to the additional penalty of transportation for life as well as fine, and to a sentence of imprisonment which may extend to three years. In order to constitute an unlawful return, it is not necessary that the transported convict should have had a substantial sentence to undergo, for his offence is complete if he returns a day before his sentence is complete. But if he is enlarged or his sentence is remitted—it may be, illegally remitted—he incurs no penalty by his return.

Return from Unlawful Transportation.

2515. Nor does he incur any penalty if he returns from a transportation to which he was not "lawfully" sentenced. This word would seem to suggest that there must have been not only jurisdiction in the sentencing Court, but the offence must be one for which transportation is a legal sentence. But in a case the prisoner being indicted for unlawful return from transportation, a certificate of the clerk of the peace was filed to prove the conviction and sentence, from which it appeared that the prisoner had been transported at the Sessions

(1) *Nga Po Chein*, 6 Bur. L. T. 261, 13 I. C. 390.
(2) *Ramasamy*, 4 M. H. C. R. 152.
(3) *Nga Po Chein*, 4 Bur. L.T. 261, 13 I. C. 390.
(4) Second Rep., s. 176.

for fourteen years for larceny. That sentence could not be legally passed for simple larceny, but Alderson B., after consulting several of the judges, held that the sentence was valid until it was reversed, and that was enough.[1]

Violation of condition of remission of punishment.

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

2516. Analogous Law.—This section deals with the conditional remission of punishment provided for in section 401 of the Procedure Code. Under that section, the Governor-General in Council or the Local Government has the power to suspend or remit any sentence conditionally or unconditionally. On breach of condition the Procedure Code empowers the same authority to arrest the accused and remand him to undergo the unexpired portion of the sentence.[2] This may be done as a matter of executive action, and apart from the section under which, however, the same end may be achieved after a judicial trial.

2517. Procedure and Practice.—As the police cannot be made judges of the violation of condition by the accused, the offence is necessarily non-cognizable and summons may ordinarily issue in the first instance. It is both non-bailable, and non-compoundable, and is triable by the Court by which the original offence was triable, which means by any Court empowered by law to try any such offence as that for which the convict was under sentence. So where a person was convicted by the Recorder's Court of Prince of Wales' Island in Singapore and Malacca, of the crime of burglary, and sentenced to transportation for ten years, at a place to be appointed by the Governor-General of India in Council, he was consequently incarcerated in the Ratnagiri jail, from which after undergoing a sentence of more than eight years' imprisonment, he was released on a ticket-of-leave, and while on such leave, he committed theft in a dwelling house, it was held that the accused could be tried for his offence under this section by a full-power Magistrate at Karwar where he had violated the condition of his release.[3] In this case the objection to the accused's conviction appears to have been based on the ground that his previous conviction being by the Recorder at Singapore, no Court in British India had jurisdiction to try him, but the contention was, of course, overruled. The accused's conviction in that case was for the offence of burglary, an offence which answers to house-breaking by night under the Code. The Court empowered to try for the latter offence, was therefore held competent to try the accused for his offence under this section.

2518. Proof.—The points requiring proof are :—

(1) That the accused had been sentenced to a punishment.
(2) That that punishment had been remitted.
(3) That the remission was conditional.
(4) That the condition made was accepted by the accused.
(5) That in consequence of his acceptance of the condition he was released.
(6) That the accused violated that condition.
(7) That he violated it after his release.
(8) That he did so knowingly.

The first three conditions can only be proved by documentary evidence. So also the fourth and the fifth, if they were reduced to writing.[4]

2519. Charge.—The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

"That you——on or about the——day of——were sentenced in case No.——of——by the Court of——to——(*specify the punishment*) and which punishment was remitted on—— by the order of——on your accepting the following condition, to wit——(*set out the condition*) and which you accepted, and which you knowingly violated in that on or about

(1) *Finney*, 2 C. & K. 774.
(2) S. 401 (3), Cr. P. C.
(3) *Ahone Akong*, 9 B. H. C. R. 356.
(4) *Nga Po Ngwe*, 7 R. 355.

the——day of——you——(*specify the nature of the violation*) and that you thereby committed an offence punishable under section 227 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session or the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2520. Breach of Conditional Remission.—The Procedure Code empowers the Governor-General in Council and the Local Government to release a convicted person or suspend his sentence on, or without condition. Where the suspension or remission is unconditional, no case can, of course, arise, under this section. Nor does this section apply to a conditional suspension of a sentence. It applies only to a conditional remission of a sentence, in which case too the authority remitting the sentence has reserved the power of recalling its remission on breach of the condition upon which it had been made. In this case, the question of breach is a matter for the decision of the same authority.[1] But it is also one which the Court may have to consider in a case arising under this section. Such a case would ordinarily arise where offenders are, after undergoing a substantial part of their sentence, released on probation on a ticket-of-leave, in which case, their liberation is conditional upon their good behaviour. There may be other conditions imposed, as to the place of residence, or exclusion from a certain locality or the like, the breach of which would entail a prosecution under this section.

2521. The breach of condition must, of course, "be made knowingly" which implies that the accused was aware of the term of his release which he was violating. It will then be necessary for the prosecution to prove that (*a*) there was a specified condition made with, offered to and accepted by the accused as a term of the remission of his sentence, and (*b*) that he broke it. The fact that he broke it "knowingly" would then be one for inference. If the condition was equivocal or ambiguous, vague or uncertain, the accused may well claim exoneration on the ground that he did not understand it in the sense it was sought to be enforced. If suppose a person is convicted for rioting and the condition of his release is that he shall not live in a certain neighbourhood the object being to prevent recurrence of a riot with a certain community there resident and hostile to him. He avoids the locality, but provokes another riot with the same community, could he be said to have violated the condition of his release? It would seem not, because he was only prohibited from residing in a circumscribed area and he could not be held responsible for any thing beyond.

Intentional insult or interruption to public servant sitting in judicial proceeding.

228. Whoever intentionally offers any insult, or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

2522. Analogous Law.—This section prescribes a punishment for contempt of Court, an offence which may be tried either under the provisions of the contempt of Courts Act or under this section or may be otherwise summarily dealt with by a Court of Record under its inherent power[2] or under the Code of Criminal Procedure,[3] if it is committed *in facie curiae*. But the penalty in such case is limited to a maximum fine of Rs. 200, which the Court may not consider sufficient, in which case the offender may be committed for a regular trial under this section. Other allied offences are described in the Code under sections 175, 178, 179 and 180, and the procedure applicable in each case is the same.

2523. Procedure and Practice.—No prosecution can be legally initiated under this section, without the previous complaint of the Court concerned.[4] It is pointed out that the Courts should not be unduly sensitive about their

(1) S. 401 (3), Cr. P. C.
(2) *Tusharkanti Ghosh*, (1935) C. 419, F.B.
(3) S. 480, Cr. P. C.
(4) S. 195 (*b*), Cr. P. C.

dignity,[1] and convict persons for contempt cases in which the insult offered to the Court was not intentional ; *e.g.*, where the accused let fall a course expression and was afterwards contrite,[2] or where the offence is technical or of a slight and trivial nature and is not calculated to prejudice the fair trial.[3] Where the Court elects to take action it is necessary that it should record the stage of judicial proceeding interrupted and the evidence that it was intentional.[4] An omission in this respect is not curable under s. 537 of the Criminal Procedure Code.[5]

2524. The offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and subject to the provisions of Chapter XXXV of the Procedure Code, it is triable by the Court in which the offence is committed. The only provisions of that Chapter apposite are those contained in sections 480-487. Under Section 487 of the Procedure Code no Court other than a Judge of a High Court, is competent to try an offence under this section if it is committed before himself, or in contempt of his authority, or is brought under his notice as such Judge. Other Courts may, however, either commit such person for trial to the Sessions or to any other Court, or they may avail themselves of the summary remedy provided in section 480, in which case, they may themselves deal with the contempt. In order, however, to enable them to punish such contempts, two things are essential : (*a*) the offence must have been committed in the view or presence of the Court, and (*b*) cognizance of the offence must be taken on the same day before the rising of the Court. The jurisdiction to try the offender is lost if the matter is deferred to another day.[6]

2525. Of course, where the procedure followed is that laid down in s. 480 of the Procedure Code, it is essential that the record should show the nature and stage of judicial proceeding in which the Court interrupted or insulted was sitting and the nature of the interruption or insult.[7] Where, therefore, in a case of a conviction under section 480 of the Procedure Code, all that appeared from the record was that the Court (a Tahsildar) was at a certain village for the purpose of attesting transfers in his capacity as revenue Court, and that the accused and another lambardar, on being told by the Tahsildar that they had rendered no assistance, gave him insolent replies, but it did not appear that at the time of the alleged insult the Tahsildar was engaged in any particular proceedings under section 40 of the Land Revenue Act, 1871, or the rules thereunder applicable to him, it was held that though the conduct of the accused was insolent, still they could not be summarily punished for contempt under section 480, as there was nothing to show that the Tahsildar was then sitting in some stage of a judicial proceeding which is the gravamen of the offence.[8]

2526. So in another case all that appeared on record was the following : " Babu Surendra Nath Banerjea produced before me a prisoner arrested in course of an affray with the police, and was repeatedly ordered by me to keep silence, while I was passing orders in his case, after the case was decided. As he disobeyed, I order him under section 480, Criminal Procedure Code, to pay under section 228 of the Indian Penal Code, a fine of Rs. 200, or in default to go to jail for one week." To this judgment was added the following postcript : " Given an opportunity of apologizing but refuses." The words " as he disobeyed " were confessedly added three days later upon which the High Court on revision held that the interpolation of the words after the judgment had been pronounced without notice to the accused was, to say the least, highly irregular, and it refused to treat them as a part of the judgment. For the rest the Court condemned the record as not made according to law. " A full and clear record," the Court

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(1) *Ramasami*, 20 M. L. J. 247, 30 I. C. 434; *Murlidar*, 38 A. 284; *Manghal Ram*, 53 I. C. (A) 617.
(2) *Jit Singh*, (1912) P. W. R. 23, 15 I. C. 983.
(3) *Dange* v. *Sheppard*, (1930) A. 483.
(4) S. 481, (2) Cr. P, C. 1882 *Kukati*, 25 I. C. 629, *Ramlal*, 134 I. C. (N.) 684.
(5) *Ram Lal Ib.*
(6) *Paiambar Baksh*, 11 A. 361.
(7) S. 481 (2), Cr. P. C., *Khushal Singh*, (1886) P. R. No. 36; *Surendra Nath Banerjea*. 10 C. W. N. 1062.
(8) *Khushal Singh*, (1886) P. R. No. 36.

observed, "as contemplated by section 481 is not only a guarantee of the coolness and judicial temper of the presiding officer, but also affords materials for the Appellate Court to proceed on . . . . the proceedings of the District Magistrate are too laconic, and contravene the directions of the law." They were, therefore, quashed.[1]

2527. Proof.—The points requiring proof are :—

(1) That the accused insulted or interrupted.
(2) That the person so insulted or interrupted was a public servant.
(3) That he did so intentionally.
(4) And at a time while he was sitting in any stage of a judicial proceeding.[2]

2528. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That you——on or about the——day of——intentionally offered insult (*or* caused interruption), to wit——(*specify the insult, or interruption*) to——a public servant, while he was sitting in a stage of a judicial proceeding, namely——(*specify the proceeding*) and thereby committed an offence under section 228 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on said charge."

2529. Principle.—The essence of the crime of the contempt of Court lies in the respect due to the administrator of justice and the necessity of protecting him against interruptions and insults. Such interruptions and insults must be intentional, and where it is a case between the Bench and Bar, the Court is loth to act unless there is clear proof that the conduct of the pleader was so clearly vexatious as to lead to the inference that his intention was no other but to insult and interrupt the Court.[3] The section is only confined to the protection of persons sitting at a stage of a judicial proceeding. Officers not so sitting are regarded as entitled to no special protection.

2530. Contempt of Court.—It is contempt of Court to intentionally offer insult or cause interruption to a public servant in any stage of a judicial proceeding. Three things are then essential to constitute this offence : (*a*) intention, (*b*) insult or interruption, and (*c*) the public servant insulted or interrupted being then sitting in any stage of a judicial proceeding.

2531. In the first place then, the insult or interruption must be intentional.

(*i*) Insult or Interruption must be Intentional.

The fact that the Court feels insulted is no reason for holding that any insult was intended. No such insult is intended when an assessor appears in *deshabille*,[4] nor is any insult implied, if the accused, upon his trial, especially if he is undefended, continues speaking after he is told to desist. As was observed in a case : "Merely uttering of words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner during the course of a judicial proceeding against him."[5] Indeed, it is a spectacle of every-day occurrence in the Courts, that men who have measured their words before, become suddenly loquacious when in the presence of Court, and if the Court perchance lets fall an expression hostile to their case, it suffices to add fresh fuel to the fire of their loquacity. In such cases it would be disastrous to the confidence reposed in the justice of Courts to hold that the person not desisting from talking intends to insult or interrupt the Court. So in the case of pleaders appearing for their clients, the Court should not put down every interruption as constituting contempt. As was observed in a case : "Some latitude should be allowed to a member of the Bar, insisting, in the conduct of his case, upon his question being taken down, or his objection noted. Where the Court thinks the question inadmissible or the objection untenable, there ought to be a spirit of give

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(1) *Surendra Nath Banerjea*, 10 C. W. N. 1062.
(2) *Kaualashia*. 12 Pat. 1.
(3) *Dattatraya*, 6 B. L. R. 541 (543).
(4) *Chaganlal Ishwardas Shah*, 146 I. C. (B.) 550.
(5) *Surendra Nath Banerjea*, 10 C. W. N. 1062 ; *Ramasami*, 29 M. L. J. 274, 30 I. C. 434.

and take between the Bench and the Bar in such matters, and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial, unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court."[1]

2532. Every protest made, may, in fact, does interrupt the Court, but it is their duty to listen to protests howmuchsoever they may delay their proceedings. So long as they are made *bona fide* they do not constitute the interruption which the section punishes as a contempt. But if they are made with that sole object in view, they cease to be *bona fide* and they may then supply a necessary element to constitute the crime. But even here the accused is allowed considerable latitude. He is on trial, and his liberty is in jeopardy and he is therefore the fit object of judicial commiseration. His pleas should not be too narrowly scanned, and the fact that they are even scurrilous or scandalous should not weigh with the Court in treating them as contempts. Such was the view taken in a case in which the accused, being arraigned before a Deputy Magistrate for rioting, protested against his trial by him on the ground of enmity due to his intimacy with a woman and on whose account the Magistrate had had him implicated as a rioter. It was held that this section was never intended to apply to pleadings such as these and that in any case the object of the accused was to secure a transfer of his case, for which purpose he had made the statement which could not then be said to have been made intentionally to insult the Magistrate.[2] In such a case the accused may be guilty of defamation, but the Court cannot in that case order his prosecution under section 476 of the Procedure Code. His proper procedure then is to file a complaint not in his capacity as a judicial officer, but in his personal capacity.[3]

Contempt Out of Court.

2533. In 1862, Sir Barnes Peacock and his eight associate Judges held that the High Court had jurisdiction to punish for contempt out of Court, but in a case before them, they accepted an apology from the accused and closed the incident.[4]

2534. This case, however, raises an important question so far as regards contempts out of Court. Captain Francis was held guilty of that offence, though all that he had done was to visit Morgan, J., on a specific mission and demanded an apology. In such cases there is authority to hold that a person cannot be charged for contempt of Court. As Anderson, J., said in a case : " There are diverse Statutes that for private discourtesies one shall not be imprisoned, and, therefore, I do not see how this custom can be maintained. A man may be imprisoned for a contempt done in Court, but not for a contempt done out of Court, and, therefore, he ought not to have been committed for such a private abuse."[5] This was the view of the whole Court, and the prisoner was discharged. So in another case Lord Abinger said : " Then if the judge had received that letter not sitting in Court it would not have amounted to a contempt "; and again : " I can only say that if I received such a letter, I should not consider myself at liberty to commit him "[6] to which Alderson, B., added : " There would be a great many committals if such a course were pursued by judges."

2535. This is now the view taken by the Privy Council whose judgment was also delivered by Sir Barnes Peacock, who therein held that this section does not provide against contempt of Court committed out of Court, or when the Court is not sitting,[7] though the power to commit for such contempts is possessed by the High Courts as Superior Courts of Record, independently of the Code. Such power was formerly a part of the Common law, and was conferred upon the Supreme

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(1) *Dattatraya*, 6 Bom. L. R. 541 (543).
(2) *Abdullah Khan*, (1898) A. W. N. 145 ; followed in *Murlidhar*, 38 A. 284 ; *Wahid Baksh*, (1903) P. L. R. 582 ; *Jogendra Narain* v. *Shyma Churn Ukil*, 6 C. L. J. 713.
(3) *Jogendra Narain* v. *Shyma Churn*, 6 C. L. J. 713.
(4) *Piffard*, 1 Hyde 79 (94, 95) ; for detailed facts *See* 1 Penal Law (4th Ed.) § 2411; *Tushar Kanti Ghosh*, (1935) C. 419 F. B.
(5) *Dean's case*, Cr. Eliz. 689.
(6) *Fulkner*, 2 Mon. and Ayr. 321.
(7) *Surendra Nath Banerjee*, 10 C. 109, P. C. Section inapplicable to quarrels in the Court verandah.—*Manghal Ram*, 53 I. C. (A.) 617.

Courts when they were established in the Presidency towns, and which was transferred to the High Courts when they were established in their place (§§ 83-84). It was evidently in this view that the learned judges had convicted Captain Francis.

2536. "Sitting in a Judicial Proceeding."—The offence of contempt of Court may then, so far as regards the High Courts, be committed independently of this section, and when the insult or interruption is not given or made *in facie curiae*. In all other cases, the offence can only be committed if the insult or interruption is offered or made in the presence of the Court, and not otherwise, or as the section puts it, when the public servant is sitting *in any stage of a judicial proceeding*. What is then judicial proceeding? The term has been evidently used here in the same sense as it has been used in section 192 to which reference should be made for more particular information.

2537. In this connection, it has been held that the proceedings of a Sub-Registrar of assurances are judicial proceedings within the meaning of this section, so that an insult or interruption caused to him would be punishable under this section.[1] For the purpose of this section, judicial proceedings are not concluded when sentence is passed, but continue until the prisoner is discharged or removed in custody.[2]

2538. But the fact that a person was at a given moment conducting a judicial proceeding does not constitute a contempt, if he in the midst of that work turned to the execution of his executive duties and was then insulted. A Tahsildar who was engaged in hearing a civil case allowed his proceedings to be interrupted by the accused, a lambardar, who had brought a part of a sum due from him for revenue, and who promised the balance on a later date. On the Tahsildar pressing for immediate payment in full, the accused abused him, and an order being given for his arrest, he resisted such arrest. It was held that the interruption suffered put an end to the judicial proceeding, after which the Tahsildar was not sitting in any stage of a judicial proceeding, and that therefore the conviction of the accused under this section was unsustainable.[3]

2539. What Amounts to Insult or Interruption.—Contempts of Court consist in the intentional insult or interruption in the Court of a judicial proceeding. In dealing with the question of intention, something has been said about what is not an insult or interruption. (§ 2540). To which it may be added, that a person merely prevaricating while giving evidence,[4] though frequently warned against it,[5] or reluctantly speaking the truth, or retracting statements,[6] or giving inconsistent or incoherent replies,[7] cannot be condemned for contempt of Court, because he takes up the time of the Court. Nor does the mere fact, that a person refused to reply to a question put by the Court, and marching out of Court without answering the question whether he had any witness, amount to that offence.[8]

2540. So a person who leaves the Court when he is ordered to remain[9] or refuses to leave when he is so ordered,[10] and even listens to the evidence which he is ordered to keep away from, or makes signs from outside to a prisoner on his trial[11] cannot be punished for an offence under this section. So a person absenting himself from Court in disobedience to a summons[12] may be punished otherwise for the disobedience, but it is not contempt, within the meaning of this section.

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(1) 22 W. R. 10.
(2) 1 Weir 214, *Salig Ram*, (1897) P.R. No.16.
(3) *Sulaiman Khan*, (1881) P. R. No. 40.
(4) *Akba*, 4 B. H C. R. 6; *Pandu*, 4 B. H. C. R. 7; *Jaimal*, 10 B. H. C. R. 69, the headnotes of the two earlier cases were held to be wrong, and it was said that it could not be generally stated that no amount of prevarication was sufficient to constitute that offence If the prevarication was merely intended to evade replies to inconvenient questions it would not amount to contempt whatever the interruption caused to the Court; on the other hand, if it was carried to the length of amounting to refusal to answer question, it is punishable under s.179.
(5) *Pandu*, 4 B. H. C. R. 7.
(6) (1862) 1 Weir 214.
(7) *Chota Hurry Pramanick*, 15 W. R. 5; *Har Narain*, 84 I. C. 706, (1925) A. 239.
(8) *Abdul Rahiman*, (1899) 1 Weir 218.
(9) (1870) 1 Weir 215.
(10) *Papa Naiken*, (1882) 1 Weir 217.
(11) (1870) 1 Weir 214.
(12) (1878) 1 Weir 215; *Abdul Rehman*, (1866) P. R. No. 75-A.

A person using vulgar language in Court may or may not be guilty of contempt for it depends upon his intention. If he used it only for the purpose of emphasis it is no insult to the Court so as to amount to an offence under this section.[1] But where a witness persisted in chewing betel while being examined, his conviction for this offence was held to be right.[2] So persisting in putting irrelevant and vexatious questions to a witness after warning, might amount to a contempt.[3] So mock-bidding at a Court-auction, with the knowledge that he is not in a position to deposit the earnest-money would be contempt punishable as much under this section as under section 184 or section 186.

2541. It has been remarked before, that a persistent refusal to answer questions put to a witness does not amount to contempt.[4] The authority upon which this statement rests was explained by the same Court in two subsequent cases[5] to be insufficient to support a general statement that, to whatever extent carried, a prevarication does not amount to a contempt under this section. This does not appear to be the trend of the earlier cases; nor indeed, can it be laid down as an inflexible rule that prevarication can under no circumstance amount to contempt. The true rule appears to be, that prevarication cannot be construed to be a contempt, where the intention of the witness was to evade giving replies to inconvenient questions and not to interrupt the Court. In such a case prevarication may be carried to a criminal stage, but the offence then committed would be one under section 179 rather than under this section. If, however, the prevarication was directed against the Court, as if the intention was to insult or interrupt the Court, the offence would then, of course, be under this section.[6] Such was held to be the case where the accused threatened a witness while under examination[7] or refused to answer questions unless an application made by him for stay of the proceedings was granted,[8] or, worse still where the accused when asked to make a statement under s. 342 of the Criminal Procedure Code called the judge "a prejudiced judge"—an expression which he declined to withdraw after he had time for reflexion.[9] It is of course no contempt under this section for a person to marry a girl in disobedience of the order of the court.[10]

2542. Other Contempts Not in Facie Curiae.—In the preceding discussion contempts of two kinds have formed the subject of discussion those dealt with under the section, and those committed not *in facie curiae*, but which under the Common Law are still punishable as contempts. The latter do not find a place in the Code, but that they are contempts cannot be denied. For this purpose Law distinguishes between Courts of record and inferior Courts. The former possess unlimited jurisdiction in matters of contempt, which is independent of the Statute law[11] (§§ 83-84). In what cases that jurisdiction would be exercised may be briefly set out here. In England, a contumacious disobedience of the order of the Court amounts to contempt, and is punishable as such.[12] Where such disobedience is confined to non-attendance in obedience to a summons or order, the contempt is punishable under section 174. Where it consists of intentional resistance or obstruction to the taking of property it is punishable under ss. 183 and 184. In fact several offences described in the preceding sections under this chapter, are what would be designated contempts in English Law. But over and above those offences, there still remain some which are treated of as contempts, though they do

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(1) *Bhavani Madaliyar*, (1888) 1 Weir 216; *Jit Singh*, (1912) P. W. R. (Cr.) 23, 15 I. C, 983.
(2) *Sardharilal*, (1883) 1 Weir 217.
(3) *Azeemoola*, (1867) P. R. No. 44.
(4) *Akba*, 4 B. H. C. R. 6; *Pandu*, 4 B. H. C. R. 7; *contra* in *Gopi Chand*, (1918) P.R. 14, 46 I. C. 36.
(5) *Jaimal*, 10 B. H. C. R. 69; s. c. (1873) B. U. C. 69, *Deoji*, (1889) B. U. C. 473.
(6) *Gopi Chand*, (1918) P.R. 18, 46 I. C. 36
(7) *Allu*, 45 A. 272.
(8) *Gopi Chand*, (1918) P.R. 18, 46 I.C. 36.
(9) *Venkat Rao*, 46 B. 973.
(10) *Kaulashia*, 12 Pat. 1.
(11) *Banks and Fenwick*, 26 C. L. J. 401, 45 I. C. 113; *Satyabodha*, 24 Bom. L. R. 92 69 I. C. 84.
(12) *Newell* v. *Newell*, (1896) W. N. 160; *Fairclough* v. *Manchester Ship Canal Co.*, (1897) W. R. 7 (13).

not fall within the category of any offence described in the Code. To such class belong offences such as comments upon a case *sub judice*,[1] tending to influence the result of proceedings.[2] Comments upon the evidence given in a case while it is still pending, are contempts.[3] So comments in a newspaper with reference to the impending examination of the directors of a banking company in liquidation, to the effect that "if they are compelled to make a full statement of the affairs of the bank, we shall have some interesting revelations" were held to be contempt, in view of the fact, that the newspaper concerned had published a series of articles against the directors previous to the filing of the petition, and they had been inspired by the petitioning shareholder.[4]

2543. So it is contempt to animadvert upon the conduct of a judge in a manner inconsistent with the respect due to him, as where he is charged with having neglected the commonest considerations of prudence and decency and is compared with two of the most notoriously unrighteous judges,[5] or where he is charged with open partiality, malice or vindictive disregard of truth and justice, with cowardly submissiveness to the behests of the executive, or indeed, when the comment ceases to be a fair comment upon the administration of justice, and deteriorates into a libel upon the judge.[6] It is contempt to publish in a newspaper an account of proceedings which, a Judge had decided, should not be disclosed, by determining to hear the case *in camera*.[7] The intimidation or subornation of persons cited or likely to be cited as witnesses in a case is contempt;[8] so it is contempt in a solicitor of one party to abuse the solicitor of his adversary immediately after leaving the Court, and while they were on their way from the Judge's room to the entrance gate of the building.[9] Of course, the use of violent and abusive language towards a person serving the process of the Court is clearly contempt.[10]

2544. Jurisdiction of High Courts.—Before the enactment of the Contempts of Courts Act[11] it was held that while the High Courts as Courts of Record possessed jurisdiction to punish for contempt of their own Court, they had no jurisdiction to punish for contempt of the inferior Courts.[12] Such jurisdiction is possessed by the High Court of England which it ascribes to the common law.[13] The Contempt of Courts Act, 1926, now extends the same jurisdiction to all the High Courts including the Chief Court.

2545. Other Contempts.—The law on the subject of contempt of Court is partly statutory and partly stated to be supported by common law. The statutes provide for certain specific acts of contempt in ss. 178, 179, 180 and 228; and the refusal to produce a document punishable by s. 175, in all of which cases the Court may either deal with the offender summarily or commit him for trial, or if the Court concerned is a Judge of the High Court, he may try him himself.[14] Apart from these specific acts there may arise other cases of contempt which tend to interfere with or prejudicially affect the trial. The High Courts have been statutorily constituted Courts of Records (s. 1 of Government of India Act, 1915), which implies jurisdiction in them to punish for contempt of themselves.[15]

2546. The question arises whether they possess the power to punish for, contempt of the Courts subordinate to them. The question has been decided in

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(1) *Castro*, L. R. 9 Q. B. 219; *Dermott*, L.R. 1 P. C. 260, L. R. 2 P. C. 341.
(2) *Daw* v. *Eley*, L. R. 7 Eq. 49.
(3) *Tichborne* v. *Mostyn*, L. R. 7 Eq. 55n.
(4) *In re Crown Bank*, 44 Ch. D. 649.
(5) *Surendra Nath Banerjea*, 10 C. 109 P. C.
(6) *Gray*, (1900) 2 Q. B. 36.
(7) *In re Martindale*, (1894) 3 Ch. 193.
(8) *Welby* v. *Still*, (1892) W. N. 6; *Bromilow* v. *Philips*, (1891) W. N. 209.
(9) *In re Johnson*, 20 Q.B.D. 68; discussing Ex Parte *Witton*, 1 Dowl. (N. S.) 805.
(10) *Price* v. *Hutchinson*, L. R. 9 Eq. 534.
(11) Act XII of 1926.
(12) *Balkrishna*, 46 B. 592 (Judges differed on the point mentioned in the text, Shah, J. supporting that view, *contra* in Macleod, C. J.).
(13) *Parke*, (1903) 2 K. B. 432; *Davies*, (1906) 1 K. B. 32.
(14) S. 487, Criminal Procedure Code (Act V of 1898).
(15) *Per* Jenkins, C. J., in *Legal Remembrancer* v. *Matilal Ghose*, (1913) 41 C. 173 (181, 209, 215).

the negative by a Special Bench of the Calcutta High Court,[1] who have limited the Court's jurisdiction to contempt of itself and not extending, at any rate, beyond the proceedings pending in the subordinate Court which might in the ordinary course come before it either for original or appellate trial. But they added that though the assumption of this extended jurisdiction was conceivable on the ground that it was implied, they nevertheless emphasised that their view was an *obiter* and open to reconsideration.[2]

2547. This omission, has since been made good by an Act[3] enabling the High Court of Judicature to punish contempts of subordinate Courts and to define and limit the powers exercisable by such High Courts and Chief Courts in punishing contempts of Court.[4]

Personation of a Juror or Assessor.

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Voluntarily***—s. 39.]

2548. Analogous Law.—This section is new, and did not exist in the Bill as originally drafted. It is directed towards punishing false personation of an assessor or juror for which no provision existed elsewhere. The offence consists of causing or suffering to be returned, empanelled or sworn as a juror or assessor to which one *knows* one is not entitled by law. Persons who are merely *exempt* from liability to serve as jurors or assessors under section 320 of the Procedure Code are not within the rule, for exemption is a privilege and not a disqualification,[5] so that such persons cannot be punished under this section if they permit themselves to be returned as jurors or assessors.

2549. The word "returned" refers to the preparation of the list "empanelled" to being summoned to take part in the trial of a case, and jurors and assessors sworn or selected become members of the Court of which the presiding officer is the judge. The offence applies to a fraudulent personation of another as a juror or assessor for the purpose of taking part in the trial of a case, which may, if permitted, lead to the corruption of justice.

2550. Procedure and Practice.—This offence is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable, but not compoundble, and is triable by a Presidency Magistrate or a Magistrate of first class.

2551. Proof.—The points requiring proof are :—

(1) That the accused was—
  (*a*) returned; or
  (*b*) empanelled; or
  (*c*) sworn as a juryman or assessor.
(2) That he was not entitled by law to be so returned.
(3) That he intentionally caused or knowingly suffered himself to be so returne etc.
(4) That he did so by personation or otherwise.
(5) That he then knew that he was not so entitled to be returned, etc.

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(1) *Legal Remembrancer* v. *Motilal Ghose*, (1913) 41 C. 173; *contra* in *Venkat Rao*, 21 M. L. J. 832; followed *Mer* MacLeod C. J., in *Balkrishna*, 46 B. 592 (605) Shah, J., dissenting, p. 627.

(2) *Ib.*, *obiter* at pp. 215, 216; citing *extra* *Lefrey*, L. R. 8 Q. B. 134; *Brompton* (CC) *Judge*, (1893) 2 Q. B. 195, (200).

(3) Contempt of Courts Act (Act XII of 1926.)

(4) *vide* Preamble, to Contempt of Courts Act, (Act XII of 1926).

(5) S. 324 (5), Cr. P. C.; M. H. C.; Pro., 15th Aug. 1873.

Or instead of (3), (4) and (5) prove :—

(3) That he knew that he had been returned, etc., contrary to law.

(4) That he nevertheless voluntarily served in that capacity.

2552. **Charge.**—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That on or about———day of———you———intentionally caused (*or* knowingly suffered) yourself to be returned (or empanelled or sworn) as a juryman (*or* assessor) in case No.———of———tried by———by personating *A B* when you knew that you were not entitled to be so returned [(*or* empanelled or sworn) or you knowing yourself to have been so returned (empanelled or sworn) contrary to law, voluntarily served on such jury (*or* as such assessor)], and that you thereby committed an offence punishable under s. 229 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2553. Principle.—The object underlying this section is to prevent the perversion of justice by excluding interested persons from coming forward to serve as jurors or assessors. The former being the sole judges on questions of fact can materially influence the administration of justice, and it may lead to the failure of justice, if in their composition, private interest of partizanship were suffered to have a scope.

2554. Personation of a Juror or Assessor.—The offence of personation of a juror or assessor possesses the features common to other personations,[1] the gist of the offence consisting in the practising of fraud either on the public or on the administration of justice. The section does not punish unauthorized acts, but only acts intentional and designed. It does not punish those who, though exempt from service as jurors or assessors,[2] waive their privilege and permit themselves to be so returned.[3] Nor does it extend to the objections which the accused is permitted to take under section 278 of the Procedure Code. These are cases of personal disqualifications to serve in a case which do not affect the administration of justice, and do not fall within the reason of the rule, which is directed only against one who knowing that he is not *entitled by law* to serve as a juror or assessor intentionally or knowingly causes or suffers himself to be so returned. Such a case may arise where a person falsely personates a qualified juror or assessor, or where one gives himself out as a juror, though in fact he is not one. In such a case, if it was a case of mistaken impression, there is no offence because there was neither intention nor knowledge. If it was deliberate, law presumes that the representation was attempted or made from corrupt or improper motives —for no other supposition is possible—and it punishes the act accordingly.

2555. The section deals with the fraud of two kinds : (*a*) that in which the accused had guilty knowledge *before* he was returned etc. ; and (*b*) that in which he has guilty knowledge *after* he had been returned, etc. In the one case, the accused procures his illegal return ; in the other case his return may have been made through an accomplice, and there may then be no evidence of previous knowledge, though the mischief aimed at may be the same. The section, therefore, makes it a crime whether the accused procures a false return or knowingly takes advantage of it.

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(1) *E.g.*, of a soldier, s. 140 ; of a public servant, ss. 170, 171 ; of another for the purpose of a suit, s. 205.

(2) S. 320, Cr. P. C.

(3) S. 324 (5), Cr. P. C.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMP.

2556. Topical Introduction.—At the time the Code was enacted, there were numerous coins of several Princes varying in quality and fineness, but the authors of the Code recommended that Government coins should be protected first and then the British Coins. They did not then suggest any measures to protect stamps or currency notes ; but the chapter was afterwards revised to include stamps, which are the subject of the closing sections of this chapter. (ss. 255–263-A).

The Counterfeiting of notes falls under the general heading of forgery of valuable securities. (Ch. XVIII).

"Coin" defined.

230. Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

"Queen's Coin."

Queen's coin is metal stamped and issued by the authority of the Queen, or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money; and metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

Illustrations.

(*a*) Cowries are not coin.
(*b*) Lumps of unstamped copper, though used as money, are not coin.
(*c*) Medals are not coin, inasmuch as they are not intended to be used as money.
(*d*) The coin denominated as the Company's rupee is the Queen's coin.
(*e*) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is Queen's coin, although it is no longer so used.

2557. Analogous Law.—The whole of this section has undergone a change in consequence of subsequent amendments. The word coin, as originally enacted, was intended to include the metal used for the time being as money. But as the Government call in coins, such coins, it was apprehended, would be excluded. The amendment in 1872[1] was intended to include them also. The other amendment was intended to prevent the counterfeiting of any coin whether issued by the authority of Indian Government, Indian States or a foreign power.[2] Illustration (*e*) was also added by the same Act.[3] Murshidabad rupees stand on the same footing as Farukhabad rupees.[4]

Metal Tokens Act, 1889.

2558. The definition of "coin" and "Queen's coin" in this section must, so far as regards this country, be read as subject to the provisions of the Metal Tokens Act[5] which prohibits the making of copper or bronze coins or of any other metal or mixed metal, whether stamped or unstamped, intended to be used as money, except by the authority of the Governor-General in Council.[6] It also declares the making of any such piece in contravention of s. 3, to be a cognizable offence. Section 6 reserves to the Governor-General in Council the power to prohibit or restrict by a notification the bringing by sea or by land into British India any

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(1) *See* Indian Penal Code Amendment Act (Act XIX of 1872) s. 1.
(2) Indian Penal Code Amendment Act (VI of 1896). For reasons which led to this amendment, *see* Penal Law (4th Ed.) p. 1265, § 2431.
(3) Act VI of 1896, s. (1) (2).
(4) *Devi*, 28 A. 62; *Gopal*, (1903) A. W. N. 115: *Baman*, (1903) P. R. No. 1.
(5) Act I of 1889.
(6) Act I of 1889, s. 3.

such pieces of metals as are mentioned in section 3. And then follows the following provision :—

Prohibition of receipt by local authorities and railways as money or metal which is not coin.

"8. (1) No piece of metal which is not coin as defined in the Indian Penal Code shall be received as money by or on behalf of any railway administration or local authority.

"(2) If any person on behalf of a railway administration or on behalf of a local authority, or on behalf of the lessee of the collection of any toll or other import leviable by a railway administration or local authority receive as money any piece of metal which is not such coin as aforesaid, he shall be punished with fine which may extend to ten rupees."

2559. What "Coin" Now Includes.—As now amended, the word "coin" as here defined does not merely mean the coin current in British India. It includes any coin issued by any State if only it is for the time being used as money. In this sense the term "coin" means only "current coin." A coin obsolete or no longer in use is not then "coin" within the meaning of this definition. For example, the gold-mohur of the reign of Shah Jahan or silver rupees of that reign are not coins within the meaning of this term, for whatever their face or intrinsic value, they are not money for they cannot be used as money.[1] Now coin may be used as money in one or two ways, either because it is a legal tender, or because its use has become customary. Coins are ordinarily made current by an official proclamation, but a proclamation in general cases is not necessary, and a prosecution for coining need not be proved.[2] If it is legal tender it is a good legal discharge of an obligation; if its use was merely customary, it may not have that effect, but it is nevertheless money if only it is in circulation as a medium of exchange. It is not necessary that it should pass at an absolutely fixed value, but it is necessary that some value should attach to it as coin, as distinguished from the intrinsic value it possesses as a lump of metal.[3] Such are, for example, *Kaldar* and *Jeypur* Mohars which are stated to pass current in certain parts of the country.[4] As such, they are "for the time being used as money" however limited the area in which they may have been so used.

2560. The test of a coin is its common usage or notoriety. If the services of a numismatist have to be requisitioned to determine its face value, it ceases to be a coin, whatever value it may otherwise possess. A coin must be capable of being used as money, which implies that it must be accepted, as such, as a medium of exchange and as a general standard of value: one test of whether it is money or not is the possibility of taking it into the market and obtaining goods of any kind in exchange for it.[5] The fact that a shroff would purchase a coin and give an anna or two more for the sake of the impression or design does not make it a coin. For, all old coins possess such value with coin collectors. Under the definition, as here given, it follows that a coin may be no coin, though it may still be a Queen's coin. For a coin ceases to be a coin if it has ceased to be used as money, though it may continue to be a Queen's coin as defined in the next paragraph.[6]

2561. What is Included in Queen's "Coin."—The word "coin" is a *genus* of which the "Queen's coin" is a species limited to the coin stamped and issued by the authority of (*i*) the Queen, or of (*ii*) the Government of India, or of (*iii*) the Government of any Presidency, or of (*iv*) any Government in the Queen's dominions. But inasmuch as a Queen's coin remains as such notwithstanding that it may have ceased to be used as money, and coin must be used for the time being as money, it follows that a Queen's coin is not necessarily coin, and in this respect the former is a narrower term than the latter. It may then be that a Queen's coin still remains a Queen's coin though it ceases to be a coin (§ 2559). For instance, rupees of a certain year withdrawn from circulation cease to be coins

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(1) *Kushhali*, 29 A. 141.
(2) *Bapu*, 11 B. H. C. R. 172.
(3) 1 East P. C. 142.
(4) *Kunj Beharee*, 5 N. W. P. H. C. R. 187.
(5) *Ib.*
(6) *Bapu*, 11 B. H. C. R. 172.

within the definition of the term, but their counterfeiting would be punishable under section 232.[1]

2562. The test whether a piece of metal is or is not Queen's coin depends upon whether it is issued by the authority of the King or of the Government of India, or of a Presidency or of any other Government in the King's dominions. It is not necessary that the King's coin should be minted at the Government mint. They may, indeed, be made anywhere, but their issue alone must be authorized by the Government as specified in the section. For example, the Murshidabad rupees of the nineteenth year of the Emperor Shah Alam, known as *Sikkah* rupees were at one time used with the sanction of the Government of British India for the time being as money—they were then "Queen's coin," within the meaning of this section.[2] Similar *Sikkah* rupees continued to be struck at the mints at Fatehgarh, Farukhabad, Benares, Saugor and Calcutta till 1835, in the September of which year the East India Company established the English coinage with the head of King William IV in place of the name of the Mogal Emperor and the older issues were then ordered to be suppressed. Such rupees having been issued under the authority of the Government were then Queen's coins, and they remained to be so despite their subsequent suppression.[3]

231. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting coins.

***Explanation.*—A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.**

[***Counterfeit***—s. 28.]

2563. Analogous Law.—The term 'counterfeiting' is here used in the sense in which it is defined in section 28. Counterfeit coin means coin not genuine, but resembling or apparently intended to resemble or pass for genuine coin, and includes genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination.[4] The money charged to be counterfeited must resemble the true and lawful coin, but the resemblance need not be perfect; but such as may in circulation ordinarily impose upon the world.[5] Thus a counterfeiting with some small variation in the description, effigies, or arms done probably with intent to evade the law, is yet within it, and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin.[6] In England, it was at one time provided[7] that it did not amount to counterfeiting, where the imitation of the real coin had not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated. It was so held where the impression of a half-guinea was forged on a piece of gold not round enough to pass current as such.[8] But in this respect law has been since altered, and now the offence of counterfeiting is held to be complete although the coin be not in a state fit to be altered, or the counterfeiting not finished or perfected.[9] It will be seen that these provisions have been incorporated in section 28 of the Code which defines counterfeiting, a term which has been there defined for the purpose of this Chapter.

2564. Procedure and Practice.—This offence is cognizable but warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

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(1) *Devi*, 28 A. 62; *Gopal*, (1903) A. W. N. 115; *Baman*, (1903) P. R. No. 1.

(2) *Baman*, (1903) P. R. No. 1; *Devi*, 28 A. 62, in which the Court gave the early history of Indian currency.

(3) *Gopal*, (1903) A. W. N. 115; *Devi*, 28 A. 62.

(4) Steph. Dig. Cr. L., Art. 408.

(5) 1 Hale P. C. 178, 184.

(6) 1 East P. C., c. 4, s. 13, p. 164.

(7) 2 Will, 4, c. 34.

(8) *Varley's case*, 1 Leach 76.

(9) 24 and 25 Vict., c. 99, s. 30.

2565. Proof.—The points requiring proof are :—

(1) That the accused counterfeited, or performed any part of the process of counterfeiting.
(2) That the thing counterfeited or intended to be counterfeited was a coin.
(3) That the accused did as in (2) knowingly.

2566. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——you——counterfeited (*or* knowingly performed any part of the process of counterfeiting, to wit——) a coin to wit——(or a King's coin to wit——) and that you thereby committed an offence punishable under section 231 (*or* s. 232, *in case the coin be the King's coin*) of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

2567. Counterfeiting Coin.—In order to constitute an offence under this section, it is in the first place necessary that the counterfeiting should be of a coin as defined in the last section. If it is counterfeiting what is not a coin, *e.g.*, a war medal, it is not an offence under this section, which is intended only to protect the currency. Now as the term "coin" is in the last section restricted to apply only to a current coin, it follows that there can be no counterfeiting of an old or obsolete coin, or a coin which though once current has ceased to be so. For instance, there can be no counterfeiting of a coin of the time of the Emperor Akbar,[1] because though once current, they have ceased to be so. The only exception to this rule is that already noticed while discussing the meaning of the term "Queen's coin," in which case the question of currency is immaterial. Of course, a person who counterfeits a rare old coin and passes it off as a genuine specimen, would be undoubtedly guilty of cheating, only his act is not an offence under this section. In order then to see whether the offence of an accused falls under this section, the Court has first to see whether the coin fabricated was current anywhere ; if it was not, there is no offence under this section. For this purpose it is not necessary that the coin should be a legal tender, for all that is required is that it should be for the time being used as money. Now, as has been already remarked, this may be because it is so declared by Government, or because it is customary. As an example of the latter, may be mentioned the Kuldar and Jeypur Gold Mohurs which, though not a legal tender, are still used as money in certain parts of the country[2] ; so were certain copper pieces struck off by the Nawab of Loharu, which were used by merchants in various parts of the country, though their issue was unauthorized.[3]

Intention to Deceive Essential.

2568. As counterfeiting implies intentional deception,[4] it follows that intention to practise deception is the first ingredient of the crime. But how is this intention to be proved? One way of proving it is, from closeness of imitation, as explained in section 28.[5] So where the accused had made in German silver, copies of a Nepalese coin for purposes of ornament and had intended that they should be used with hooks attached, which he had omitted to attach, the Court convicted him of this offence and sentenced him to imprisonment till the rising of the Court.[6] But as pointed out by the Punjab Court, the gist of the offence is the intention to practice deception by making and causing of wrongful loss or wrongful gain which is lacking in coins made merely for ornaments.[7]

2569. Removing Solder from Coins.—A converse case arose where the accused converted certain *Kundedar* rupees by removing their *Kundas* or hooks and removed all traces of the hooks, his intention being to restore the rupees to their normal condition. It was held that this was not counterfeiting, since there was

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(1) *Bapu Yadar*, 11 B. H. C. R. 172 : *contra* in *Kandamuru Annappa*, (1883) 1 Weir 221.

(2) *Kunj Peharee*, (1863) 5 N. W. P. H. C. R. 187.

(3) *Premsookh Das*, (1870) P. R. No. 38.

(4) S. 28.

(5) S. 28, Expl. 2.

(6) *Quadir Baksh*, 30 A. 93, S. 95, I. P. C.

(7) *Shumsoodeen*, (1868) P. R. No 26

no intention to cause wrongful gain or wrongful loss and no practice of deception.[1] Indeed, even where deception is practised, it does not necessarily follow that the intention to deceive was present at the time of counterfeiting. It was so held in a Punjab case, where the accused had in his possession a double pice which he quicksilvered so that it resembled a rupee, and he then delivered it to one *K* to get it changed as a rupee. If the idea of using the white coin as a rupee was an afterthought the accused might be convicted of abetting *K* to cheat the person to whom he was sent with the counterfeit rupee.[2] But in view of Explanation 2 since added[3] to section 28, by the Metal Tokens Act, 1889, this view is now no longer tenable, since deception of one kind may be easily turned into a deception of another kind, and therefore the Code makes no distinction between them. But it is always open to the accused to show that the deception he intended to practise was of one kind rather than of the other kind. Such indeed was the defence made by Quadir Baksh, but in view of explanation 2 of section 28, it did not prevail with the Court. It would then seem that in such cases, the thing of paramount importance is the closeness of imitation. The closer the imitation the greater is the presumption of guilt, and though in theory it is always open to the accused to profess his innocence, a stage may arise in the imitation when the Court is irresistibly driven to the belief that the imitation was intended only for the purposes of fraud and not for mere display.

Quantum of Imitation Necessary.

2570. This raises the question how much imitation amounts to counterfeiting. It is, of course, of the essence of counterfeiting, that the counterfeit must bear some such resemblance to a genuine piece of coin as to show that it was intended to resemble and pass for it though the imitation may be imperfect or the process incomplete.[4] The question, whether the resemblance, in a given case, is such as to amount to counterfeiting, is then a question of fact which the jury are to judge upon the evidence before them—the rule being that the resemblance need not be perfect but such as may in circulation ordinarily impose upon the world.[5] There may be counterfeiting with some small variation in the design, inscription, effigies or arms, done probably with intent to evade the law. So is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin.[6] And the offence may be complete where the counterfeit money is made to resemble coin, the impression on which has been worn away by time, if only the resemblance is such as might very probably be accepted by persons for a good coin.[7]

2571. In fact, the offence consists in the deception, and if one blank piece of metal is so forged as to resemble another which is current as a wrong coin, there is counterfeiting, the want of impression being probably the more conducive to the deception.[8] Counterfeiting may be done as much by forging a new coin of a baser metal, as by sweating or tampering with the genuine coin. The coating of quicksilver given on a piece to make it resemble an eight-anna silver piece, is a familiar example of such counterfeiting. So where a genuine sovereign had been fraudulently filed at the edges so as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin, the coin was held to be false and counterfeit.[9]

2572. The extraction of gold or silver by the use of acids known as sweating is another method of counterfeiting coins. In all such cases, the coins counterfeited were colourable imitations of the original. Where, however, they are so different in size, shape or design that no one could be ordinarily deceived by the imitation, there is no counterfeiting. For this purpose, the test is the

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(1) *Muhammad Husain*, 23 A. 420.
(2) *Miharban*, (1884) P. R. No. 9.
(3) Metal Tokens Act, (1889).
(4) S. 28, Expl. 1: (1883) Weir 219.
(5) 1 Hale, P. C. 178, 184, 211, 215.
(6) 1 East, P. C., p. 4 s. 13, p. 164.
(7) *Wilson's case*, 1 Leach 285.
(8) *Welsh*, 1 Leach 364; following *Wilson's case*, 1 Leach 285.
(9) *Hermann*, 4 Q. B. D. 428.

test of the man in the street and not of an expert from the Mint. For those who practise deception do so on the common people who use money as a medium of exchange and the only question in such cases, therefore, is whether they are likely to be deceived by the imitation. Where the current coins are circular discs of stamped metal the imitation must, at least, be round, to amount to counterfeiting. Where, therefore, the impression of money was forged on an irregular piece of metal not rounded without finishing it, so as not to be in a state to pass current, there was held to be no offence though the accused may have actually attempted to pass it in that condition.[1] So a person, fraudulently representing to an ignorant person a metal as being money, could not be said to have attempted to pass a counterfeit coin.[2] In an English case, the accused attempted to pass off a medal for a half-sovereign, which it resembled; on the obverse there was the head of the Queen as in a half-sovereign, but the legend was entirely different. The metal was querled but the querling was round and not square. While a witness had deposed so far, he accidentally dropped the metal and it was lost. There was no evidence as to what it contained on the reverse, but the Court held that there was evidence that the metal resembled a half-sovereign in size, colour and figure.[3]

Performing any Part of the Process of Counterfeiting.

2573. Where the counterfeiting, crude or perfect, is complete, the question to be condsidered is comparatively simple. But, somewhat complicated questions may arise where the offence charged is "knowingly performing any part of the process of counterfeiting coin." This evidently means something more than a mere preparation for counterfeiting, such as the collection of tools and materials. It means the reaching of some stage of the process itself, that is to say, a stage which is necessary for the process of counterfeiting. It must be an act immediately connected with the offence, and the accused could have no other object than to commit the offence.[4] The phrase "performing any part of the process of counterfeiting" would have given rise to much comment, but in view of the more general provisions of section 235, the Court felt safer to charge the accused under both the sections and when it is so, the question loses its intrinsic importance, but in such case, the accused must be convicted only under one section.[5]

Counterfeiting Queen's coin.

232. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Counterfeit*—s. 28. *Queen's coin*—s. 230.]

2574. Analogous Law.—This section only provides an enhanced penalty for an offence, described in the last section, when it is committed in respect of the Queen's coin. The protection which law gives to the coins of the realm is necessarily greater, and the offence is, therefore, necessarily visited by heavier penalties.

2575. Procedure and Practice.—Like the last section, this offence is cognizable and warrant should ordinarily issue in the first instance. It is non-bailable and non-compoundable and is triable exclusively by the Court of Session. Separate sentences cannot be passed on a person convicted of this offence and of s. 235, *i.e.*, for counterfeiting King's coin and having in his possession implements and materials used for counterfeiting such coin.[6]

2576. Proof.—The points requiring proof are those mentioned under the last section (§ 2565), in addition to which it must be proved that the coin counterfeited is the King's coin.

2577. Charge.—The form is set out under the last section (§ 2566).

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(1) *Varley*, 1 Leach 76.
(2) (1863) 1 Weir 219.
(3) *Robinson*, 34 L. J. M. C. 176.
(4) Robert's Dears, C. C. 539.
(5) *Hayah*, (1904) P. R. No. 14.
(6) *Bishandas*, 71 I. C. (L.) 700.

2578. Counterfeiting King's Coin.—All the elements necessary to establish the offence of counterfeiting, as described in the last section, must be present in a case arising under this section. In addition to this, the coin counterfeited must be shown to be the King's coin. This is not difficult where the counterfeiting is complete, but it may not always be possible where the act only amounts to the performance of any part of the process of counterfeiting. In such a case, the question would be—did the accused intend to counterfeit a coin, and was the coin to be counterfeited the King's coin? Of course, if the coiner is found in possession of his moulds, coining tools and materials, they may be enough to lead to a conclusion as to what was his intention. Otherwise, the only section under which a conviction is possible is section 231.

2579. As has been remarked under the last section, where counterfeiting is not complete, the accused may be charged for performing any part of the process of counterfeiting, or in the alternative for being in possession of coining instruments. In such case, the accused could only be convicted of one or the other of the two offences, and not of both, for if he is convicted under this or the last section, he could not then be convicted under section 235 for having in his possession implements and materials, as the possession of such implements and materials was a part and parcel of the transaction of counterfeiting, for which a second sentence would be illegal.[1]

For a further commentary under this section, *see* the last section (§§ 2567-2573).

233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Making or selling instrument for counterfeiting coin.

[*Reason to believe*—s. 26. *Counterfeiting*—s. 28.]

2580. Analogous Law.—This section and the next deal with the same offence, only the next section provides an enhanced penalty as the coin affected is the King's coin. In this respect, this section bears the same relation to the next as section 231 bears to the last section.

2581. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of first class. In the case of a previous conviction, the Magistrate may have to commit the accused to Session as required by section 348 of the Procedure Code.

2582. Proof.—The points requiring proof are :—

(1) That the accused made, or mended, or performed some part of the process of making or mending the die or instrument, or that he bought, sold or disposed of it.

(2) That he did so—

(*a*) intending or knowing that such die or instrument might be used for the purpose of counterfeiting coin ;

(*b*) or that he knew, or had reason to believe that the same was intended to be used for such purpose.

2583. Charge.—*See* under next section (§ 2588).

2584. For a commentary under this section reference should be made to §§ 2589-2591 under the next section.

234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting the Queen's coin, shall be

Making or selling instrument for counterfeiting Queen's coin.

(1) *Hayah,* (1904) P. R. No. 14.

punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Reason to believe***—s. 26. ***Counterfeiting***—s. 28. ***Queen's coin***—s. 230.]

2585. Analogous Law.—The offence in this section is an aggravated form of an offence described in the last section, the aggravating circumstance being that the coin affected is the King's coin. The provisions of this section, as of the last, are taken from an English Statute, the provisions of which will be found set out under the next section.

2586. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is exclusively triable by the Court of Session.

2587. Proof.—All the points mentioned under section 233 must be proved, in addition to which must be proved that the coin counterfeited was a King's coin.

2588. Charge.—The charge should run thus:—

" I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

" That on or about the——day of——at——you made (*or* mended *or* performed any part of the process of making *or* mending, *or* bought *or* sold *or* disposed of) a certain die, exhibit——(*or* instrument) for the purpose of being used (*or* knowing *or* having reason to believe that it was intended to be used) for counterfeiting a coin, to wit——(or a piece of King's coin, to wit——), and that you thereby committed an offence punishable under s. 233 (*or* s. 234 *if the coin be King's coin*), and within my cognizance (*or* the cognizance of the Court of Session).

" And I hereby direct that you be tried (by the said Court) on the said charge."

2589. Making or Mending Instruments for Counterfeiting King's Coin.—This section is distinguishable from the last in that the instrument relates to the counterfeiting of the King's coin. In such case, there must be something from which the Court may legitimately infer that the instruments were not only so intended, but that they were so designed. The fact that the instrument might conceivably serve some other purpose as well, would then be material, for innocence being presumed, the accused's instrument could not be said necessarily to be for counterfeiting King's coin. On the other hand, if such an instrument is found along with other instruments, the use of which is unmistakable, a different inference would then be justifiable. In an English case, the prisoner was found in possession of a number of puncheons made of iron and steel upon which was impressed the obverse of a shilling together with a number of counterfeit shillings the impression on which was too taint to be compared, but which appeared to have been made with the puncheon found, but which, it was shown, could also be used for other purposes, such as making seals, buttons, metals or other things where such impressions were wanted. It was also shown, that the puncheon without the counter-puncheon or matrix was, by itself, incapable of producing the impression. Moreover, the puncheon impressed the device on a shilling without the letters, but these letters were shown never to be impressed by a puncheon at the Mint. In short, the puncheon, as it was, was insufficient to make a new shilling, though it was sufficient to make an old or base shilling current, and upon this eleven of the judges convicted the prisoner, holding that the absence of the letters did not matter if the instrument impressed, a resemblance, in fact, such as was sufficient to impose on the world.[1]

2590. The fact that the instrument, by itself, and without the aid of other machinery was insufficient to perform any part of the making of a coin is again immaterial, for both under the English Statute as well as under the act, this is unnecessary. A collar is, for example, used in coining for milling the coins, but, in order to do so, the coins must be forced through it by machinery, but it is, nevertheless, a coining instrument, though it has to be used in conjunction with other machinery.[2] But, though an instrument may be by itself insufficient to make a coin, it must be an instrument or a die, and not merely a part of one or the other,

(1) *Ridgelay's case*, 1 Leach 189. (2) *Moore*, 2 C. & P. 205.

nor such as is by itself or in conjunction with other machinery or instrument workable. So where the prisoner was found in possession of a mould of a shilling but which had no channel by which the metal ran, Maule, J., directed an acquittal, holding that it required something to make it a mould.[1] But the terms of this section are wider, and in such a case, there would be certainly a conviction under the next section.

2591. Intention Material.—Neither the last section nor this speaks of intention, but this is assumed in the words which require that the making or mending of a die or instrument should be for the purpose of being used for counterfeiting. An innocent maker of a die or instrument cannot, therefore, be punished under this section. So where the prisoner ordered a die-sinker to sink dies which would impress the obverse of a shilling, representing that the dies were required for counters for two whist clubs, but the die-sinker, entertaining suspicions, consulted officers at the Mint, and upon their seeing no objection executed the order. The dies were afterwards used for counterfeiting coins, but the prisoner who had ordered the dies was alone held to be guilty, the die-sinker being held to be an innocent agent.[2]

Possession of instrument or material for the purpose of using the same for counterfeiting coin;

235. Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

If Queen's coin.

and if the coin to be counterfeited is the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Reason to believe*—s. 26. *Counterfeiting*—s. 28. *Queen's coin*—s. 230.]
Possession—s. 27.

2592. Analogous Law.—The provisions of this section, as of the other sections generally, have been taken from the English Law,[3] the present provisions of which as to the offence described and made punishable by this section are as follows:—

Making, mending or having possession of any coining tools.

"S. 24. Whoever, without lawful authority or excuse (the proof whereof shall be on the party accused), shall knowingly make, or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter puncheon, matrix stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin or of any coin of any foreign prince, state or country, of any part or parts of both, or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell or have in his custody or possession, any edger, edging or other tool, collar, instrument, or engine, adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be adopted and intended as aforesaid; or shall make or mend or begin or proceed to make or mend, or shall buy or sell or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine, or machine, to have been used or to be intended to be used for or in order to the false making of counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of

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(1) *MacMillan*, 1 Cox. 41; to the same effect, *Kona Tirumala Reddi*, (1899) 1 Weir 219.

(2) *Bannen*, 1 C. & R. 295; *Harvey*, L. R. 1 C. C. R. 284.

(3) 2 Will. IV, c. 34, s. 10; re-enacted as 24 and 25 Vict., c. 99.

the Court, to be kept in penal servitude for life, or for any term not less than five years[1] or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement."

2593. The following provisions of an older Statute relates to making or having in possession copper coining tools[2]:—

Making or having in possession copper coining tools.

"Whosoever, without lawful authority or excuse, the proof whereof shall be on the party accused, shall knowingly make or mend or begin or proceed to make or mend, or buy or sell or have in his custody or possession any instrument, tools, or engine adopted and intended for the counterfeiting any of the Queen's current copper coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

2594. These two sections deal with the offences described in the last two and this section, that is (*i*) of making or selling coining instruments, (*ii*) when they relate to King's coin, and (*iii*) of being in possession of any such coining instruments. As will be perceived, the sections of the English Statute are more specific and comprehensive than their abridged paraphrase which forms sections 233—235. But they are both intended to meet the same evil, and the close similarity of the language between the two enactments justifies the interpretation of the one with the aid of precedents settled under the other.

2595. In England, a number of cases have been decided on the question as to what constitute puncheon[3] or collar[4] or other coining instrument. The section steers clear of this difficulty by referring to no instrument in particular, but making the offence depend upon possession of any instrument or material for the purpose of using the same for counterfeiting. This would include not only the instruments ordinarily used in coining but also those which may be put to that service by whatever name they might be called.

2596. Both under the English Statute as well as under the Code, the offences depend not upon intention but upon knowledge.[5] If *A* is in possession of coining implements, or makes, mends or sells them to *B*, knowing that *B* will use them for illicit coining, *A's* crime is complete, though *A* may not have been privy to *B's* coining.

2597. Procedure and Practice.—This offence is cognizable and warrant should, ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable and it is triable exclusively by the Court of Session, if the offence relates to the King's coin, otherwise, by the Court of Session, or Presidency Magistrate or Magistrate of first class. In case of a previous conviction, the accused may be committed to the Court of Session, as provided in section 348 of the Procedure Code. As the offence of counterfeiting coin has the effect of not only defrauding public revenue, but also the public, it should be visited with condign punishment.[6]

2598. Proof.—The points requiring proof are :—

(1) That the accused was in possession of an instrument or material,
(2) Which instrument or material was for the purpose of using for counterfeiting coin, or King's coin ; or, the accused knew or had reason to believe that the same was intended to be used for that purpose ;
(3) That the instrument or material was in fact for the purpose of counterfeiting coin, or King's coin.

2599. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

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(1) Three years if the offence was committed before the 25th July 1864, *see* 27 and 28 Vict., c. 47, s. 2.
(2) 2 Will. IV, c. 34, s. 12.
(3) *Ridgelay's case*, 1 Leach 189; 1 East P. C., c. 4, s. 18, p. 171.
(4) *Moore*, 2 C. & P. 205.
(5) *Harvey*, L. R. 1 C. C. R. 284.
(6) *Allah Wadha*, 123 I. C. (L.) 525.

"That on or about the——day of——at——you were in possession of a certain instrument (*or* material), to wit——(*mention it*) for the purpose of using the said instrument for counterfeiting a coin, to wit——(or King's coin, to wit——) (*or* knowing or having reason to believe that the said instrument was intended to be used for the purpose of counterfeiting etc.) and thereby committed an offence punishable under section 235 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session.).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2600. Possession of Coining Tools.—Like the last two sections, this section also punishes a mere preparation as an offence, if the preparation unmistakably points to its being made for counterfeiting coin, or a King's coin, the latter being an offence of much greater severity in accordance with the general policy of the Chapter. The gist of the offence consists in being (*i*) in possession, (*ii*) of tools and materials for counterfeit-coining, or (*iii*) knowing or having reason to believe that the same is intended to be used for that purpose.

2601. What is Possession.—In the first place, there must be possession. The English Statute speaks of possession or custody. But whether it is one or the other, there must be knowledge of its existence, and an intention to exercise power or control over the object possessed. "The mere physical relation arising from the position of the object is insufficient. The possession contemplated is not possession which has never been voluntary; and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact of which he knows nothing, would be valueless. The section, no doubt, also requires in the accused person intention or knowledge as to the use to be made of the objects in his possession, and these might be implied from the nature of the objects themselves. But before that stage is reached, there must be some circumstances indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word "possession." Such indication may arise from the position of the object in a place which is constantly used by the person accused and which could not be overlooked by him, or from the bulk of the object itself, or from any circumstance, such as the looking up of the object, which would point to voluntary and conscious possession.[1] Any other possession would be, as the Roman Jurists remarked, *possessio asinina ut asinus sellum*—such possession as the ass has of its saddle.[2]

2602. Indeed, it is an accepted doctrine of criminal jurisprudence, that whatever may be a man's civil liability, no one can be held criminally liable on possession, when there is no conscious retention— *animus sibi habendi*. So speaking of the possession of the stolen property Melville, J., citing from Best's work on Evidence[3] remarked: "In order to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. The finding of it on the person of the accused, for instance, or in a locked-up house or room, or in a box of which he kept the key, would be fair ground for calling on him for his defence; but, if the articles stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box in which others had access, no definite presumption of the guilt could be made.

2603. An exception is said to exist where the accused is the occupier of the house in which the stolen property is found, who, it is argued, must be presumed, to have such control over it as to prevent anything coming in, or being taken out without his sanction. As a foundation for *civil* responsibility, this reasoning may be correct; but to conclude the master of a house guilty of felony, on the double presumption, *first* that the stolen goods found in the house were placed there by him, or with his connivance, and *secondly*, supposing they even were, that he was the thief who stole them, there being no corroborative circumstances, is certainly treading on the very verge of artificial conviction."[4] Batty, J., applied these observations to the case of a goldsmith prosecuted under this section for being

(1) *Per* Batty, J., in *Hari*, 6 B. L. R. 887 (891).
(2) Savigny on Possession, Bk. 1, s. VII.
(3) S. 212.
(4) *Malhari*, 6 B. 731; followed in *Hari* 6 B. L. R. 887 (890) (Ashton, J., dissentient).

found in possession of a mould, and nine counterfeit rupees. The mould contained an impression of the Queen's head as it appears on a rupee. The room in which it was found belonged no doubt to the accused, but it could have been opened from without, as the door was found to have a slit through which the unfastening of its latch was possible, and the Court thereupon held that though the mould and counterfeit rupees had been recovered from his house, they could not be held to have been recovered from his possession. The same view has been taken in the Punjab, in a case in which the accused was found in possession of a box containing instruments for counterfeiting coin. It appeared that his two other brothers had access to the box, and it was not proved that any property of the accused was in it. It was held that there was no evidence of exclusive possession upon which the accused could be convicted.[1]

2604. Evidence of Possession.—The question whether possession has been sufficiently traced to a person, is a question dependent upon the proved circumstances of each case. In one case, Weeks and two other men and two women were indicted for having in their possession a mould impressed with one side of a half-crown. Weeks was owner of the house which he had occupied for a month, but he was absent when the police raided it. The men attacked the police, whilst the women threw into the fire something, which on examination was found to be a wet mould of a half-crown made of a plaster of Paris. Other materials for counterfeit coining were found in several parts of the house. Thirteen days before, Weeks had passed a bad half-crown, but there was no evidence of its having been made in the mould found in the house. It was held that the evidence as to Weeks' possession was sufficient to justify his conviction.[2]

2605. A somewhat similar view was taken in another case in which on an indictment against the husband, the wife, and a boy, aged ten years, for having in possession a mould on which was impressed the obverse side of a shilling; it appeared that the boy had been apprehended whilst passing a counterfeit half-crown, and on the police going to the house where he said he resided, the husband was found in an upper room, while the moulds and other coining instruments were found in the room below. During the search, the wife came in and destroyed a mould used in counterfeiting shillings. She was found also to possess counterfeit shillings, but her husband had none. It was held by Telford, J., that, as the mould was found in the room occupied by the husband, he must be *prima facie* presumed to be in possession of what the room contained, but it was only a presumption which might be rebutted, and what the jury had to consider was whether the counterfeiting had been carried on there with his sanction. If they were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not, in law, be said to have any possession separate from the husband; but, if they thought that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, she might be convicted. If they thought she broke the mould to screen him from detection, that would not affect the case. Either husband or wife might be convicted on this evidence, but not both. The fact of a wife attempting to break up coining instruments at the time of her husband's apprehension, if done with the object of screening him, is no evidence of possession. As to the boy, it would be going too far to say that he was in joint possession with either of his parents.[3]

2606. The question whether possession in such case should be presumed against the manager of a joint Hindu family, was decided in the case of a goldsmith and his son who maintained a shop, in a verandah of their house in which were found buried some counterfeit coins. The father was convicted of this offence holding that *prima facie* the shop was in his possession. There was evidence that the son ordinarily worked in the shop while the father looked after the cultivation;

Hindu Family and Possession.

(1) *Abdul Majid*, (1903) P. L. R. No. 14.
(2) *Weeks*, (1861) L. & C. 18.
(3) *Boober*, 4 Cox. 272.

whereupon the High Court acquitted the father holding that the presumption was rebutted, and that as regards the son who used the shop, he too was acquitted as, being an open verandah, other persons had equal access to it.[1]

2607. The question whether possession includes also custody, separately mentioned in the English Statute, may perhaps be disposed of on the ground that the term " possession " is wide enough to include both, the only difference being that in the one case the possession is for and on behalf of another, whereas in the other case it is on behalf of one's own self. So the English Statute runs—" Where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having it by himself in his personal custody or possession, but also the knowlingly and wilfully having it in the actual custody or possession of any other person and also the knowingly or wilfully having it in any dwelling house, or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."[2]

2608. Coining Instruments.—The section does not specify any instrument or material as falling into the class of coining instruments, but these have been sufficiently specified in the English Statute quoted before (§ 2592). A mould[3] or a puncheon[4] upon which is impressed the inverted decive of a shilling, a collar of iron for making the edges of coin,[5] a press for coinage[6] are all coining implements. These are *sui generis* coining instruments, but any instrument may become a coining instrument, if there is evidence to show that it was used as such. For instance, a galvanic battery is by itself an indifferent thing, but if it is found with white metal and other things plainly indicating that it was used for coining, and it appeared that counterfeit coins were electro-plated before they were put in circulation, it would, under the circumstances, become a coining instrument.[7] So, as regards materials, plaster of Paris or clay or any like substance cannot by itself be designated a coining material. But if there is evidence that it had been used for making moulds, they become materials for counterfeit coining, within the meaning of this section.

2609. Knowledge Essential.—No man can be convicted of this offence on the mere ground that he was in possession of coining implements, unless it is established at the same time that he had knowledge of their character.[8] The evidence may, of course, be direct or presumptive, but it must be sufficient to convince the jury, not merely that the accused knew that the instruments were counterfeiting instruments but also that they were being used or intended to be used for that purpose.

236. Whoever, being within British India, abets the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Abetting in India the counterfeiting out of India of coin.

[*British India*—s. 15 *Counterfeiting*—s. 28 *Abets*—s. 107 *Coin*—s. 230]

2610. Analogous Law.—This section follows the analogy of many others in which the Code punishes abetment of the commission of an offence in foreign territory. This section enacts that in such a case, the abettor shall be punished in the same way as if he had abetted the offence of counterfeiting coins in British India. But in such a case, abetment in British India must be complete. As abetment may consist merely of instigation, and one who instigates a resident abroad to counterfeit a coin, whether the King's or any other coin, would be guilty of this offence. Thus, if *A* in British India were to order the manufacture of nickel

(1) *Amrit Sonar*, (1919) Pat. 220, 51 I. C. 263.
(2) 24 and 25 Vict., c. 99, s. 1.
(3) *Lennard*, 1 East 170.
(4) *Ridgeley's case*, 1 Leach 189.
(5) *Moore*, 2 C. & P. 235.
(6) *Bell*, 1 East 169.
(7) *Gover*, 9 Cox, 282.
(8) *Nga San Nyein*, 8 Bur. L. T. 131, 28 I. C. 152; *Ebrahim*, 4 Bur. L. T. 9, 9 I. C. 449; *Khadin Hasain*, 84 I. C. 247, (1925) L. 22.

rupees, say in Germany and a manufacturer in Germany were to make or refuse to make them, *A* may still be guilty of abetment under section 110 or section 116, as the case may be. But, a person in Germany, instructing *A* in the process of counterfeiting, could not be punished under the Code, nor is there any section under which *A* could be punished. It will at best be a mere preparation, and not an attempt, nor indeed, could the abettor in Germany be punished under the section. But any person, irrespective of his nationality, would be liable under this section provided that he was in British India at the time of abetment.

2611. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable and is exclusively triable by the Court of Session.

2612. Proof.—The points requiring proof are :—

(1) That the accused abetted.
(2) That the abetment related to the counterfeiting of coin.
(3) That the counterfeiting of coin was to be out of British India,
(4) That at the time of such abetment, the accused was in British India.

2613. Charge.—The charge should run thus :—

"I (*name and office of Magistrate etc.,*) hereby charge you (*name of accused*) as follows :—

"That on or about the———day of———at———being in British India you abetted one *A B* resident in———out of British India in the counterfeiting of coin by———(*specify the act*) and you thereby committed an offence under section 236 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

Import or export of counterfeit coin.

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[***British India***—s. 15. ***Reason to believe***—s. 26. ***Counterfeit***—s. 28. ***Coin***—s. 230.]

2614. Analogous Law.—This section is again taken from the English Law[1] the provisions of which against importing and exporting of counterfeit or light coins are as follows :—

Importing counterfeit coin from beyond the seas.

"S. 7. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than 5 years[2] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Exporting counterfeit coin.

"S. 8. Whosoever, without lawful authority or excuse (the proof whereof shall be on the party accused) shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement."

2615. This section includes all cases of exporting counterfeit colonial coins. S. 19 of the Statute similarly prohibits the bringing in or receiving into the United Kingdom of counterfeit coins. Other sections[3] similarly penalize purchase or sale of counterfeit gold and silver coins for lower value than their denomination.

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(1) 24 and 25 Vict., c. 99.
(2) Three years if the offence was committed before the 25th July 1864; *see* 27 and 28 Vict., c. 47, s. 2.
(3) *E. g.*, S. 6.

2616. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session or Presidency or First Class Magistrate.

2617. Proof.—The points requiring proof are :—

(1) That the accused imported into or exported from British India some coins.
(2) That such coins were counterfeit.
(3) That the accused then knew or had reason to believe that they were counterfeit.

2618. Traffic in Counterfeit Coins.—This section is directed against the illicit traffic in counterfeit coins. If counterfeiting alone had been visited by high penalties it would set a high premium on counterfeiting abroad and from where such coins could be safely imported. In such a case the mischief would remain the same, namely, the debasement of the currency with its attendant loss to the state. The offence as here described consists of (*i*) importing or exporting any (*ii*) counterfeit coin (*iii*) knowing or having reason to believe that the same is counterfeit. The question whether a person has imported or exported counterfeit coin must then depend upon whether it was done with guilty knowledge or belief. A person receiving or paying out in counterfeit coin without being aware of its true nature, may have done so, because he was himself deceived into accepting it, or because he may have received or paid it in the ordinary course of business. Such receipt and payments are then not within the penal visitations of the section. At the same time, if there was the guilty knowledge, the offence is complete without any actual uttering.

2619. Charge.—The charge under this and the next section should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——you imported into (*or* exported from)——a place in British India, certain pieces of coins (*or* King's coins) to wit——(*mention the coins*) then knowing (*or* having reason to believe) that the same were counterfeit, and that you thereby committed an offence punishable under s. 237 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session or High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

Import or export of counterfeits of Queen's coin.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[***British India***—s. 15. ***Reason to believe***—s. 26. ***Counterfeit***—s. 28. ***Coin***—s. 230.]

2620. Analogous Law.—This section is the same as the last, only it provides the enhanced sentence on account of the coins imported or exported being counterfeit King's coin. In other respects the two sections are identical, and require the same proof.

Delivery of coins, possessed with knowledge that it is counterfeit.

239. Whoever, having any counterfeit coin, which, at the time when he became possessed of it, he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

[***Fraudulently***—s. 25. ***Counterfeit***—s. 28. ***Possessed***—s. 235.]

2621. Analogous Law.—This and the next four sections ending with section 243 deal with the uttering of counterfeit coins, the offence varying according to the time when guilty knowledge was possessed by the utterer. The authors

are admittedly indebted for this distinction to the French Code which appears however to have been also adopted in the Bomaby Code.[1]

2622. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session, Presidency or a First Class Magistrate.

2623. Both under this as well as the next section, the possession of any number of coins would constitute only one offence, and the accused could not be tried for as many offences as there are coins. So again, a person having, say, four counterfeit coins in his possession and uttering only one of them, cannot be separately convicted under section 240 respecting the one coin, and under section 243 of the Code regarding the other three, because an offence under this and the next section implies prior guilty possession. In such a case, if the accused had uttered the four coins together, there would not have been a second conviction and sentence, and it would be anomalous that uttering one coin instead of four, should expose him to a severer sentence: "The possession of all four was, as a crime, an indivisible act, which was the complement of the uttering in constituting the offences under section 240, and a conviction having been obtained under that section, the guilty possession should not have been made the distinct crime. If such separations were allowable, there might be a conviction for the possession of each rupee. The physical acts, though capable of separate existence and perception, coalesce, when coincident, in time and space and purpose."[2] If two prisoners are indicted for uttering a counterfeit shilling, and it appears that one of them entered the shop and uttered the bad money whilst the other awaited him outside the shop and having had other bad coins, they may be both convicted of uttering, as the facts sufficiently prove that both the possession and the uttering were joint. So if in such a case both entered the shop and one utters a bad coin, which is not accepted, it is not necessary to prove with certainty the very coin uttered if all the coins, found in their possession were bad.[3]

2624. Proof.—The points requiring proof are :—

(1) That the accused was in possession of a coin,
(2) Which was counterfeit;
(3) That he then knew it to be counterfeit ;
(4) That he delivered it to another, or attempted to induce him to receive it ;
(5) That the delivery was made fraudulently or that fraud may be committed.

2625. Charge.—The charge under this and the next section should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you——had a piece of counterfeit coin (*or* King's coin) Exhibit——in this case (*or* certain pieces of counterfeit coins) which at the time you became possessed of it (*or* them) you knew to be counterfeit, and which you frauduleutly (*or* with intent that fraud may be committed) delivered to *A B* [*or* attempted to induce *A B* to receive it (*or* them)] and you thereby committed an offence punishable under section 239 (*or* section 240) of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2626. Principle.—This section and the next deal with professional dealers in false coin, that is to say, those who receive it knowingly as false, and fraudulently palm it off as true.[4] The recipient need not, however, necessarily be innocent, for if a dealer in false coins employs an accomplice to palm off a false coin, he commits the same crime as if he had himself committed the imposition. The object of the section is to penalize all fraudulent circulation of base coin, whether it be through an accomplice or a stranger. In this respect the professional and the casual utterer of false coin differs, as the former is subject to the penalties of this and the next

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(1) Note I.

(2) *Per* West and Nanabhai, JJ., in *Lakshia*, (1884) B. U. C. 202, relying on S. 71 *ante*.

(3) *Per Garrow*, B., *Sherrit*, 2 C. and P. 427 ; *Rogers*, 2 M. C. C. 85 ; *Garrish and Brown*, 2 Moo. and R. 219 ; *Williams*, Carr, M. 259. This point is now, so far as regards England, settled by the interpretation clause (s. 1) of 24 and 25 Vict., c. 99.

(4) *Sheobux*, 3 N. W. P. H. C. R. 150.

section, whereas the casual offender is made subject to the more lenient penalties of s. 241. The distinction between these two classes of offenders was explained by the authors to be very material. A professional utterer is a helpmate of the professional coiner and is, therefore, an offender in equal degree. A casual receiver of false coins may, however, be himself imposed upon; but, if he tries to retrieve his loss by passing it on to another, he would naturally be guilty of dishonesty, but which the authors regarded as comparatively venial, and hence the difference in punishment.[1]

2627. Professional Dealer in False Coin.—This section is admittedly directed against professional dealers in false coins,[2] the distinction between such persons and a casual offender punishable under section 241 being that, while the former knew of the coin being counterfeit at the time they became possessed of it, the latter was innocent then, though he too acquired the same knowledge before he passed it off. The distinction between the two offenders is not a radical one; it is a distinction of degrees, the previous knowledge of the one showing greater deliberation which the latter presumably lacks. This section is, it will be observed, in other respects also strongly worded. For instance, it requires not only knowledge of counterfeit coin at the time of possession, but it further requires that its delivery should be made fraudulent, or with intent that fraud may be committed.

2628. In the first place, then, there must be knowledge that the coin received is counterfeit, and that knowledge must have been possessed with the possession of the coin. But how is the possession of such knowledge to be proved? Direct proof is not possible always, nor if possible, is it always available. The usual mode of proving such knowledge is by circumstances, and it is then necessarily a matter of inference.[3] It has been held that for this purpose, evidence of other acts, other than the one complained of, is admissible, not for the purpose of showing the probability of the accused's crime, but as making the possession of guilty knowledge in the particular case charged, more probable.[4] In one case such evidence was objected to, but the Court allowed it observing: "As to the cases put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*, if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad."[5] As Heath, J., in the same case said: "the charge in this case puts in proof the knowledge of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances."[6]

(1) Knowledge at the Time of Possession.

2629. So it is provided in the Indian Evidence Act:—

"'*A* is accused of fraudulenty delivering to another person a counterfeit coin, which, at the time when he delivered it, he knew to be counterfeit:

"The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin, is relevant.

"The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit, is relevant."[7]

2630. But this is not all. For knowledge may be inferred as much from the accused's previous conviction and possession of other false coins, as from other facts

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(1) Note 1, Reprint, pp. 135, 136.

(2) Note 1, 2nd Rep., ss. 192-202; *Sheobux*, 3 N. W. P. H. C. R. 150.

(3) *Parushullah* v. *Kheroo Mundul*, 23 W. R. 4.

(4) I Russ. Cr. (6th Ed.) 241; 3 Russ, Cr. 411.

(5) *Per* Thompson, B., in *Whiley*, 2 Leach 983.

(6) *Whiley*, 2 Leach 983.

(7) Act I of 1872, s. 14, ill. (*b*). The proof of previous conviction, being here admissible, is not excluded by s. 310 of the Cr. P. C., *see ib.*, s. 311.

to which reference is equally legitimate. For instance, evidence of the facts, that the accused had uttered other false coins previously to the act in question, was always held to be admissible, whether the other coins were or were not of the same description,[1] but it was at one time a moot question whether the same rule applied to coins uttered subsequently to the act charged.[2] But it is now settled that the same rule must apply to all acts whether prior or subsequent, and whether in each case the coins uttered are of the same or of different denominations.[3] Indeed, for this purpose, the Courts have admitted not only evidence of acts and facts, but even of his general demeanour, as tending to show that what the accused did or attempted to do, was known to him to be criminal.[4]

2631. But, while this is the rule, it is obviously subject to some limits both as to time and circumstances, beyond which evidence of other similar acts would not be permitted.[5] In England, it is left to the Judge's discretion to determine these limits, but, probably, his discretion would be exercised, having regard to the probative value of the evidence tendered. An act done in the remote past, and after which the accused has led a moral life could scarcely throw much light on his knowledge, and such evidence would in most cases be excluded. On the other hand, if that act was of a series of acts so connected together as to amount to the evidence of a system, it is then not only admissible, but will be an essential factor in determining the question of his knowledge. In one case, the Court inferred such knowledge from the fact of the accused being a goldsmith and therefore, as one who could not have been deceived into receiving base coins mistaking them for genuine ones.[6] Of course, the section only requires evidence of guilty knowledge of the spuriousness of the coins, at the time of receiving possession of them. Direct proof of fabrication is not required.[7]

2632. In addition to the contemporaneous knowledge of the character of the coins, the accused must deliver the same fraudulently or with intent that fraud may be committed. The former implies delivery to an innocent recipient, while the latter implies delivery to an accomplice, who in turn delivers it fraudulently to one whom he can induce to accept, or if he refuse them his act is an attempt to induce that person to receive it, within the meaning of the third clause of the section. For the purpose of this section, it is not necessary that the coin should have been accepted. All that is necessary is that it should be either delivered, or that an attempt to induce any person to receive it should be made. An offer made but refused, is then sufficient to complete the offence. It was so held in an English case, decided under 2 Will. IV, c. 34, s. 7, the words of which were "uttering and putting off a counterfeit coin," and in which the prisoner went into a shop and asked to purchase some coffee and sugar, and in payment of the same he put on the counter a counterfeit shilling which the shopkeeper refused to accept as a bad one. The prisoner thereupon left the shop leaving both the coffee and sugar as well as the shilling behind him. It was held that the charge of uttering and putting off had been made out.[8] In another case, the accused had purchased five apricots for six pence, and offered in payment a bad shilling. The fruiterer put it in his mouth to bite it to try its goodness, and he returned it as bad. The accused then gave him another and yet another shilling with the same result. He told the fruiterer that they were all good coins, but in fact, they were bad ones. He was held to be guilty of uttering false coins.[9]

(2) Delivery Fraudulently or that Fraud May be Committed.

2633. What is Delivery.—Of course, there can be no offence, unless there was delivery or an attempt to induce any other person to *receive* as genuine any coin

(1) *Ball*, 1 Camp. 324; *Millard*, R. R. 245; *Foster*, 24 L. J. M. C. 134; *Nur Mahomed*, 8 B. 223.

(2) *Taverner*, 4 C. & P. 413*n*.

(3) *Foster*, 24 L. J. M. C. 134; *Harrison*, 2 Lewin 118.

(4) *Tattershall*, cited *per* Lord Ellenborough in *Whiley*, 2 Leach 983.

(5) *Green*, 3 C. & K. 209; *Whiley*, 2 Leach 983; *Lutt*, 3 F. & F. 834.

(6) *Kandamura*, (1883) 1 Weir 221.

(7) *Parushullah* v. *Kheroo Mundul*, 23 W. R. 4; *Karruppa Muppen*, (1887) 1 Weir 222.

(8) *Welsh*, 2 D. C. C. R. 78; Lon. 2 Dent C. C. 475.

(9) *Franks*, 2 Leach 644.

known to be counterfeit. The words "receive" and "delivery" imply payment in discharge of an obligation. They do not refer to a mere change of custody. For instance, if a person hands false coins to another to keep for him awhile, he cannot be held to have delivered them to him nor could the other be said to have received them. It was, indeed, so held in a case in which two vagrants, the prisoner and another purchased some liquor and drank it at the doorway of the shop. One of them them entered the shop for some more liquor, but the shopkeeper mistook him for a thief, and shut the door upon him and called out for his arrest. On this he ran off and, meeting one Mungli, put two rupees and eight annas in his hands, telling him to keep them for him. The coins were found to be counterfeit, and he was prosecuted under this section for delivering them to Mungli but this conviction was annulled on appeal, the Court holding that such delivery was not contemplated by or punishable under the section.[1]

2634. False Coiner Excluded.—As remarked before, this section only applies to a professional utterer of coins, and not to one who is a false coiner. As remarked by Turner, J., : "The words 'which, at the time when he became possessed of it, he knew to be counterfeit' point to a person other than the coiner, that is to say, the person who procures or obtains or receives counterfeit coin. It is against such person that the section is directed."[2] Consequently, a person who both makes false coins and delivers them to others cannot be convicted both under s. 231 as well as this section. His offence only falls under s. 231.[3] In a case, the accused went into a village and purchased sweetmeats from one *K*, for which he paid with a counterfeit two anna piece : he also delivered another counterfeit two anna piece to *R* in payment for some milk. On discovering the fraud, *K* pursued the accused, and aided by two others arrested him. On being pursued the accused threw away a yellow bag which was found to contain a mould, an instrument called a "jugi" used for keeping up a draught in a file, a file, and some white metal, all evidently instruments or materials used for counterfeiting coin. It was held that the only conviction possible was under s. 235, and not under the next section, which is applicable only to the actual coiner, as there was nothing to show under what circumstances the accused became possessed of the counterfeit of the Queen's coin.[4]

Delivery of Queen's coin, possessed with knowledge that it is counterfeit.

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[*Person*—s. 11. *Fraudulent*—s. 25. *Counterfeit*—s. 28. *Coin*—s. 230. *Queen's coin*—s. 230.]

2635. Analogous Law.—This is an aggravated form of the offence described in and punishable under the last section, the aggravating circumstances being that the coin in respect of which the offence is committed is the King's coin. In other respects, the two sections are identical, and require the same points to be proved. For a further commentary under this section reference should be made to the discussion under the last section.

2636. Procedure, Proof and Charge.—*See* last section (§§ 2622-2625)

2637. Uttering King's Coin.—The essential elements of an offence under this section are exactly those discussed under the last section. Shortly stated, they are (*i*) that the offence here described applies only to a professional dealer, and not to a coiner who is otherwise liable ; (*ii*) in order to hold a person liable under this

(1) *Sookut*, 4 N. W. P. H. C. R. 62.
(2) *Sheobux*, 3 N. W. P. H. C. R. 150 ; *Ahmad Shah*, (1892) P. R. No. 10.
(3) *Ib.*
(4) *Ahmad Shah*, (1892) P. R. No. 10.

section, there must be evidence of knowledge at the time of possession, and there must then be (*iii*) fraudulent delivery or delivery with intent that fraud may be committed, or an attempt to induce any person to receive it, added to which, must be proved the fact (*iv*) that the coin possessed and delivered was the King's coin.

Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration.

A, a coiner, delivers counterfeit Company's rupees to his accomplice *B*, for the purpose of uttering them. *B* sells the rupees to *C*, another utterer, who buys them knowing them to be counterfeit. *C* pays away the rupees for goods to *D*, who receives them, not knowing them to be counterfeit. *D*, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here *D* is punishable only under this section, but *B* and *C* are punishable under s. 239 or 240, as the case may be.

[***Person***—s. 11 ***Counterfeit***—s. 28. ***Coin***—s. 230 ***Possession***—s. 235.]

2638. Analogous Law.—In discussing the scope of s. 239, the distinguishing feature of this section has been already set out (§ 2632). As has been there stated, this section refers only to a casual, as opposed to a professional, utterer of base coins. As such he differs from the latter in not knowing that the coin was counterfeit at the time when he took it into his possession. But, of course, he had that knowledge at the time of uttering it, for if he had not, he would then be wholly innocent, and the question about the applicability of this section could not then arise.

2639. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

2640. Proof.—The points requiring proof are :—

(1) That the accused delivered or attempted to deliver a coin to another.
(2) That the said coin was counterfeit.
(3) That the accused delivered or attempted to deliver it as genuine.
(4) That at the time of delivery he knew it to be counterfeit[1]

2641. Charge.—The charge should run thus :—

"I (*name and office of Magistrate*, etc,) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you——delivered to *A B* as genuine (*or* attempted to induce *A B* to receive as genuine), a coin Ex.——which was counterfeit, and which you then knew to be counterfeit though which you did not know to be counterfeit at the time when you took it into your possession, and you thereby committed an offence punishable under s. 241 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2642. Casual Delivery of False Coin.—The only palliating feature which this offence, as distinguished from that punishable under s. 239, presents is that the guilty knowledge as to the spuriousness of the coin dawns on the accused after he comes into possession of it. It may then be that he had been himself made the victim of an imposition, and not brooking the loss he has so sustained, he becomes anxious in his turn to palm off his bad money so received to another. By so doing he brings himself within the grip of the law but it is a discriminating law, and regards his offence as mitigated by his previous innocence.

2643. Of course, the gist of the crime consists in delivering the coin as genuine when he knew it to be counterfeit. Such knowledge may have been acquired by him

(1) *Bhan Singh*, 124 I. C. (P.) 688.

at any time prior to the delivery, but it must have been after the accused had himself received the money. He may have found it out only a moment afterwards, but, if he had not known of its spuriousness *at the time* he took it, he is entitled to the reduced penalty provided under this section. In ordinary cases this will be assumed, and in any case, it will be on the prosecution to prove that a given case falls under the graver penalties of s. 239 rather than of this section.[1] The evidence under this section must be given to show that, at the time the accused delivered, or attempted delivery of the base coin, he was aware of its spuriousness, and that being so aware, he passed it or attempted to pass it off as genuine.[2] And in this respect the section requires that he must *know* it to be counterfeit. If, then, he merely suspected it as such, or for that matter believed it to be so, he could not be convicted whatever may have been his turpitude in passing off suspicious coins.[3]

As to what constitutes delivery, *see* s. 239 (§ 2633).

242. Whoever, fraudulently, or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable for fine.

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.

[***Fraudulently***—s. 25. ***Counterfeit***—s. 28. ***Possession***—s. 235.]

2644. Analogous Law.—This section and the next are again the same, the next section possessing the same aggravating feature, namely, that the coin possessed is a spurious King's coin. In other respects, the two sections are identical. The commentary under this section must be read as applicable to the next section.

2645. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session or a Presidency Magistrate, or a Magistrate of first class.

2646. Proof.—The points requiring proof are :—

(1) That accused was in possession of a coin.
(2) That that coin was counterfeit,
(3) That he was in possession of it with intent to defraud, or with intent that fraud might be committed.[4]
(4) That *at the time he became possessed of it*, he knew it to be counterfeit.[5]

To which may be added the following aggravating circumstance justifying a conviction under the next section :—

(5) That the coin in question was a King's coin.

2647. In connection with the question of knowledge, the following provision of the Indian Evidence Act is noteworthy :—

"S. 21:—

"(*e*) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

"He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it, and told him it was genuine.

"*A* may prove these facts for reasons stated in the last preceding illustration."

The reasons there stated are that, though these statements are admissions, they are admissible as being explanatory of conduct influenced by facts in issue.

2648. Charge.—The charge under this or the next section should run thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you fraudulently (*or* with intent that fraud might be committed) were in possession of Ex.——being counterfeit coins (*or* King's

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(1) Cf. *per* Melvill, J., in *Rangoo Timaji*, 6 B. 402 (403).
(2) *Soorut*, 4 N. W. P. H. C. R. 62.
(3) *Ib.*
(4) *Sangaram*, 143 I. C. (O.) 152.
(5) *Fateh Chand*, 21 C. W. N.33 ; *Ebrahim*, Bur. L. T. 9, 9 I. C. 449.

coins), knowing at the time when you became possessed of the same that they were counterfeit, and thereby committed an offence punishable under s. 242 (*or* s. 243) of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2649. When is Possession of a Counterfeit Coin Criminal.—This section dispels the common erroneous notion that the possession of all counterfeit coins is reprobated by law under its sanction. As this section enacts, all possession is not criminal. To be criminal, it must be possession with intent to defraud, or with intent that fraud might thereby be committed. Then, again, the section couples with this requirement another, namely, that only possession of the coin which the person in possession knew to be counterfeit *at the time* he became possessed of it is criminal. Any other possession is not. For instance, a person may obtain possession of counterfeit coin without knowledge that it is counterfeit. He may then discover its true nature. He may preserve it to palm it off upon another on a suitable opportunity offering. Here he is in possession with intent that fraud may be committed. But his possession is not criminal, because he had no knowledge of its spuriousness *at the time* he came into possession of it.

2650. Again, suppose a person knowingly purchases spurious coin for a collection. As he does not intend to commit fraud thereby, his possession is not criminal, though the coins in his possession are counterfeit. It is thus evident that, in order to amount to a crime, the two circumstances above specified must both co-exist, and it is from that time that his possession assumes a criminal complexion. A coin collector may, for example, change his mind and intend to pass his coins off as genuine coins. His possession then becomes criminal the moment there is this change in his intention. How this change is to be proved, is another matter. But the fact remains that he cannot be punished for his possession of counterfeit coin, unless there is proof of that intention.

Possession of Queen's coin by person who knew it to be counterfeit when he became possessed thereof.

243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of a counterfeit coin, which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Fraudulently***—s. 25. ***Queen's coin***—s. 230. ***Possession***—s. 235.]

2651. Fraudulent Possession of King's Coin.—This section is one aggravated form of the last section, under which its scope and operation will be found discussed.

2652. Procedure and Practice.—*see* § 2645.

Person employed in mint causing coin to be of different weight or composition from that fixed by law.

244. Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***British India***—s. 15. ***Legally bound***—s. 43.]

2653. Analogous Law.—This section visits with its drastic penalties pilfering of bullion used at the mint for the coinage of money. The provisions of the section naturally extended only to those who are employees at the mint, whatever may have been their duties and responsibilities. The object to the section is to ensure the conformity of the coinage to its exact legal requirements, and its unauthorized debasement by those who may have an opportunity to tamper with its purity, composition and weight. But the very exactness in composition of metals is practically unattainable, and the Indian Coinage Act consequently provides a remedy

up to a certain extent,[1] beyond which a coin ceases to be a good coin. The section is not, however, intended to punish any unintentional aberration in the minting of coins. It only deals with *intentional* acts and omissions, the intention being to vary the weight or composition of the coin. This is enough to constitute the offence, and it is not necessary to prove dishonesty or fraud.

2654. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is exclusively triable by the Court of Session.

2655. Proof.—The points requiring proof are:—

(1) That the accused was employed in any mint lawfully established in British India.
(2) That, as such, he did some act or omitted what he was legally bound to do.
(3) That the act or omission was with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law,
(4) That it will have the effect as in (3).

2656. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you being employed as——in the——mint lawfully established in British India did an act, to wit——(*specify the act*) or omitted what you were legally bound to do (*specify the omission*) with the intention of causing the coin issued from the said mint to be of a different weight or composition from the weight or composition fixed by law, and thereby committed an offence punishable under s. 244 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

"And I hereby direct that you be tried by the said Court on said charge."

2657. Debasement of Coin by Mint Employees.—In the first place, it is not necessary for an offence under this section that in consequence of the act or omission of the accused, the coin should have been actually debased or issued as such. The accused may perpetrate a fraud, and it may be detected before any mischief is done. The offence is then complete apart from any injury his act may have caused. All that the section requires is that (*i*) the accused must have been an employee of a Government mint, and (*ii*) as such he must have done some act or omission, (*iii*) with the intention of varying the weight or composition of any coin issued from the mint. As such, there can be no offence if the act or omission was due to mere carelessness, indolence, or negligence. In order to amount to this offence it must have been intentional, and the intention must be as stated in the section. A person who mixes more alloy than is permitted under law, may be guilty of merely negligence, or his act may have been designed. In the latter case, he will be guilty of this offence.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Unlawfully taking coining instrument from mint.

[***British India***—s. 15. ***Coining tool or Instrument***—s. 235.]

2658. Analogous Law.—The offence consists in the unauthorized removal of tools from a mint, whether by an employee of the mint or an outsider. Intention is no part of the definition of the offence and need not be proved. But upon the proof of intention must depend the punishment. The object of the offence is to prevent the theft of mint tools for the purpose of using them for counterfeiting coin.

2659. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable exclusively by the Court of Session.

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(1) Indian Coinage Act (III of 1906), ss. 5, 6.

2660. Proof.—The points requiring proof are :—

(1) That the accused took out of a mint lawfully established in British India,
(2) A coining tool or instrument.
(3) That he did so without lawful authority.

2661. Charge.—The charge should run thus :—

"I (*name and office of Magistrate*, etc.) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you took out of the mint lawfully established in British India at——Exhibit——which was a coining tool or instrument without lawful authority, and you thereby committed an offence punishable under s. 245 of the Indian Penal Code, and within the cognizance of the Court of Session.

" And I hereby direct that you be tried by the said Court on the said charge."

2662. Unlawful Removal of Coining Tools.—The offence here described consists in *taking out* of any mint any coining tool or instrument. Merely concealing it on one's person with a view to take it out of the mint, would not be an offence under this section, though it would be an attempt, for which the accused might be punished under section 511 of the Code. Of course, in order to constitute an offence, the thing removed must be proved to be a coining tool or an instrument, and it must necessarily belong to or be in possession of the mint.

Fraudulently or dishonestly diminishing weight or altering composition of coin.

246. Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—**A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.**

[***Dishonestly***—s. 24. ***Fraudulently***—s. 25.]

2663. Analogous Law.—The previous of this and the next section correspond with those of 2 Will. 4 c. 34, s. 5 as modified by, and re-enacted in 24 and 25 Vict., c. 99, s. 4 : " Whoever shall impair, diminish or lighten any of the Queen's current gold or silver coin, with intent that the coin impaired, or diminished, or lightened may pass for the Queen's current gold or silver coin shall, in England and in Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term exceeding fourteen years, and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

2664. Sections 2 and 16 of the Indian Coinage Act[1] are also relevant, inasmuch, as they give the meaning of " deface" and the authority by whom the defaced coin may be destroyed.

2664-A. The next two sections then provide for the return or payment of the coin so cut to their owner, in cases (*a*) and (*b*) of section 16 last quoted, the effect of the provision being that the person cutting shall pay for them, unless he believes that the coin has been fraudulently defaced. It is then explained that sweating is deemed to amount to fraudulent defacement.[2] This and the next section deal with the tampering of a coin either by sweating or other means which diminishes its weight or alters its composition. Where the coin in respect of which the offence is committed is the King's coin, the offender is subject to the aggravated penalty provided in the next section.

2665. Procedure and Practice.—This offence is cognizable and a warrant should ordinarily issue in the first instance. It is both non-bailable and non-compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

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(1) Act III of 1906.
(2) Similar provisions are made in England by 24 & 25 Vict. (c, 99. s. 26).

2666. Proof.—The points requiring proof are :—

(1) That the accused performed an operation.
(2) That the thing on which operation was performed was a coin.
(3) That the operation was performed fraudulently or dishonestly.
(4) That it diminished its weight or altered its composition.

To which may be proved the following aggravating circumstance, calling for enhanced punishment under the next section :—

(5) That such coin was the King's coin,

2667. Charge.—The charge under this and the next section should run thus'

"I (*name and office of Magistrate*, etc.) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——yau fraudulently or dishonestly performed on the coin, Exhibit——(*or* on the King's coin, Exhibit——) an operation which diminished its weight (*or* altered its composition), and yon thereby committed an offence under section 246 (*or* 247) of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2668. Sweating Coins.—It is an offence to fraudulently or dishonestly diminish the weight or alter the composition of a coin. As for the weight, it must, of course, to some extent, be diminished by wear, but two per cent. has been fixed: to be the maximum diminution so possible.[1] Any greater reduction in weight must then be *prima facie* fraudulent. It does not, however, necessarily follow that any coin may be diminished to that extent with impunity, for it a new coin shows that diminution in weight, it may be presumed to have been made fraudulently or dishonestly. The question whether the diminution in weight in any case was made fraudulently or dishonestly, is a question of fact depending on the age of the coin, the diminution suffered and the signs of operation which it may bear on its surface.

2669. It will be noted that both under this as well as the next section, the offence is confined to performing an operation, so that it is not enough to show that the accused had such a coin in his possession, nor is it necessary to show that as such he had uttered it. What is required in evidence is that it was the accused who had performed the operation. Persons who are found in possession of such coins, may, however, be punished under the provisions of sections 250-254.[2] The section has, again, no application to gilding, silvering, etc., of a coin so as to give it the appearance of a coin of a higher denomination. Such offence is punishable by section 248 or 249.

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Fraudulently or dishonestly diminisbing weight or altering composition of Queen's coin.

[***Dishonestly***—s. 24. ***Fraudulently***—s. 25. ***Coin***—s. 230.]

2670. Analogous Law.—Except that the coin here is the King's coin, the offence is in other respects exactly the same as that described in the last section, the commentary on which should be read as a commentary under this section.

2670-A. Procedure and Practice.—*see* § 2665.

248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Altering appearance of coin with intent that it shall pass as coin of different description.

[***Coin***—s. 230.]

2671. Analogous Law.—This section refers to an operation performed on a coin which, without reducing its weight or altering its composition, alters its

(1) Indian Coinage Act (III of 1906) s. 21 (*c*). (2) *Mehtab Rai*, 48A, 603.

appearance, by giving to it the presentment of a coin of a different higher denomination. The quick-silvering of a pice so as to give it the appearance of an eight-anna silver piece, is an example of such an operation.

2672. The provisions of this and the next section are the same, except that the coin in the next section is a King's coin, which calls for the higher penalty there provided. The following provisions of the English Statute[1] refer to the same offence :—

"S. 3. Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, case over or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver or by any means whatsoever, wash, case over or colour any piece of silver or copper, or of coarse gold or coarse silver or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin ; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over or colour any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin ; or shall, with any wash of materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, case over, or colour any of the Queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than five years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

2673. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is both non-bailable as well as non-compoundable, and is triable by the Court of Session, or Presidency Magistrate or a Magistrate of the first class.

2674. Proof.—The points requiring proof are :—

(1) That the accused performed an operation.
(2) That the operation was performed on any coin.
(3) That it altered the appearance.
(4) That he did so with the intention that the altered coin should pass as a coin of a different description.

To which may be proved the following aggravating circumstance :—

(5) That the coin in question is a Queen's coin.

2675. Charge.—The charge under this and the next section should run thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of ——at——you performed an operation on the coin Exhibit——(*or* King's coin) which altered the appearance of the said coin, with the intention that the said coin shall pass as a coin of a different description, and you thereby committed an offence punishable under section 248 (*or* section 249) of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2676. Altering Appearance of a Coin.—It is an offence under this section to alter the appearance of a coin, if the alteration was made with the intention that the coin shall pass as a coin of a different description. Fraud or dishonesty are not then expressly a part of this definition, though they are necessarily implied in the intention, the presence of which alone makes the act criminal. That intention must be to convert a coin of a lower denomination into one of a higher denomination. Uttering is not necessary, the offence being complete the moment the alteration is made with the intention aforesaid.

2677. The operation which *alters* the appearance of the coin must be one which does not diminish its weight or alter its composition. If this is effected as

(1) 2 Will. IV, c. 34.

well, the accused may be liable under either of the last two sections. But is he liable under both? It is apprehended not, for the intention being one, the offence is also single, whatever may have been the alteration.

2678. The question whether what is done was sufficient to alter the appearance, must be judged in the light of whether the alteration effected is sufficient to make the coin passable for a coin of different denomination. If it is done so as to be able to deceive no one, it cannot be said to have been done with that intention. In other words, in such cases the intention must be judged by the result likely.

2679. The offence only punishes those who perform the *alteration*—those who are merely found in possession of such coins, or those who deliver it with knowledge that it is counterfeit, are not punishable under this section, though they do altogether not escape unpunished."[1]

Altering appearance of Queen's coin with intent that it shall pass as coin of different description.

249. Whoever performs on any of the Queen's coin any operation which alters the appearance of that coin with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Queen's coin***—s. 230.]

2680. Analogous Law.—This section is exactly the same as the last, except that the coin altered is the King's coin, for which the section provides the higher penalty.

2681. Procedure and Proof.—The procedure and practice applicable to this case is the same as for an offence punishable under the last section. (§ 2673) The points requiring proof are the same, except that the coin altered should be proved to be the King's coin.

2682. Charge.—The form of charge is set out under the last section (§ 2675).

Delivery of coin possessed with knowledge that it is altered.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

[***Fraudulently***—s. 25. ***Coin***—s. 280.]

2683. Analogous Law.—This section and the next go together. They must both be compared to sections 239 and 240 to which they correspond. As those sections deal with professional dealers in counterfeit coins, so these sections deal with professional dealers in coin counterfeited in the manner described in s. 246 or 248. The next section is the same except that the coin possessed is the King's coin. In both cases it is a part of the offence that there must have been both possession with knowledge, and delivery fraudulently, or with intent that fraud may be committed. The absence of delivery reduces the offence to that described in s. 252, or section 253 if the coin delivered was the King's coin.

2684. Procedure and Practice.—The offences described in this and the next section are cognizable, and warrant should ordinarily issue in the first instance. They are both non-bailable as well as non-compoundable, and are triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

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(1) Possession, ss. 252, 253; delivery, s. 254.

2685. Proof.—The points requiring proof in offences under this and the next sections are :—

(1) That the coin in the case was one in respect of which an offence under s. 246, or 248 had been committed.
(2) That the accused was in possession of it.
(3) That he then knew that any of the said offences had been committed.
(4) That he delivered it to some other person, or attempted to induce him to receive the same.
(5) That he did so fraudulently, or with intent that fraud may be committed.

2686. Charge.—The charge under this, and the next section should run thus :

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you had in your possession a coin Exhibit——(and which was the King's coin) with respect to which the offence defined in section 246 (*or* section 248) of the Indian Penal Code had been committed, and having known at the time when you became possessed of the said coin, that such offence had been committed with respect to it, you fraudulently or with intent that fraud may be committed, delivered such coin to *A B* (*or* attempted to induce the said *A B* to receive the same), and thereby committed an offence punishable under section 250 (*or* section 251) of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2687. Fraudulent Dealing in Altered Coins.—The Court recognizes two great sub-divisions of counterfeit coins : those which are wholly fashioned to resemble the real coins, and those which are real coins defaced or altered. Professional dealers in either case are subject to the same punishment, though the Code allows them the choice of sections under which they might be convicted. The essential elements in each case are the same, *viz.*, Possession of guilty knowledge *at the time* of possessing the coin—, and its delivery with intent to defraud or with intent that fraud might be committed. In this respect, though the section is different, the offence is the same as is punishable under section 239 or 240. But in order to bring it more clearly within its purview it would be necessary to prove that the knowledge was of the fact that the process of counterfeiting adopted was that described in section 246 or section 248. This may be proved directly or, as is more often the case, indirectly by proof of circumstances from which an inference may be legitimately drawn that the accused could not but have known that the coin he was receiving had been tampered with, in the manner indicated in those sections.

251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin possessed with knowledge that it is altered.

[***Fraudulently***—s. 25. ***Coin***—s. 230.]

2688. Analogous Law.—This section is just the same as the last with the aggravated fact superadded that the coin possessed is the King's coin, for which the section prescribes the higher penalty. For the rest of the commentary, *see* under the last section.

2689. Meaning of Words.—"*And shall also be liable to fine*": This does not mean that the infliction of fine is imperative. All it means is that the sentence of fine is optional and if passed the accused shall be liable to pay it.[1]

(1) *Joseph*, (1888) 1 Weir 223.

252. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of coin by person who knew it to be altered when he became possessed thereof.

[***Fraudulently***—s. 25. ***Possession***—s. 235.]

2690. Analogous Law.—This section and the next correspond to ss. 242 and 243 respectively. They, in fact, bear the same relation to those sections as the two last preceding sections bear to sections 239 and 240. In comparison with sections 250 and 251 these sections are lighter, because while in those sections the offender has taken an advanced step towards imposition by passing the coin in transit, under this section and the next, there is only possession, beyond which the accused may not dare to venture.

2691. Procedure and Practice.—Offences under this and the next section are both cognizable, and warrant should ordinarily issue in the first instance. They are both non-bailable and non-compoundable, and are triable by the Court of Session, Presidency Magistrate, or a Magistrate of the first class.

2692. Proof.—The points requiring proof under this and the next sections are :—

(1) That the accused was in possession of a coin.
(2) That it was a coin with respect to which the offence defined in section 246 or 248 had been committed.
(3) That the accused knew of it when he became possessed of the coin.
(4) That he was in possession of the coin with intent to defraud, or with intent that fraud might be committed.

2693. For a general commentary on this section, *see* under ss. 242, 250.

253. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Possession of Queen's coin by person who knew it to be altered when he became possessed thereof.

[***Fraudulently***—s. 25.]

2694. Analogous Law.—This section provides a higher punishment for the offence described in the last section, owing to the fact that the coin altered was the King's coin. In other respects, both as to the procedure and proof, the offence is that described in the last section, to the commentary on which reference must be made for more particular information.

2695. Procedure and Practice.—*See* § 2691.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

Delivery of coin as genuine which, when first possessed the deliverer did not know to be altered.

2696. Analogous Law.—This section generally corresponds to section 241 of the Code, the commentary on which might be usefully [read as a part of the commentary on this section.

2697. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is both nonbailable as well as non-compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

2698. Proof.—The points requiring proof are :—

(1) That the accused delivered to any other person, or attempted to induce him to receive—

(2) A coin, with respect to which any such operation as is mentioned in ss. 246-249 had been performed.

(3) That the accused delivered, etc., the coin as genuine, or as a coin of a different description to what it is.

(4) That he then knew that the operation mentioned in (2) had been performed with respect to it.

2699. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*nam of the accused*) as follows :—

"That on or about the——day of——at——you delivered to *A B* (*or* attempted to induce the said *A B* to receive) as genuine a coin, Exhibit——(*or* as a coin of a different description to what it is), in respect of which you then knew that an operation such as is mentioned in section 246 (*or* sections 247, 248, or 249) of the Indian Penal Code, to wit—— had been performed, and you thereby committed an offence punishable under section 254 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2700. Innocent Possession but Guilty Delivery.—As remarked before this offence is the same as is described in and is punishable under section 241 of the Code. There is in each case innocent possession to start with. Knowledge that the coin is counterfeit then supervenes. Then there arises the desire to palm it off upon another and thus avert the loss which it might otherwise entail on the possessor. This offers some temptation to commit the crime, and law recognizes it in measuring the degree of punishment here provided. There is, of course, criminality born of knowledge that the coin was one upon which an illegal operation described in sections 246, 247 had been performed ; without such knowledge there would be no offence. Possessing the knowledge, the accused is guilty of imposition upon whomsoever he utters or attempts to utter, as genuine, what is, in fact, and which he knows to be a base coin. The section speaks of delivering as genuine what is spurious, or as a coin of one description when it is a coin of another description, but which had been subjected to an operation described in any of the sections viz., 246-249. A mere delivery of one coin for a coin of another description is, when it is not a mistake, not an offence under this section. For instance, a person may try to palm off a double pice for an English penny, or an eight anna silver piece for an English shilling. He may induce another to accept the one for the other, and he may thereby cheat, and be liable to the penalty attaching to cheating, but he cannot be held punishable under this section. The gravamen of the crime under this section is setting current altered and defaced coins with the knowledge of their alteration and defacement. It is no doubt cheating, but wherein the accused is seconded by the altered appearance of the coin.

Counterfeiting Government stamp.

255. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—**A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.**

[***Government***—ss. 17 and 263-A. ***Counterfeit***—s. 28.]

2701. Analogous Law.—The rest of the sections in this chapter deal with offences relating to the revenue stamps of Government. Their provisions correspond to those of 54 and 55 Vict., c. 38, s. 13, which deals with the same matter. This section is an echo of section 241 which deals with the same offence as applicable to coins. The counterfeiting of the modern stamps is not an easy matter, for stamps are made on a paper specially prepared and water-marked and the impressions they bear are the outcome of elaborate machinery. The offence here described is, therefore, likely to remain a dead letter, but as a necessary part of the Code it is necessary, providing as it does for a contingency, however remote, which may conceivably occur, and which the absence of a penal provision may encourage.

2702. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is exclusively triable by the Court of Session.

2703. Proof.—The points requiring proof are :—

(1) That the accused counterfeited, or knowingly performed any part of the process of counterfeiting.

(2) That the counterfeiting, etc., was of a Government revenue stamp.

2704. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you counterfeited (*or* knowingly performed a part of the process of counterfeiting, to wit——) a certain stamp, issued by Government for the purpose of revenue, to wit——and thereby committed an offence punishable under s. 255 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

2705. Counterfeiting of Government Stamps.—The word "stamp" has been used here in its generic sense as denoting anything which is a paper token of the payment of a certain charge, tax or revenue. It includes the stamps payable as Court-fee as well as those payable to the post office,[1] and the forest department of Government. Stamps are either adhesive or non-adhesive. The former are, ordinarily, those used in judicial work, Post and Telegraph offices, the Forest and other Revenue Administrations of Government. Non-adhesive stamps are used for the execution of assurances, the engrossing of plaints and appeals and for other similar purposes. They all, however, fall into the general category of stamps issued by Government for the purpose of revenue.

2706. A stamp is an impression upon paper, parchment or any material used for writing, made by Government, mostly for the purpose of revenue. As such, counterfeiting a stamp is a forgery, for the act of forgery consists in the making of a false document or writing. It makes no difference whether an entirely new document is construed, or whether an old one is altered so as to have a different effect.[2] Indeed, the offence here described, has been so described in English law, and in the Statute[3] dealing with it. Counterfeiting, like forgery, implies an imitation of the genuine article. There must, then, be at least some attempt at imitation. The dropping of a blot on the portion of a stamp indicating its value, even if intended that it may be mistaken for a stamp of higher denomination cannot be held to constitute counterfeiting.[4]

2707. Other terms used in the section must be interpreted in the light of the remarks made under sections 28 and 231.

256. Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by the Government for the purpose of revenue, shall be punished with imprisonment of either description

Having possession of instrument or material for counterfeiting Government stamp.

(1) They are expressly so declared by S. 17 of Indian Post Office Act (VI of 1898); *Sitaram*, 5 C. P. L. R. 48.

(2) *Blenkinsop*, 1 Den. C. R. 276.

(3) 54 and 55 Vict., c. 38, s. 18.

(4) *Shuroop Chunder Doss*, 2 W. R. 65 (66).

for a term which may extend to seven years, and shall also be liable to fine.

[***Possession***—ss. 27, 235.]

2708. Analogous Law.—This section corresponds to section 235, and has, so far as regards the Government stamps, the same object in view as that section has as regards coins.

2709. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

2710. Proof.—The points requiring proof are :—

(1) That the accused had in his possession an instrument or material.
(2) That the said instrument or material was for the purpose of being used, or knowing, or having reason to believe that it was intended to be used for the purpose of counterfeiting a Government stamp.
(3) That the stamp to be counterfeited was one issued by the Government for revenue.
(4) That the instrument or material was so usable.

2711. Possession of Counterfeiting Instruments or Materials.—The gist of this offence is the same as of s. 235, namely, the prevention of counterfeiting by meeting the would-be counterfeiter at the gate. In each case, the mere possession of such tools is not an offence, unless the possession was (*a*) for the purpose of being used for counterfeiting, or (*b*) knowing or having reason to believe that it was intended to be so used. In this respect, the provisions of this section are narrower than those of the English Post Office Act which says that " a person shall not make or, unless he shows a lawful excuse, have in his possession, any die, plate, instrument or material for making any fictitious stamp."[1] Of course there is a very material difference between " without lawful excuse " and " with guilty knowledge,"[2] and consequently, it has been held in England in a case decided under s. 7 (*c*) of the Post Office Protection Act, that it was an offence for a person to be in possession of a die for making a false stamp known to be such to its possessor, however innocent the use that he intended to make of it. Such a possession would be possession " without lawful excuse " though it would not be possession " with guilty knowledge."[3] In this case, the proprietor of a newspaper circulating among stamp-collectors and others, had caused a die to be made for him abroad, from which imitations or representations of a current colonial postage-stamp could be produced. The only purpose for which the die had been ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue, or newspaper called " The Philatelists' Supplement," illustrations in black and white, and not in colours, of the colonial stamp in question, this special Supplement being intended for sale as a part of his newspaper. The Metropolitan Magistrate, who referred the case to the Judges, found as a fact that the accused had " lawful excuse " in fact and the question then was whether it afforded a lawful excuse in law. It was held that a mere *bona fide* possession was no lawful excuse in law in a matter, where the statute absolutely forbade possession of a die for making any fictitious stamp. Nor was there any other excuse for it, for there can be no excuse for conscious possession of a die for making a fictitious stamp.[4]

2712. It is evident that if such a case came up for decision under this section the verdict would be very different, for, by the very definition of " counterfeit " the intention to practise deception or knowledge that deception is likely to be thereby practised is essential. But in that case though the accused could not be convicted under this section, he would still be liable to a conviction under s. 263-A (*c*) for the language of that section is exactly identical, to the English Statute. Indeed, its provisions were inserted in the criminal law by all States who

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(1) (1884), 47 & 48 Vict. c. 76, s. 7 (*c*).
(2) See *Arguendo per* Solicitor-General in *Dickins* v. *Gill*, (1896) 2 Q. B. 310 (312).
(3) *Dickins* v. *Gill*, (1896) 2 Q. B. 310 (312)
(4) *Ib.*, p. 318.

were parties to the Post Congress held at Vienna where a resolution for the suppression of counterfeit stamps was mutually agreed upon, in terms which have since found a place in the penal legislation of all the States concerned. An instrument for forging stamp need not be any more perfect than an instrument for counterfeiting coin. It is not necessary that it should produce a finished stamp by a single impression, or that it should make an entire impression. If it was necessary for counterfeiting, it may be a clumsy but passable instrument, and is sufficiently an instrument for the purpose of this section.[1]

Making or selling instrument for counterfeiting Government stamp.

257. Whoever makes or performs any part of the process of making, or buys or sells or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Reason to believe***—s. 26. ***Stamp***—s. 255. ***Government***—s. 263-A]

2713. Analogous Law.—This section is an adaptation of s. 234, and the two sections *mutatis mutandis* deal with the same offence. One who makes, buys o sells a counterfeiting instrument, knowing that it is intended to be used for forg ing stamps, is guilty of abetment. As such, he may be dealt with as an abettor under the general provisions of the Code. But this section provides a specially drastic penalty applicable to him.

2714. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

2715. Proof.—The points requiring proof are :—

(1) That the accused made or performed any part of the process of making or buying or selling or disposing of an instrument ;
(2) That the said instrument was intended to be used for the purpose of counterfeiting a Government revenue stamp ;
(3) That the accused did as in (1) for the purpose of the instrument being used or knowing or having reason to believe that it was intended to be used as in (2) ;
(4) That the instrument was one which could be so used.

2716. Charge.—The charge should run thus :—

"I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you made [*or* performed any part of the process of making (*or* bought or sold or disposed of)] an instrument, Exhibit——for the purpose of being used (*or* knowing or having reason to believe that it was intended to be used) for counterfeiting a stamp, to wit——issued by Government for the purpose of revenue, and thereby committed an offence punishable under s. 257 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

2717. Making or Selling Instruments for Forging Stamp.—It has already been stated before, that in order to fall into the category of an instrument intended to be used for the purpose of counterfeiting a stamp there must be something on the face of the instrument to suggest that the instrument was so serviceable. An instrument which is an ordinary tool of a mechanic does not, of course, fall within the description of a counterfeiting instrument ; such an instrument must be one specially designed for or adapted to counterfeiting a stamp. A die or an engraved plate is such an instrument. A person who performs any part of the process of making such an instrument is guilty of this offence, (*a*) if it was made for the purpose of being used, or (*b*) he knew, or (*c*) had reason to believe that it was intended to be used for the purpose of counterfeiting a Government revenue stamp. A person who suspected foul play, but was assured of the legitimate

(1) *Per* Patterson, J., in *Foster*, 7 C. & P. 495.

purpose for which it was intended, would not be punishable under this section, though he may have made or mended a counterfeiting instrument. For instance, suppose a person believed to be an accredited agent of a Native State were to commission one to make a die for making a revenue stamp, and the die so made was intended to be used for counterfeiting Government stamp, the die-sinker could not be punished under this section, for the element of criminality was wanting.

Sale of counterfeit Government stamp.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Reason to believe***—s. 26.]

2718. Analogous Law.—The seller of counterfeit Government revenue stamps is comparable to a dealer in counterfeit coin punishable under s. 239 of the Code. The gist of the offence lies in making money out of counterfeit stamps, the sale being reprobated only when the seller knows or has reason to believe that the stamp he is selling is counterfeit. But, if there was no sale, but only a mortgage, would it be an offence under this section? It would seem not, for there is no reason to suppose that the word "sale" has been used to include a pledge, though the result may, in each case, be the same.

2719. Procedure and Practice.—This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is exclusively triable by the Court of Session.

2720. Proof.—The points requiring proof are:—

(1) That the accused sold or offered for sale;
(2) That the thing sold or offered for sale was a stamp;
(3) That such stamp was a counterfeit of a Government revenue stamp;
(4) That the accused then knew, or had reason to believe that the stamp was counterfeit.

2721. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you sold (*or* offered for sale) a stamp, Exhibit——which you knew (*or* had reason to believe) to be counterfeit of the stamp——(*mention it*) issued by the Government for the purpose of revenue, and thereby committed an offence punishable under section 258 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

Having possession of counterfeit Government stamp.

259. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[***Possession***—ss. 27 and 235. ***Counterfeit***—s. 28.]
Stamp—s. 235. ***Government***—s. 263-A.]

2722. Analogous Law.—This section corresponds to s. 243, and deals with the same offence as applicable to counterfeit stamps.

2723. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of first class.

2724. Proof.—The points requiring proof are:—

(1) That the accused had in his possession a stamp;
(2) That it was a counterfeit of a Government revenue stamp;

(3) That the accused knew it;
(4) That he had it in his possession intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp.

2725. Charge.—The charge should run thus:

"I, (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——you were in possession of a stamp, Exhibit—— which you knew to be a counterfeit of a stamp, to wit——issued by Government for the purpose of revenue, intending to use (*or* dispose of) the same as a genuine stamp, and thereby committed an offence punishable under section 259 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

"And I hereby direct that you be tried by the said Court on the said charge."

2726. Possession of Counterfeit Stamps.—Mere possession of counterfeit, whether coin or stamp, is not an offence in the Code. It becomes an offence when the possession is a mere prelude to an intended imposition upon the public, which may be practised by using it as a genuine stamp, or disposing of it to another as counterfeit stamp who was to pass it off or use it as a genuine stamp. The section only applies to a person other than a forger who is punishable under s. 255.[1]

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Using as genuine a Government stamp known to be counterfeit.

[*Counterfeit*—s. 28.]

2727. Analogous Law.—The using of a counterfeit as a genuine stamp corresponds to the delivery of a counterfeit coin as a genuine one, which is punishable under s. 254. The intention, in each case, is the same, namely, practice of imposition by use of false tokens.

2728. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of first class.

2729 Proof.—The points requiring proof are:—

(1) That the accused used stamp;
(2) That it was counterfeit;
(3) That it was counterfeit of a Government revenue stamp;
(4) That he used it with knowledge that it was counterfeit;
(5) That he used it as a genuine stamp.

2730. Charge.—The charge should run thus:—

"I (*name and office of Magistrate etc.*), hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you used as genuine stamp, to wit—— knowing it to be counterfeit of any stamp issued by Government for the purpose of revenue, and thereby committed an offence punishable under section 260 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session or the High Court).

"And I hereby direct that you be tried (by the said Court) on the said charge."

2731. Use of Counterfeit Stamp.—In order to make a person liable under this section for use of counterfeit for a genuine stamp, there must be evidence of knowledge that he knew it to be counterfeit at the time of using it. Such knowledge may be brought home to him by the very appearance of the stamp, or it may be a fact which the prosecution will have to establish by independent evidence. There can, however, be no offence under this section, unless the stamp used is shown to be counterfeit. For instance, a cancelled stamp is not a counterfeit stamp, so that a person using it cannot be held liable under this section, though, in that case, he may be liable under section 262. So when a person used an anna revenue stamp as a one rupee stamp and smudged the letters indicating

(1) *Cf. Sheobux*, 3 N. W. P. H. C. R. 150. *Ahmad Shah*, (1892) P. R. No. 10.

its true denomination, it was held that he could not be convicted under this section because the stamp used was not counterfeit.[1] Again, the accused must have "used" the stamp: the fact that he had affixed it as a preliminary to using it would not bring him within the penalty, for it is the *use* and not a mere preparation that is punishable under this section. In such a case, the accused might be dealt with under the last section, but it will be even then difficult to hold that in spite of his abstention from using it, he had intended to use it: but intention may be inferred *aliunde*.

Effacing writing from substance bearing Government stamp or removing from document a stamp used for it, with intent to cause loss to Government.

261. Whoever fraudulently, or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[***Government***—ss. 16, 263-A (4) ***Fraudulently***—s. 25. ***Document***—s. 29.]

2732. Analogous Law.—This section may be compared with sections 246 and 248 which deal with the alteration and defacement of a coin.

2733. Procedure and Practice.—This offence is cognizable, and warrant must ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

2734. Proof.—The points requiring proof are:—

(1) That the stamp was a Government revenue stamp;

(2) That the accused—

(*a*) removed or effaced any writing or document on which such stamp had been used, or

(*b*) removed from any writing or document a stamp which had been used for such writing or document, in order that such stamp may be used for a different writing or document;

(3) That he did so fraudulently, or with intent to cause loss to the Government, or in order that such stamp may be used for a different writing or document.

2735. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you fraudulently (*or* with intent to cause loss to the Government) removed (*or* effaced) from any substance bearing any stamp issued by Government for the purpose of revenue any writing, (*or* document) for which such stamp had been used or removed from any writing (*or* document) a stamp which had been used for such writing (*or* document), in order that such stamp may be used for a different writing (*or* document), and, thereby committed an offence punishable under section 261 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried (by the said court) on the said charge."

2736. Principle.—This section deals with two distinct acts: (*a*) removal of a writing from a stamp, and (*b*) removal of a stamp from a document. It again postulates two intentions: (*i*) the intention to defraud some one not necessarily the Government, and (*ii*) intention to defraud no one but merely to cause loss of revenue to Government. The removal of a writing may be effected without interfering with the stamp, as where a person changes the date of its issue and thus brings it within the limitation fixed for the refund allowable on unused or spoilt stamps. The dropping of a blot with the same object would scarcely come within the meaning of "removing or effacing the writing"[2] though the words appear to be wide enough to reach such mischief.

(1) *Shuroop Chunder Das*, 2 W. R. 65 (66). (2) *Shuroop Chunder Doss*, 2 W. R. 65.

2737. The removal of a stamp from a document is not *per se* an offence. But it is an offence to remove it with the intention of using it over again on a different writing or document. The removal of a receipt stamp from an acknowldgment with the object of using it as a postage stamp is an example of such an offence. The offence is complete with the removal. Its re-use constitutes an offence punishable by the next section.

2738. In all such cases, the intention to cause loss to Government is manifest. But the commission of the offence may not have been intended to defraud Government, and in that case, the removal of the stamp or the writing must be shown to have been done fraudulently, that is to say, it must have been done to defraud some one, not necessarily the Government. But in each case, there must be either fraud or loss of Government revenue. But whether it is fraud or loss, it must be clearly inferable from the act, or it must be proved. It cannot be assumed.[1]

262. Whoever fraudulently, or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Using Government stamp known to have been before used.

[*Fraudulently*—s. 25.]

2739. Analogous Law.—The last section deals with the fraudulent *removal* of a stamp. This section deals with the fraudulent *use* of it. The Code treats the latter a little more leniently than the former for the one paves the way for the other.

2740. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

2741. Proof.—The points requiring proof are :—

(1) That the accused used a stamp ;
(2) That it was a stamp issued by Government for the purpose of revenue ;
(3) That it had once been so used ;
(4) That when the accused used it he knew that it had been previously used ;
(5) That in using it over again he acted fraudulently or he intended to cause loss to the Government.

2742. Principle.—The essential element of criminality in this section is the intent to defraud or cause loss to the Government, which must be proved and cannot be assumed.[2] Such proof was held to be wanting in a Bombay case, in which the accused had affixed to his private letter a used service postal stamp. The facts of this case are not reported, and such facts as are given in the judgment do not support the conclusion the learned Judges appear to have held to follow as a matter of course. A person may use a used postal stamp fully aware that the post office will not treat his letter as duly stamped. He could not, then, intend to cause loss to the Government. But, if the mark of its previous use is so faint as may elude a cursory examination, the accused might well have intended that the stamps he had affixed would pass muster, in which case it is difficult to see why he should not be held guilty. Of course, in such a case, there must be evidence that the accused had affixed the stamp, or that, at any rate, it had been affixed under his direction.

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(1) *Niaz Ahmed*, (1881) A. W. N. 56; *Mulldhar*, (1881) B. U. R. 145 (146).

(2) *Ib.*

263. Whoever fraudulently, or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Erasure of mark denoting that stamp has been used.

[*Fraudulently*—s. 25.]

2743. Analogous Law.—There can obviously be no corresponding section relating to coin. It deals with three offences :—

(*a*) Erasing marks of cancellation, (*b*) Knowingly possessing, or (*c*) Disposing of such stamps.

2744. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Court of Session, Presidency Magistrate or a Magistrate of the first class.

2745. Proof.—The points requiring proof are :—

I. *As to erasure*—

(1) That the stamp in question was issued by Government for the purpose of revenue;
(2) That it had been so used;
(3) That it bore a mark or impression denoting that it had been so used;
(4) That the accused removed or erased such mark or impression;
(5) That he did so with intent to defraud or cause loss to Government.

II. *As to possession*—

Prove points (1) to (3) and further :—

(4) That the mark of impression had been removed;
(5) That the removal was done with intent to defraud or cause loss to the Government;
(6) That the accused knew of it;
(7) That the accused was in possession of such stamp.

III. *As to disposal*—

Prove further :—

(8) That the accused sold or disposed of any such stamp.

2746. Principle.—As before remarked, this section deals with offences of three kinds : (*a*) erasure of marks of cancellation, (*b*) possession of a stamp so erased, (*c*) sale or disposal of such stamps. In any case, there must be intention or knowledge—intention to defraud or cause loss to Government, or knowledge that the erasure had been made with that intention. The stamp must be a stamp issued by the Government for revenue, though the erasure need not be of a mark put on or impressed by the authority of Government. The mark or impression to denote that a stamp had been used may be a word such as "cancelled," or it may be any device not necessarily intelligible except to those conversant with the departmental rule. For instance, the mark of cancellation adopted by the post office in the case of a postal stamp is the impression of the name and date stamp, but the erasure of which will be equally an offence under this section. Judicial stamps are ordinarily punched, in which case no erasure or removal of the mark is possible. In that case, there can be no offence under this section.

2747. The second branch of the section deals with the possession or disposal of such stamps, that is to say, stamps from which the marks of cancellation have been fraudulently removed. The offence requires that the possession or disposal should be with the knowledge of the fraudulent erasure. In any other case, a person may be an innocent recipient. That his possession was innocent will, then, be

presumed, and it is on the prosecution to shew that he had the knowledge to render his possession or transfer criminal.

263-A. (1) Whoever—

Prohibition of fictitious stamps.

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(*c*) makes or, without lawful excuse has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263 both inclusive, the word "Government" when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive Government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

2748. Analogous Law.—This section is the same as section 7 of the English Post Office (Protection) Act, 1884[1] and was added to the Code by the Indian Criminal Law Amendment Act, 1895[2] in consequence of the resolution of the International Postal Congress held at Vienna on 20th May, 1891,[3] in which it was agreed to make an organized attempt to prohibit the growing traffic in fictitious stamps, the use of which on postal articles posted from abroad involved the post office in much loss and inconvenience.[4]

2749. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first class.

2750. Proof.—The points requiring proof are :—

That the accused knowingly —

(*a*) Made, altered, dealt in or sold any fictitious stamp,
(*b*) Or he knowingly used a fictitious stamp for any postal purpose,
(*c*) Or had in his possession without lawful excuse any fictitious stamp,
(*d*) Or made or, without lawful excuse, had in his possession, any die, plate or instrument or materials for making any fictitious stamp.

2751. Principle.—This section was added in 1895, and its terms are identical with those of section 7 of the English Post Office (Protection) Act, 1884. As such, cases decided under that section may be referred to for the elucidation of words which are common to them. For example, the possession of a die made abroad by the proprietor of a newspaper though for the innocent purpose of embellishing his stamp catalogue was held to be penal and offering no lawful excuse within the meaning of section 7 of the English Post Office Protection Act.[5] The working of the section

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(1) 47 & 48 Vict., c. 76, s. 7.
(2) Act III of 1895, s. 2.
(3) Art. XXXII, *see* Report of Select Committee, dated 30th Jan. 1895, Gazette of India, Pt. V, dated 2nd Feb. 1895, pp. 19, 20.
(4) Report of Select Committee on the Amending Bill of 1895, dated 1st Jan. 1895; Gazette of India, Pt. V, dated 2nd Feb. 1895, pp. 19, 20.
(5) *Dickins* v. *Gill*, (1896) 2 Q. B. 310 : *see* this case further discussed under s. 256, *ante*.

depends upon the proper understanding of the two terms "knowingly" and "without lawful excuse." The former has a recognized place in the vocabulary of the Code; the latter requires some discussion. Now the phrase "lawful excuse" does not mean the same thing as "lawful authority." "Excuse," said Willes, J., "is either an authority or a reasonable belief in authority."[1] But excuse is something more and, sometimes, something different from a reasonable belief in authority.

2752. As Grantham, J., observed: "If a person ignorantly bought a fictitious stamp, it would be hard that he should be punished and made liable to a fine, because his knowledge was not sufficient to enable him to know whether it was good or bad, and that, I think, would be a lawful excuse. Why? Not because the man believed that he had authority to have it, for he could not believe that he had authority to have a fictitious stamp in his possession, simply because he had been taken in the purchase of it; he might, however, say that he wished to excuse himself for having the stamp, because he did not believe that it was fictitious, but believed it to be genuine: that seems to me to be an excuse in law, and, therefore, would be a 'lawful excuse."[2] "The fact that a person's motive was innocent is immaterial. He may make fictitious stamps for the purpose of curiosity or display an antiquarian interest, but, nevertheless, he brings himself within the mischief of the section, for he has no lawful excuse for his possession, that is to say, no excuse which law considers sufficient to merit exoneration from criminal liability."[3]

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(1) *Harvey*, L. R. 1 C. C. R. 284 (286).
(2) *Dickins* v. *Gill*, L. R. (1896) 2 Q. B. 310 (316).
(3) Cf. *per* Collins, J., in *ib.*, 318.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

2753. Topical Introduction.—This chapter does not require for its working any fixed and immutable standard of weights and measures, nor in fact has such a standard been yet striven for or attained in this country. It is sufficient for the purpose of the chapter, that the weights and measures current in a locality should be fraudulently deviated from. The offence, in short, consists in the fraud practised by making a person believe that a weight and measure is what in reality it is not. The offence consists in cheating by using false weights and measures, which carry with them the semblance of public authenticity. In England, the use of false weights and measures has been, from early times, regarded as an offence against the common law. So if a person measured corn in a bushel and put something in the bushel to fill it up, or measured it in a bushel short of the stated measure, he was indictable.[1] The offences of using false tokens, whether they be false coins, false stamps, false weights and measures or false trade-marks are all parts of the generic offence of cheating, against which extensive provisions have been made by the Municipalities and Local Boards, by regulating the weights and measures and for verifying and stamping them. In such cases, the use of unauthorized weights and measures is also prohibited and punished. But whether it is a charge for using unauthorized weights and measures, or for an offence under any section of this chapter, the underlying principle is the same, only in the one case cheating is apprehended, in the other case it is to be proved. A police officer in charge of a police-station possesses the power to inspect or search for any weights and measures which he has reason to believe to be false, and if they are so found, to seize them.[2]

2754. In England, the weights and measures are regulated by a Statute of that name,[3] The Statute[4] fixes imperial standards of measures, and a bronze bar and a platinum weight deposited in the Standard Department of the Board of Trade in the custody of the warden of the standards are declared to be the standard yard and standard pound for the United Kingdom. The unit or standard measure of capacity for liquids and dry goods are declared to be the gallon, containing ten imperial standard pounds weight of distilled water weighed in air against brass weights, with the water and the air at the temperature of sixty-two degrees of Fahrenheit's thermometer, and with the barometer at thirty inches.[5] In using an imperial measure of capacity, the same should not be heaped, but should either be stricken with a round stick or roller, straight and of the same diameter from end to end or if the article sold cannot from its size or shape be conveniently striken it should be filled in all parts, as nearly to the level of the brim as the size and shape of the article will admit.[6] The Statute prohibits under a penalty the use of any weights and measures other than those so legally authorized, and for the periodicial verification of which the Board of Trade and local administrations are made responsible.[7] It then goes on to enforce the use of just weights and measures by penal provisions quoted under corresponding sections in the sequel.

English Law.

2755. These provisions of the English Statute closely correspond with the sections dealing with false weights and measures, and cases decided thereon are therefore instructive.

264. Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false instrument for weighing.

[*Fraudulently*—s. 25.]

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(1) *Pinkney*, 2 East P. C. 820; *Young*, 3 T. R. 304.

(2) S. 153, Cr. P. C.

(3) Weights and Measures Act, 1878, (41 & 42 Vict., c. 49); (1889) 52 & 53 Vict., c. 21.

(4) 41 & 42 Vict., c. 49, s. 4.

(5) *Ib.*, s. 15.

(6) 41 & 42 Vict., c. 49, s. 17.

(7) 41 & 42 Vict., c. 49, s. 32.

2756. Analogous Law.—This section corresponds to s. 25 of the English Statute quoted below :—

"25. Every person who uses or has in his possession or use for trade any weight, measure, scale, balance, steelyard, or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offencc ten pounds, and any contract, bargain, sale or dealing made by the same shall be void, and the weight, measure, scale, balance or steelyard shall be liable to be forfeited.

Penalty or use or possession of unjust measures, weights.

2757. Procedure and Practice.—Except that the Magistrate may under s. 153 of the Code of Criminal Procedure enter and search for weights and measures, and if they are false, inform the Magistrate, the police have no further power to proceed against the offender. The offence is thus non-cognizable, and summons should ordinarily issue in the first instance. It is bailable, but not compoundable and is triable by the Presidency Magistrate or a Magistrate of the first class or second class, and may be tried summarily.[1]

2758. Proof.—The points requiring proof are :—

(1) That the accused used an instrument.
(2) That it was an instrument for weighing.
(3) That it was false.
(4) That the accused then knew it to be false.
(5) That he used it fraudulently.

2759. Charge.—The charge under this, and the next section should run thus :—

"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——at——you fraudulently used an instrument Exhibit——for weighing (*or* a weight *or* measure which was false, *or* a weight *or* measure as a different weight *or* measure from what it is), which you knew to be false (*or, in the case of weight and measure*, which you knew to be different from what it was), and thereby committed an offence under s. 264 (*or* s. 265) of the Indian Penal Code, and with my cognizance.

"And I hereby direct that you be tried on the said charge."

2760. Fraudulent Use of False Scale.—Intention to defraud is the essential part of this offence,[2] for, the mere use of false scales is not an offence if there is no intention to cheat, and both parties are aware of it. The false scales presumably favour the user, otherwise if the advantage is the other way there is no offence as there is then no fraud. The section makes it an offence to *use* false "instrument for weighing," in other words, scales of a weighing machine. A steelyard is such an instrument. The scales must be *false*, and they must be used fraudulently. Fraudulent use of correct scales would be cheating, because though there was deception—it was not practised with the aid of false scales.[3] Scales are false if they do not weigh equally from either scale. But in considering whether a given instrument is false regard must be had to the nature of the instrument, and the thing it is intended to weigh. The section does not require that coal or cotton should be weighed in golden scales, so that the difference of a tola or so in five seers could not be held to reduce it to a fasle instrument.[4] Indeed such a discrepancy would at times be scarcely noticeable. On the other hand where precious metals or stones or things of value have to be weighed, it is but natural to expect greater precision.

2761. In the majority of cases the question whether the use of false scales was or was not fraudulent would be judged by the crude but natural test : "What profit did he make or was likely to make by his fraud ? But this is neither the sole

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(1) S. 260 (*b*), Cr. P. C.

(2) *Cf.* "fraudulently" as defined in s. 25 ; *Kengalee Muduk*, 18 W R. 7.

(3) *Achi*, (1882) 1 Weir 223. So the Law Commissioners observe: "It has been suggested that it may be expedient to provide in this chapter for the fraud lent use of a true balance. This it appears to us is an offence which falls within the definition of cheating under which head it will be liable to the same punishment as the offence of using a false balance under this chapter."—2nd Rep., s. 222, Reprint, p. 404.

(4) *Bhikha Mal*, (1883) A. W. N. 224

nor an infallible test. It has been said before that intention has to be proved, but intention may be as much a matter of proof, or as it is more often the case, a matter of inference from the fact of the possession and the attendant circumstances, as manifesting the purpose, and such an inference may, of course, be rebutted. But where the incorrectness of the scale is so visible, and, there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; that circumstance by itself negatives the intention of fraud, and no charge would lie against the party using such a balance. On the other hand, a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of this chapter.[1]

2762. A false balance is no less a false balance because it has been made true by the suspension of a removable make-weight from the beam. For the time being such a scale may be true but it is not true by itself and the mischief the section is directed against may be done any moment by the removal of the adjustment. But the case is different, where the make-weight is made an integral part of the machine.[2] As Cockburn, C. J., observed: "Supposing from wear and tear, or any other cause, scales become so affected as to require adjustment, and you effect this by adding something not originally a part of the machine, so as to make it, as it were permanently part of the machine, I am far from saying this addition might not be considered an integral part of the machine, and that the machine, when found on inspection to have been thus permanently adjusted, would not be just. But when you find that the weighing machine, be it scales or any other instrument of weighing, is in itself unjust, and that the error is only rectified by the introduction of some temporary contrivance that can be added or withdrawn at pleasure, the case is very different, and there is the more reason to hold the machine unjust. That, in the present case, the contrivance can readily be made use of for the purpose of fraud, as by merely unhooking this ball or removing the shot the scales become unjust in favour of the seller and against the purchaser."[3] To which Blackburn, J., added: "If scales owing to wear and tear must require adjustment, and if it is necessary that the means of adjustments should be removable, persons using such means, should, in order to be secure against conviction, take care that the scales when the moveable adjustment is removed, should turn against the vendor."[4]

2763. A scale is a false scale, if it is not true whatever may have been the object for the difference. In one case the accused had placed on the scoop of a machine used for weighing tea, a piece of paper for the purpose of convenience and expedition in weighing, because it took longer to weigh the tea if it were placed in the bag in which it was to be sold, before being put into the scoop for weighment. The paper weighed less than the bag in which the tea was sold, but it was held, that inasmuch as the machine when used with the paper indicated a weight in excess of the true weight, it was a false and unjust scale, so that the seller using it became liable to the penalty provided in s. 25 of the Statute.[5]

2764. The term "uses" implies that the person guilty of the offence must have himself used the instrument. But one who employs another to use false balance would be guilty of abetment, if he knows it to be false and intended to defraud thereby, and the actual user may be innocent if he was not privy to it.

Fraudulent use of false weight or measure.

265. Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[*Fraudulently*—s. 25.]

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(1) 2nd Rep., ss. 220, 221, Reprint, p. 404.

(2) *Great Western, Ry. Co.* v. *Bailie*, 34 L. J. M.C. 31, in which Crompton, J., distinguished *London and North Western Ry. Co.* v. *Richards*, 2 B. & S. 326, on the ground stated in the text.

(3) *Carr* v. *Stringer*, L. R. 2 Q. B. 433 (436, 437).

(4) *Ib.*, p. 438.

(5) *Lane* v. *Rondall*, (1899) 2 Q. B 1673

2765. Analogous Law.—The last secton deals with the use of a false balance. This section deals with the use of a false weight or measure. The two sections together thus deal with the same offence differently compassed. This section corresponds to s. 26 of the English Statute quoted below :—

Penalty for fraud in use of weight, measure, balance, etc.

"26. Where any fraud is wilfully committed in the using of any weight, measure, scale, balance, steelyard or weighing machine, the person committing such fraud, and every person party to the fraud shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and the weight, measure, scale, balance or steelyard shall be liable to be forfeited.

2766. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.[1]

2767. Proof.—The points requiring proof are:
(1) That the accused used a weight or measure.
(2) That it was false.
(3) That he used it fraudulently.

2768. Charge.—*See* under s. 264 (§ 2759).

2769. Fraudulent Use of False Weights and Measures.—A weight is an instrument for measuring the force of gravity as determined for any particular body; a measure is an instrument by which its extent or capacity is ascertained. No weight need necessarily bear a fixed ratio to a measure, for the one depends upon the force of gravity, and the other on the extent of capacity. There is the greatest diversity conceivable in the use of weights and measures in different countries, and in this country itself, what is a maund in Calcutta is not a maund in Bombay, and in Bombay itself the weight of a maund varies according to the article, and the custom of the trade. The same diversity exists as regards the use of measure. But these incongruities only remotely affect the offence here enacted. It assumes that both parties to a transaction use the same term in the same sense, and both understand and abide by the custom of the trade. If one bargained for a maund of raisins, understanding it to mean 80 pounds avoirdupois, and another quoted for a maund of a local variety weighing only 32 of such pounds, it may be a case of cheating, but there is no *use* of a false weight or measure.

2770. The offence is confined only to this that if the parties have expressly or impliedly fixed upon an instrument, weight, or measure, with reference to their mutual dealings, one shall not defraud the other by using a different instrument, weight or measure than that agreed upon. If the weight or measure agreed to is itself variable, or uncertain, no one can be blamed for availing himself of it. For instance, a person may purchase cloth at so many hands per rupee. In such a case the "hand" may be the hand of a giant but the vendor cannot object to it. If, however, the measure agreed to was by yards, containing 36 inches, the vendor cannot measure out with a measure short of that length. The same remark applies to weights. A pound weighs 40 tolas and a seer 80 tolas. No one purporting to weigh out a seer can use a weight short of 80 tolas. But in such case something must depend upon the nature and value of the article weighed. In weights used for weighing ordinary commodities a small deficiency could scarcely count. For instance, a difference of a tola in a five-seer weight might well be put down to wear and tear.[2] It would scarcely make any appreciable difference in the case of ordinary commodities, though, of course, the more precious the article the more precise would have to be the weight.

2771. In the case of measures, there is a still greater room for discrepancy. And it is in any case wholly fallacious to judge of the correctness of a given measure by reference to a fixed standard of weights, for the weight of a given measure is never invariable, and must vary with the specific gravity and density of the thing measured. Even an article of the same kind may differ in weight. A bushel of

(1) S. 260 (*b*), Cr. P. C.

(2) *Bikka Mal*, (1883) A. W. N. 224.

pedigree wheat weighs more than a bushel of ordinary wheat. In order to ascertain whether a measure is false or not, the only proper test to apply is that of measure, and the same article must be measured in each case, and proof should be adduced that this had been done. The weight of the grain that a measure is found to hold is no evidence of its capacity as compared with that of another measure, unless the very same grain is used.[1] And, it may be added, even then the result attained is not invariable; and some allowance should be made for the mode and habit of the different measures, and of the same measurer on different occasions.

2772. Again, it will be difficult to bring home an offence under this section for using a false measure, unless the measure used was a prescribed measure, or one agreed upon by the parties. If it was neither one nor the other, it is not for either to complain, for what is then the test? If in such a case, there was an assurance as to a certain capacity with reference to a standard measure, and that assurance was false, the accused would be rightly convicted of cheating by his falsehood, but not of using a false measure. So it was held that the accused who sold liquor, measuring it with a glass which was not a prescribed measure, and of which he frequently misrepresented the capacity, could not be convicted under this section though his offence would then certainly fall into the category of cheating.[2]

2773. Of course, it is the primary duty of a person selling by a certain standard of weight or measure to take a reasonable care that the weights and measures he uses are not incorrect.[3] If they vary from the standard materially so as to give the seller considerable advantage, the Court would be justified in attributing the variation to fraud.[4]

2774. But in the Bombay case last cited, the glass was held not to be a measure, because there was no indication thereon that it purported to be one. But if it had been marked to denote a measure, the case would then have been different. Such was the case of the appellant in an English case who was convicted under s. 25 of the Weights and Measures Act, 1878,[5] one of having false measures in his possession for use for trade. He sold milk to a purchaser, and sent it by train in his own churns, which were fitted with gauges to indicate the number of gallons they contained, and the contract of carriage between the appellant, and the Railway Company provided that they should be so fitted. By this contract with the appellant the purchaser was entitled to have the churns regauged when he deemed it necessary. The Magistrate found that in the dealings between the appellant and the purchaser, and between the appellant and the Railway Company, the gauged churns were used as measures, and that as two of the churns purporting to contain 16 gallons contained two pints less, it was held that the gauged churns were measures which the appellant had in his possession for use for trade, within the meaning of the Act, and he was rightly convicted.[6]

Being in possession of false weight or measure.

266. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[*Fraudulently*—s. 25.]

2775. Analogous Law.—For its general object this section may be compared to ss. 235, 239, 240, relating to coins, and s. 259 relating to stamps. In each case the offence lies in the fraudulent intention to be put in practice—not in the mischief done, but in the mischief threatened.

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(1) *Lakshman* (1898) B. U. C. 989.
(2) *Nurodin*, (1888) B. U. C. 386.
(3) *Appasami*, v. *Munisami*, (1884) 1 Weir 225.
(4) *Venkata Chetti*, (1883) 1 Weir 225, *Bakhatlal*, 116 I. C. (N.) 671.
(5) 41 & 42 Vict., c. 49, s. 25.
(6) *Harris* v. *London County Council*, (1895) 1 Q. B. 240.

"59. Where any weight, measure, scale, balance, steelyard or weighing machine is found in the possession of any person carrying on trade within the meaning of this Act, or on the premises of any person which, whether a building or in the open air, whether open or enclosed, are used for trade within the meaning of this Act, until the contrary is proved he shall be deemed to have such weight, measure, scale, balance, steelyard or weighing machine in his possession for use for trade."

Evidence as to possession.

2776. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable, but not compoundable and is triable by a Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.[1]

2777. Proof.—The points requiring proof are :—

(1) That the accused was in possession of some instrument for weighing, or any weight or measure.
(2) That the same was false.
(3) That the accused knew it.
(4) That he was in possession, intending that the same may be fraudulently used.

2778. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

"That on or about the——day of——at——you were in possession of a certain instrument for weighing (*or* of a certain weight, *or* of a certain measure of length or capacity), Exhibit——, to wit——knowing it at the time of your possession to be false, and intending that the same weight might be fraudulently used, and thereby committed an offence under s. 266 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2779. Possession of False Weight Fraud Expectant.—As it has been remarked in the course of discussions in connection with coins and stamps, so it may be remarked here, that the mere possession of false weights and measures is no offence under the Code, but if such possession is accompanied by the criminal intention,[2] the possession itself becomes criminal and the person in possession is liable to punishment under this section. Four things are, however, required to complete the crime : (*i*) that the weights and measures must be false ; (*ii*) that they must be in the possession of the accused ; (*iii*) that he must know that they are false ; and (*iv*) that he must have stored them with the intention to defraud. It has already been seen as to what is implied by the expression "false weights and measures." The meaning of possession has also been the subject of frequent discussion (§§ 239-243). It may, however, be once more repeated that the possession required in this connexion, is such control as can be exclusively traced to the person charged. Added to such possession, there must be knowledge of their falsity. This knowledge must, ordinarily, go with the intention to defraud. But it is possible that there may be knowledge without fraudulent intention.

2780. For instance, a person may put aside false balance, weights and measures as no longer serviceable. He puts them aside knowing them to be false, and because he does not wish to use them. He could not then be punished, for though he had knowledge of their falsity he did not intend to turn it to his advantage. The question whether he had one or the other in such a case would be a knotty one. But the circumstances in which they were found may probably throw a considerable light on the question. If, for instance, the weights and measures were found stowed away with lumber and in a condition showing that they could not have been used since long, the inference arising would be different than if they were found placed on a tradesman's counter where he usually received his customers. So where the accused, a farmer, had in his barn or out-house a balance or portable weighing machine, and two iron weights which were found to be light, and the Inspector of weights and measures saw no produce about his premises and could not prove that he exposed or kept for sale, or weighed for conveyance or carriage any goods or

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(1) S. 260 (b), Cr. P. C.
(2) *Damodhar Dalji*, 1 B. H. C. R. 21; *Harak Chand*, 40 A. 84.

produce, it was held that he could not be convicted for keeping light or unjust weights in a shop, store, etc., where goods are sold or weighed for conveyance.[1]

2781. In a prosecution for possessing short weights, the evidence of customers, who had had dealings with the accused, would be admissible, and so will be the evidence of any complaints they may have addressed to him, not as proving the charge but as showing that the attention of the accused having been drawn to the short weights, he could not be unaware of that fact. The evidence of customers receiving short weight would be material for the purpose of showing that the accused defrauded people by their use and that "he intended that the same may be fraudulently used."

English Law.

2782. It has been held under the corresponding provision[2] of the English Statute that it did not extend to false scales which are the property of the Crown, though they might be false, and, as such, used by a person in his private capacity. The question arose in a case in which the accused, a baker, was also a Post Master, and upon whose counter a false scale belonging to the Post Office was found by the Inspector of weights measures. It was conceded that, if the baker was found selling bread by weighing it on the postal scale, he could be proceeded against under the provisions of 6 and 7 Will., IV, c. 37.[3] The only question argued was whether the Justices had jurisdiction to confiscate false scales if they were the property of the Crown. It was held that they had no such power under s. 25 read with s. 59 of the Statute, which did not extend to the property of the Crown. Mathew, J., said: "The necessary consequence of holding that such scales and weights are within the purview of the Act, would be that the perfectly innocent user of such weights and scales might be punished as criminal, that the whole work of a Post Office might be stopped by seizure of the weights and scales, and that the Justices would have power to order the property of the Crown to be forfeited."[4]

2783. No Offence.—Since the commission of fraud is the gist of the crime, there can be no fraud where a short weight or measure is customary. So where the village shopkeeper used a yard measure only 35½ inches long and it was found that every one in the village knew it to be the prevailing measure, the accused could not be convicted of this offence, though his measure was not a standard measure.[5]

Making or selling false weight or measure.

267. Whoever makes, sells, or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

2784. Analogous Law.—This section corresponds with s. 27 of the English Statute[6] which run as follows:—

Penalty on sale of false weight, measure, balance, etc.

"27. A person shall not wifully or knowingly make or sell or cause to be made or, sold, any false or unjust weight, measure, scale, balance, steelyard or weighing máchine, and every person who acts in contravention of this section shall be liable to a fine not exceeding ten pounds, or in the case of a second offence, fifty pounds."

2785. Similar offences relating to coin and stamps are described in ss. 239-241 and 258, from which last this section makes a departure in that it does not punish one who merely "offers for sale" a false scale, weight or measure.

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(1) *Griffits* v. *Place*, 20 L. T. N. S. 484, decided on the language of 5 & 6 Will, IV c. 63, s. 28.

(2) Weights and Measures Act, 1878 (41 & 42 Vict., c. 49), s. 25.

(3) *Justices of Kent*, 24 Q. B. D. 181 (183).

(4) *Justices of Kent*, 24 Q. B. D. 181 (185).

(5) *Harak Chand*, 40 A. 84.

(6) 41 & 42 Vict., c. 49.

2786. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

2787. Proof.—The points requiring proof are :—

(1) That the accused either made, sold or disposed of an instrument, or any weight or measure;
(2) That it was false;
(3) That he then knew it to be false;
(4) That he so made, sold or disposed of it in order that it might be used as true or that he knew that it was likely to be used as true.

2788. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

" That on or about the——day of——at——you made (*or* sold *or* disposed of) Exhibit ——which was an instrument for weight (*or* a weight or measure of length or capacity) knowing at the time of making (*or* selling *or* disposing of) it, to be false, in order that the said, instrument might be used as true (*or* knowing that the said instrument was likely to be used as true and thereby committed an offence) punishable under s. 267 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

2789. Traffic in False Weights.—This section penalizes the making, selling or disposing of a false scale, weight or measure. It does not prohibit its import and export, but merely its manufacture. A true scale, weight or measure may be made false by tampering with it. It is not necessary under this section that the maker should make a false weight a new. The disposal of an instrument may or may not be for a valuable consideration. The offence lies in putting in circulation false weights, with the intention that they should be used as true. In other words, it is the intention accompanying the act that makes the act criminal.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

2790. Topical Introduction.—The title of this chapter is one definition of a public nuisance. It is an offence affecting the public health, safety, convenience, decency or morals. According to Blackstone, "common nuisances are a species of offence against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the King's subjects, or neglecting to do a thing which the common good requires."[1] A nuisance,[2] *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience or damage. Nuisances are of two kinds, public or common nuisances, which affect the public, and are an annoyance to all the King's subjects, and are, therefore, treated as public wrongs; and private nuisances which are done to the *hurt*, or *annoyance* of the lands, tenements or hereditaments of another.[3] Affecting as they do only a member of the public and not the public generally, they are treated as private wrongs for which the person injured has redress by a civil action, but which are not indictable. Where, however, besides being injurious to a private person they are also detrimental to the public, they are then treated as public nuisances, and are then punishable by a public prosecution. The old books contain many curious instances of such nuisances. Besides those which are even now classed as public nuisances, such as disorderly inns or ale-houses, bawdy houses, gaming houses, stage plays, unlicenced booths and stages for ropedancers, mountebanks and the like,[4] and those created by Statute, such as lotteries,[5] the making and selling of fireworks and squibs or throwing them about in any street,[6] the keeping of an inordinate quantity of gunpowder in one place or vehicle,[7] there are those which the early writers classed as public nuisances, but reference to which can scarcely by made without provoking a smile.

2791. Such, for instance, was the Statute against the erection of single cottages on the waste, which, being harbours for thieves and other idle and dissolute persons, were treated as nuisances.[8] So were eavesdroppers, or such as would listen under walls or windows, or the eaves of a house, or hearken after discourse, and thereupon frame slanderous and mischievous tales, all these were indictable as common nuisances at the sessions and were punishable by fine and finding securities for their good behaviour.[9] So was also a common scold (*communis rixatrix*) who was held to be public nuisance to her neighbourhood, for which she was liable to be indicted and, if convicted, placed in a certain engine of correction, called the trebucket, castigatory, or cuking stool, which meant the scolding stool, afterwards corrupted into ducking stool, on account of the ducking in water which concluded her punishment. Some will still regret that the modern puritan spirit has eliminated eavesdroppers and scolds from the table of public nuisances.

2792. There is no statutory definition of a public nuisance in English Law. One such definition was attempted by the authors of the Digest of Criminal Law,[10] from which the Indian Law Commissioners have largely borrowed for the purpose of the Code.[11] The definition of "nuisance" in the Public Health Act, 1875 (ss. 91 & 112) is also instructive.[12]

2793. This Statute deals also with other cases of nuisances, referred to under appropriate sections.

Procedure and Civil Action.

2794. This Chapter deals with nuisances considered as offences. Chapters X (ss. 133-143) and XI (s. 144) of the Procedure Code prescribe the procedure relating to the abetment of nuisances, s. 144 dealing with a nuisance in case of urgency. The powers conferred by those sections on certain Magistrates, are confined to the nuisances described in section 133, which, however, is another working definition of the term. Proceedings under Chapters X and XI of the Procedure Code are

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(1) Hawk, P. C. 197; cited in 4 Black., 166.
(2) From Lat. *Nocere*, to annoy—something that annoys or gives trouble.
(3) 3 Black., 216.
(4) 1 Hawk, P. C. 198, 225.
(5) 10 & 11 Will. III, c. 17.
(6) 9 & 10 Will. III, c. 7.
(7) 12 Geo. III, c. 61.
(8) 31 Eliz., c. 7.
(9) 1 Hawk, P. C. 132.
(10) 6 M. 213; 1 Hawk, P. C. 198, 209 3 Just. 219; 4 Black., 168, 169.
(11) Ch. XIII, Art. 1.
(12) 38 & 39 Vict., c. 55, s. 91, quoted in 1 Penal Law (4th ed.), p. 1340 § 2642.

optional, and the fact that no proceedings were taken under the Procedure Code cannot be pleaded as a bar to a prosecution under this section.[1] And since a public nuisance is both indictable as well as actionable, there is nothing to prevent a person individually affected by the nuisance, from enforcing his civil remedy without having recourse to a prosecution.[2] So Lord Ellenborough said in a case: "I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustain a special injury from it, he has an action."[3] So Abbot, C. J., said, "I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful, on the ground of public injury, may maintain an action for his own special injury."[4] But without special injury there can be no civil action for damages[5] though it may expose the nuisance-feasor to a prosecution for his act. And inconvenience suffered in common with the rest of the community is not such a special injury.

2795. **All Nuisances Possess One Common Feature**—They cause or are conducive to the injury, destruction, danger or annoyance of a person or persons collectively. This chapter deals only with such nuisances as affect the public and not only some of its members. The definition of the term given in section 268 makes this sufficiently clear. The rest of the chapter then describes and provides punishments for specific nuisances—those not so covered being punishable under the residuary provisions of section 290. There are eleven principal cases of nuisances specifically dealt with. They are:—

(1) Spread of infection (ss. 269-271).
(2) Fouling water (s. 277).
(3) Making atmosphere noxious to health (s. 278).
(4) Adulteration of food, drink and drugs (ss. 272-276).
(5) Rash driving (s. 279).
(6) Rash navigation (ss. 280, 282).
(7) Endangering public ways (ss. 281, 288).
(8) Negligent handling of poisons, combustible and explosives (ss. 284-286).
(9) Negligence with respect to—
  (*a*) machinery (s. 287).
  (*b*) buildings (s. 288).
  (*c*) animals (s. 289).
(10) Spread of obscenity (ss. 292-294).
(11) Public gambling (s. 294-A).

2796. **Section 290 refers to cases not otherwise provided for.** These sections then include all that is regarded as nuisances in English Law. Besides them, there are other cases of minor nuisances against which provision has been made in the various special and local laws dealing with the health and sanitation of towns and urban areas.[6]

2797. **Private Defence Against Public Nuisance.**—It was, at one time the common view, that any one could pull down or destroy a public nuisance, and so, it was said that any one whose property was prejudiced by a private nuisance could justify the entering into another's land and pulling down and destroying such nuisance.[7] But as regards the right to remove a public nuisance, it has now been held that, if there is a nuisance in a highway, a private individual cannot, of his own authority, abate it, unless it does him special injury, and he can only interfere with it so far as is necessary to exercise his right of passing along the highway, and he cannot justify any damage to the property of another who has improperly placed the nuisance in the highway, if by avoiding it, he might have passed on with reasonable convenience.[8]

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(1) *Suklal*, (1869) B. U. C. 23.
(2) *Jina Ranchhod* v. *Jodha Ghella*, 1 B. H. C. R. 1.
(3) *Dewsnap*, 16 East 196.
(4) *Duncan* v. *Thwaites*, 3 B. & C. 584; *Rose* v. *Miles*, 4 M. & S. 101; *Butterfield* v. *Forester*, East 60; *St. Helen's Smelting Co. Ltd.* v. *Tripping*, 35 L. J. Q. B. 67; *Benjamin* v. *Storr*, 43 L. J. C. P. 166; *Metropolitan Board of Works* v. *McCarthy*, 43 L. J. C. P. 385.
(5) *Loyd*, 4 Esp. 200; *Ivson* v. *Moore*, 1 Ld. Raym. 486; *Ricket* v. *Metropolitan Ry. Co.*, 34 L. J. (Q. B.) 257; *Winterbotham* v. *Lord Derby*, L. R. 2 Ex. 316 (322).
(6) *Winterbotham* v. *Lord Derby*, L. R. 2 Ex. 316. (322).
(7) 1 Hawk, P. C. C. 75, s. 12; Bac. Abr. Tit. "Nuisance" (*c*).
(8) *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Denies* v. *Perby*, 15 Q. B. 276; *Bateman* v. *Black.*, 18 Q. B. 870.

2798. The explanation definitely overrules the English common law rule and the cases in which it was adopted till 1865 when the House of Lords settled the rule in accordance with the section.[1]

Public nuisance.

268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

[***Person***—s. 11. ***Public***—s, 12. ***Act***—s. 33. ***Illegal***—s. 43. ***Injury***—s. 144.]

2799. Analogous Law.—The definition of "public nuisance" here given applies to all Acts of the Governor-General in Council and Regulations under 33 Vict., c. 3, s. 1 made after 14th January 1887.[2]

2800. Principle.—This chapter dealing with the subject of public nuisances is intended to protect three classes of persons: (*a*) the public, (*b*) the neighbours as distinct from the public, and (*c*) persons possessing a public right. In each case, the nuisance-feasor must be guilty of an act or an illegal omission. But its resultant effect is not, in each case, the same. For instance, where the nuisance affects the public or the neighbours, it must cause a common injury; where it affects the enjoyment of a public right, it must necessarily cause an injury. In such a case, the injury may be likely and it need not be suffered in common. This distinction is important, for, while in the one case there must be evidence of an actual injury, it will suffice, in the other case, if the injury is inevitable, though it was not actually caused. Again, while, in the former case, there must be evidence that the nuisance affected a number of persons generally, in the latter case, this is not necessary. If any individual suffered or was likely to suffer, an infringement of a public right, it may amount to a nuisance though the public at large may be unaffected by it.

2801. The question what amounts to "injury, danger or annoyance" in the one case and an obstruction to use of a public right in the other depends upon public convenience. As such, criminality in such cases depends not upon intention and knowledge but upon injurious effect produced in the manner stated.[3] This is true whether the nuisance be public or private, or whether it is indictable or merely actionable.[4]

2802. Analysis of Public Nuisance.—This section follows the general scheme adopted in the Code of not defining a term in the abstract, but defining it in relation to the doer. As such, it defines the doer of a public nuisance to be one (*i*) who does any act or is guilty of an illegal omission, which (*ii*) causes (*a*) any common injury or (*b*) danger or (*c*) annoyance (*iii*) to the public or to the people in general who dwell or occupy property in the vicinity or (*iv*) which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. The section then adds that (*v*) it is no answer to a public nuisance that it causes some convenience or advantage.

There must be Act or Illegal Omission.

2803. In order to constitute a public nuisance, there must be, then, in the first place, an act or an illegal omission. An act, as such, does not include an omission—much less an illegal omission.[5] Any act may amount to a public nuisance. It is not necessary that it should be, in itself, an illegal act. But as soon as it becomes

(1) As to nuisance—Beng. Act II of 1888 (ss. 221-316); Bom. Act VI of 1873 (ss. 30-79); Mad. Act I of 1884 (ss. 283-367); Burmah Act XVII of 1884 (ss. 76-105). As to infectious diseases—Act XVII of 1884 (ss. 126, 127); Act of 1891 (ss. 139-141); Beng. Act II of 1888 (ss. 321-334); Mad. Act I of 1884 (ss. 368-377.)

(2) General Clauses Act (X of 1897), s. 3 (44), s. 4 (2).

(3) *Stephens*, (1866) L. R. 1 Q. B. 702; *Nisar Mahomed*, 6 L. 203.

(4) Com. Dig. Action on the case for Nuisance, *Hole* v. *Barlow*, 4 Com. Beng. N. S. 334; *Bomford* v. *Turnley*, 3 B. & S. 62, overruled in *Carvey* v. *Lidbitter*, 13 C. B. (N.S.). 470; *St. Helen's Smelting Co.* v. *Tripping*, H. L. C. 642.

(5) S. 33.

a nuisance, the act itself becomes illegal, not because it is *per se* illegal, but because it has an injurious effect upon and is intolerable to the public. Public nuisance is, then, a recognition of the maxims of civil law—*sic utari tuo ut alienum non lædas*[1] *sic utari tuo ut rem publicaim non lædas.*[2] It is, then, no defence to a charge of public nuisance that the act done was in assertion of one's right in property, or that it was done on one's own property, or indeed, that it had been done from time immemorial. This suggests the question whether the right to continue a nuisance can be acquired by prescription. The question depends upon the nuisance.[3] At one time, it was held that a right to a nuisance might be acquired by prescription, because it was said that it was the complainant who went to the nuisance and not the nuisance to him. This is no longer the law. It is now settled that neither prescription nor custom would legalize a public nuisance.[4] Even where the nuisance is private, the question is one of degree and inconvenience caused to the party aggrieved. A nuisance, imperilling the health of a neighbour or destroying his amenities, would be as much subject of redress as a public nuisance, though this chapter deals only with such nuisances which are injurious to health and life.

Bona Fide Dispute.

2804. But while prescription is no answer to a charge of public nuisance under this chapter, still it may give to the objection of the person possessing and enjoying a right the character of a *bona fide* dispute as to title, which might have the effect of ousting the jurisdiction of the Magistrate under sections 133 and 137 of the Procedure Code, and making the question a proper one for the Civil Courts.[5] If an act is a nuisance, the presence of other nuisances will not justify it, nor indeed, is it any defence that the accused's act only contributed to the public nuisance. Such was the case of a varnish maker who being indicted for causing a public nuisance, pleaded that the offensive smells proceeded as much from his factory as from the neighbouring slaughter-houses, brewery, a gas factory, a melter of kitchen-stuff and a blood-boiler, and that although the accumulation of all the smells was offensive, yet the accused's alone was not sufficient, whereupon Abbot, C.J., said : " It is not necessary that a public nuisance should be injurious to health ; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, *knackers*, melters of kitchen-stuff, etc., but the presence of other nuisances will not justify any one of them : or the more nuisances there were the more fixed they would be ; however, one is not the less subject to prosecution because others are culpable. The only question, therefore, is this : is the business, as carried on by the defendant, productive of smells offensive to persons passing along the public highway.[6]

Act or Illegal Omission Essential.

2805. The question whether the act of the accused did or did not amount to public nuisance depends upon whether it has the effects which are characteristic of a nuisance. They must be, however, due to the act or *illegal* omission of the accused. Every omission resulting in a nuisance is not indictable, whatever other remedial rights the Courts may otherwise possess. Thus in England, there is a Statute which binds the owner to fence wells in his premises within twenty-five yards of, and open to, the highway, but there is not the same statutory obligation in India. Therefore, the accused who neglected to fence his well

(1) " Enjoy your own property in such a manner as not to injure the rights of another."

(2) " Enjoy your own property in such a manner as not to injure the rights of the public." *See* this maxim applied in *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(3) *Per* Lord Westbury in *St. Helen's Smelting Co* v. *Tripping*, H. L. C. 642 (652).

(4) *Hole* v. *Barlow*, 4 C. B. N. S. 336, indirectly overruled on another point in *Carey* v. *Ledbitter*, 13 C. B. N. S. 470 ; *Shottis Iron Co.* v. *Ingles*, 7 App. Cas. at p. 528. *Attorney-General* v. *Richmond*, 1 L. R. 2 Eq. 306 (311) ; *Tipping* v. *St. Helen's Swetting Co.*, L. R. 1 ch. 66 (69) ; *Cross*, 3 Camp. 227 ; to the same effect, *The Stook Port Water Works Co.*, v. *Potter*, 7 H. N. 160 ; *Municipal Commissioners of The Suburbs of Calcutta* v. *Mahomed Ali*, 16 W. R. 6 ; *Preonath Dey* v. *Gobardhone Mal*, 25 C. 278.

(5) *Preonath Dey* v. *Gobardhone Mal*, 25 C. 278.

(6) *Neil*, 2 C. & P. 485 ; *Wattz*, Moo. & M. 281 ; *Neville Peake*, N. P. C. 91.

at a distance of only eight yards from the highway, may endanger the public, but he could not be convicted of this offence because his omission is not illegal.[1] That term is defined in section 43 of the Code to be applicable to everything which is an offence, or which is prohibited by law, or which furnishes a ground for a civil action. The test in such cases then is : was the omission, of itself, an offence, or was it prohibited or did it furnish a ground for a civil action.

2806. Now in the case of an unfenced well, a person straying from the road might fall into it, but would this furnish him a ground for a civil action ? It would not, because he could not fall without contributory negligence ; for the person so falling into the well would be bound to keep to the public road, and his fall would be the consequence of the neglect of his duty. Of course, where there is no legal duty, an omission to do what a person had been in the habit of doing, believing it to be his duty, would not make the omission illegal. So Keating, J., observed in a case : [2] " To throw upon the owner the objection of fencing a pit in his land adjoining a road, it ought to be shown that the pit is near as to be dangerous to person using the road in the line of the road." To which Williams, J., added : " No right is averred but merely that the owners allowed persons for diversion or business to go across the waste without complaint. But a person using the waste has no right to complain of any excavations he may find there ; he must accept the permission with its concomitant conditions, which may be its perils." " The proper and true test of legal obligation is," Wightman, J., observed, " whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury, whether the excavations were sufficiently near to the highway to be dangerous." [3] So where the defendant was possessed of a canal and the land between it and a sluice, and an ancient public footpath passed through the land close to the sluice, it was held that the path was not so near the canal as to render the defendant liable for any accident which may befall those who made use of the path.[4]

2807. So the lambardar of a village, where a fair was annually held, used to make arrangements every year at the time of the fair for the sanitation of the place. In one year he failed to do so, and he was convicted of this offence because of his failure to make the usual arrangements, and because the public roadway had been for several hundred yards covered with faetid matter ; it was held that the conviction could not be sustained as there was no legal obligation on the accused to attend to the sanitation.[5]

(1) Common Injury.

2808. Again, though there may be an act or illegal omission causing an injury, it does not necessarily amount to a public nuisance unless the injury so caused is *common* to the public. For example, the injury resulting from the straying of one's cattle into other people's garden is in consequence of an illegal omission, because every individual so injured may maintain a civil suit for damages against the owner of the strayed cattle, but it is, nevertheless, not a public nuisance, because the injury so done is neither common to the public, nor was it caused to persons who had occasion to use any public right.[6] But such would be the case, if the cattle had been let loose at night on a road.[7] So a person, trotting in a marketplace rams trained to fight, was convicted of this offence, because his act was calculated to cause injury, obstruction, danger or annoyance to persons using a public right, namely, the market.[8] So while there is nothing against possessing a furious mastiff, its going on the streets unmuzzled is, from the ferocity of his nature, and the likelihood of his being

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(1) *Anthony Udayan*, 6 M. 280.
(2) *Houksell* v. *Symth*, 29 L. J. (N. S.) C. P. 203.
(3) *Hardcastle* v. *The South Yorkshire Ry. & Co.*, 28 L. J. (N. S.) Ex. 139.
(4) *Binks* v. *The South Yorkshire Ry. & Co.*, 32 L. J. Q. B. 26.
(5) *Guj Singh*, (1875) P. R. No. 11.
(6) *Joynath Mundul* v. *Jamul Sheikh*, 6 W. R. 71 ; *Velapoo Kotadu*, (1894) 1 Weir 244.
(7) *Keshaji Ahmed* (1892) 1 Weir 239.
(8) *Raja Sahib*, (1883) 1 Weir 243.

a cause of terror to the public, a public nuisance for which the owner is indictable.[1] And so it is said that the setting up of a sty for swine in inconvenient parts of a town where they cannot but incommode the neighbourhood, is a common nuisance.[2]

Who are the "Public"?

2809. In this connection it may be inquired, what the section means by the term "public." As defined elsewhere,[3] the word "public" is said to include any class of the public, or any community. But that class must obviously be non-sectarian, and numerically sufficient to be designated "the public." The question, whether a number of persons injuriously affected by a nuisance are sufficiently large enough to be designated *the* public, is a question of fact which the Magistrate will have to decide having regard to the nature of the nuisance and its effect upon the public generally or upon any section of the public complaining of its existence.

2810. In one case the Mahomedans had set up an image during the Mohurrum festival on a piece of waste land forming part of the village site and in the proximity of a Hindu temple. It was proved that the setting up of the image was likely to cause serious annoyance to the Hindus. And the question then raised was, did it suffice to constitute a public nuisance, but Turner, C. J., referring to the section, remarked: "It is obvious from the language of the Act that it was not intended to apply to acts and omissions calculated to offend the sentiments of a class. In this country, it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of the adherents of other creeds residing in the neighbourhood; but the Penal Code does not regard such an act as a public nuisance. The scope of the provision we are considering is to protect the public or people in general, as distinguished from the members of a sect, from injury, danger or annoyance in the neighbourhood of places where they dwell or occupy property, or when they have occasion to use a public right."[4] In this view the action of the Mohammedans could not be held to amount to a public nuisance, and as such, punishable under section 290.

2811. This view was adopted in Bombay in a case in which the Jains had complained against the accused's having cut up, in their view, in the verandah of his house, meat that was to be cooked for a dinner. The meat was fresh and no noxious smell emitted therefrom. Its exposure was, however, revolting to the feelings of the Jains who resided in the neighbourhood, but that alone was held to be insufficient to constitute a nuisance.[5] But this case was so decided because the very sight of meat is offensive to the Jains whose susceptibilities could not be respected to the extent of prohibiting the exposure of mutton. But suppose, if in such a case, the slaughter had been made in public on purpose so that the groans and blood of the poor slaughtered beast, were heard and seen by the passers-by, would it not cause annoyance to the public at large, whether Hindu, Mahommedan or Christian? In such a case, the act of the accused would clearly amount to a public nuisance.[6] The question in such cases then depends not so much upon what was done, but how it was done and what was its effect upon the general public. For instance, every Mahommedan has the right to slaughter kine, if he is so minded. If he cut them up before people were about, the fact that one or two members of a certain community witnessed it and felt thereby annoyed, would not convert a legitimate act into a public nuisance.[7] On the other hand, if the killing was done in a manner revolting to humanity, it could not be avoided being so punished. So the mere sale of meat or fish near or on a public road, cannot be

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(1) Burn's Just., tit. "Nuisance," 1; 3 Chit. Cr. L. 643.
(2) Bac. Abridg., tit. "Nuisance," 1 Hawk, P. C. C. 75, s. 10.
(3) S. 12.
(4) *Muttumira*, 7 M. 590.
(5) *Byramji Edalji* 12 B. 437.
(6) *Zaki-uddin*, 10 A. 44.
(7) *Ib.*

deemed a nuisance[1] though the fact that such exposure is offensive to the religious susceptibilities may be a matter for executive action.

2812. The same view of the rights of the public underlay another case in which the accused who were Hindu Sonars belonging to a sect called Shumsees had complained against the other Hindu residents who had excluded them from the wells and all social intercourse.[2]

2813. There can be no common injury to the public where there is no public or persons sufficiently large at hand to feel the annoyance. A certain act might be immoral and annoying to the public, if it were known to them, but such a possibility does not enter in the case of a public nuisance. A traveller was putting up in a dak bungalow and on his invitation a prostitute paid him a visit ; she had been warned against visiting that place and was, therefore, prosecuted for a public nuisance, but it was held that both the elements of common injury and injury to the public were wanting, and that the woman could not, therefore, be convicted.[3] So bare solicitation of chastity even in a public place, is not a public nuisance, as it proves or suggests no fact relating to any *common* injury, danger or annoyance which is an essential element of the offence.[4]

(2) Common Danger.

2814. Either injury, danger or annoyance must be the necessary consequence of the act of the nuisance-feasor. The danger, here spoken of, may arise to the public health or safety in a variety of ways. Some of the more important cases of such danger have been specifically provided for in the Act. Others will be punishable under the more general provisions of section 290. A person fouling the water of a stream by putting into it bundles of stalks of *tur* plants, would be so punishable.[5] The same fate will befall one who makes the atmosphere noxious to health, by depositing dust and sweepings on the road in front of his house,[6] or keeping on his premises vegetable matter exuding offensive odour to persons using the public street.[7] Of course, this does not apply to the throwing of rubbish into one's own garden, so long as the nuisance does not affect the public or the passers-by.[8]

2815. The negligent blasting of stone in a quarry so as to endanger the safety of persons living in the vicinity, is a public indictable nuisance.[9] So the erection of buildings and making fires which sent forth noisome, offensive and stinking smokes, and making great quantities of noisome, offensive and stinking liquors near to the common highway and near to the dwelling houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells, was held to be a common nuisance.[10] So the steeping of stinking skins in water, laying it to be committed near the highway and also near several dwelling houses, was held to be an indictable nuisance.[11] So allowing a building near a highway to be ruinous and dangerous to the public, is a common nuisance as it is a danger to the passers-by.[12] All these cases proceed upon the assumption that every one has the right to pure and fresh air.[13]

2816. But, in civil law, there is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing only personal discomfort. As to the latter, a person must, in the interests of the public generally, submit to the discomfort of the circumstances of the place, and the trade carried on around him ; as to the

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(1) *Paung Tha Ri*, (1880) P. J. L. B. 94.
(2) *Ram Ditta* v. *Kirpa Singh*, (1883) P. R. No. 3.
(3) *Masumut Begum*, 2 N. W. P. H. C. R. 349.
(4) *Raji*, (1895) B. U. C. 765 ; following *Masumut Begum*, 2 N. W. P. H. C. R. 349. To the same effect, *Nanni*, 22 A. 113.
(5) *Vithoba*, (1884) B. U. C. 203.
(6) *Vasudeva Chetti*, (1882) 1 W eir 242.
(7) (1883) 1 Weir 210.
(8) *Kuppa Pillai*, (1888) 1 Weir 242.
(9) *Mutters*, 34 L. J. (N. C.) 22.
(10) *White*, 1 Burr. 333.
(11) *Pappineaw*, 1 S M. 686.
(12) *Watts*, 1 Salk. 356.
(13) *Neil*, 2 C. & P. 485 ; *Watts*, 2 C. & P. 486 ; *Crossley* v. *Lightowler*, 36 L. J. Ch. 584.

former, the same rule would not apply. "With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's guilt, one's personal freedom—anything that discomposes or injuriously affects the senses of the nerves, whether that may or may not be denominated a nuisance—must undoubtedly depend greatly on the circumstances of the place, where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade and commerce, and also for the enjoyment of the property, and for the benefit of the inhabitants of the town or the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another and the result of that trade or occupation or business is a materi al injury to the property, then there unquestionably arises a very different consideration. I think that, in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property."[1] The question whether the danger from any trade or occupation is sufficient to endanger the neighbourhood so as to constitute a public nuisance, depends, then, upon whether the injury is to the property or person; in the former case, there must be evidence of visible diminution in the value of property for which purpose, locality and all other circumstances must be taken into consideration, and in countries where great works have been and were carried on before, parties must not stand on extreme rights.[2]

(3) Annoyance.

2817. This raises the more difficult question of annoyance to the public. But it is clear that, here again, the annoyance caused must be to the public generally, and not only to any section or class of persons not sufficiently large or general to be included in that term. But while the annoyance must be general, it does not mean that a multitude of men must complain. The fact that one person complains of a nuisance is sufficient, provided the nuisance is one which affects him and others.[3] But a nuisance of which only a few complain and the many do not, would not be indictable as a public nuisance (§ 105).

2818. So where certain residents of the chambers in Clifford's Inn complained against a tinman of noise made in carrying on his trade, and it appeared that the noise only affected the inhabitants of three members of the chambers, and that by shutting the windows the noise was in a great measure prevented, Lord Ellenborough held that the indictment could not be sustained, as the nuisance was a private nuisance.[4] But where a person was charged with keeping certain enclosed lands in the proximity of a certain highway and buildings, which attracted a concourse of idle and disorderly people for rifle and pigeon shooting who crowded the street, discharging fire-arms and making a great noise as they ran about in pursuit of the escaped pigeons, it was held that the defendant was liable to be indicted for a nuisance, for if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable; and although it may not be his object to create a nuisance, yet, if it be the probable consequence of his act, he is answerable as if it were his actual object: if the experience of mankind must lead any one to expect the result, he will be answerable for it.[5] So an indictment against a defendant that he kept a common ill-governed and disorderly house, and in the said house for his lucre, etc., certain persons of ill-fame, etc., used to frequent and come together who caused

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(1) *St. Helen's Smelting Co.* v. *Tripping*, 11 H. L. C. 642 (650, 651).
(2) *Ib.*
(3) *Lallu Ram*, 21 A. L. J. 772.
(4) *Lloyd*, 4 Esp. 200, *Hing* (*K. T.*) v. *Silar* (I. N.) 57 C. 849.
(5) *Moore*, 3 B. & Ad. 184.

and procured the said persons in the said house to remain cock-fighting, boxing. playing at cudgels and misbehaving themselves, was held to be good.[1] Similarly, the Court held it to be a public nuisance where the accused were found to have caused annoyance and obstruction to the public by gambling on a thoroughfare.[2]

2819. Disorderly Houses.—But whether the house of a prostitute, which is visited by a number of men both day and night, can be designated a brothel or bawdy house, is one upon which the cases are not unanimous.[3] So it was observed in a case in which the Magistrate had ordered the removal of a prostitute from her house which she had erected in a respectable neighbourhood, but the High Court observed : " I do not understand the section to contemplate a case like this. It may be extremely unpleasant for the respectable inhabitants of the quarter to have a woman of Nundo Coomaree's class installed close by and in her own house too, but unless it can be shown that her dwelling there causes actual and positive discomfort to her neighbours, she cannot. I consider, be removed. If she made her house the resort of bad characters, or filled it with noisy revellers at nights, or entertained her admirers with music or disreputable nautches, her continuing in the place where she is, might very well be a discomfort amounting to a positive nuisance to the neighbourhood, such as would warrant a Magistrate's interference under s. 521 (now s. 133) of the Code of Criminal Procedure ; but nothing of this sort is alleged ; in fact, it is quite clear that the only objection to the woman's living in her house is the character of her profession, which is considered by the respectable inhabitants of the *mohulla*, to be an insult to their virtue."[4]

2820. The same view was taken in an English case[5] but, in another case, the appellant was employed by the owner as the porter in charge of a block of eighteen flats, among the tenants of which were twelve women who were in the habit of bringing men to them for the purpose of prostitution. He knew the purpose for which the women used the premises and was convicted under s. 13 (3) of Criminal Law Amendment Act, 1885, of being wilfully a party to the continued use of the premises or part thereof as a brothel. It was held that the conviction was right, as it was open to that Magistrate upon the evidence to find that it was not a case of each single flat being used for prostitution by one woman who was the tenant of it, but of the building as a whole being converted into a brothel.[6]

2821. To the same class belong disorderly houses maintained for gambling, and the keeping up of lottery or betting houses. They attract a number of disorderly persons and thus cause annoyance to the neighbours. In England, a common gaming house, is, as such, a nuisance,[7] but there is nothing corresponding to it in this country. The question may, then, arise whether the keeper of a common gaming house can be indicted for a public nuisance. It has been held that in the absence of any statutory provision, the mere keeping of such a house cannot expose the keeper to the penalty of this section, unless there is evidence of any actual annoyance to the public.[8] And this view has commended itself to the other Courts.[9]

2822. Legalized Nuisances.—Such cases may be called nuisances of necessity. They are often called legalized nuisances, being indeed, instances of those compromises belonging to social life upon which the peace and comfort of that life mainly depend, and in which some apparent natural right is invaded or some

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(1) *Higginson*, 2 Burr. 1233.
(2) *Juturi Venkatappa*, 28 I. C. (M.) 110 ; High Court Proceedings, 1 Weir 239 ; *Betham Chetty*, 1 Weir 242.
(3) *Singleton* v. *Ellison*, (1895) 1 Q. B. 607 ; considered in *Durose* v. *Wilson*, (1907) 71 J. P. 263.
(4) *Nundo Kumaree* v. *Anund Mohun Gooho*, 24 W. R. 68 (69).
(5) *Singleton* v. *Ellison*, (1895) 1 Q. B. 263.
(6) *Durose* v. *Wilson*, (1907) 71 J. P. 263, 96 L. T. 645.
(7) *Rogier and another*, 1 B. & C. 272 ; *Taylor*, 3 B. C. 502.
(8) *Han Nagji*, 7 B. H. C. R. 74.
(9) *Thanda* v. *Arayudu*, 14 M. 364 ; *Managil Karuran*,(1891) 1 Weir 240 ; *Betham Chetti*, (1881) 1 Weir 242 ; *Sasi Kumar Bose*, 7 C. W. N. 710 ; *Nga Shwe Nyo*, (1884) S. J. L. B. 279 ; *Dustoor Khan*, (1867) P. R. No. 16.

enjoyment abridged to provide for the more general convenience or necessities of the whole community.[1] So it often happens that certain acts are done under the authority of the Legislature. In such cases, the Legislature not only legalizes the act but also the nuisance which is necessarily incident to it. Such a nuisance may involve even an invasion on rights which would not be otherwise tolerated. But, even in such cases, there is a distinction between acts which are imperative and those which are merely authorized. So where an act of Parliament authorized the construction of a small-pox hospital, but did not enjoin the purchase of lands and the erection of buildings for the purpose and the defendants erected a hospital near the plaintiff's properties, it was held that they had no such right, and that the Act merely empowering the construction of hospitals did not, and could not legalize the perpetration of a nuisance, unless they could justify it on the ground of necessity.

2823. So Lord Watson said: "If the order of the Legislature can be implemented without nuisance, they (defendants) cannot, in my opinion, plead the protection of the Statute; on the other hand, it is sufficient for their protection that what is contemplated by the Statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done. Where the terms of the Statute are not imperative, but permissive (when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not), I think the fair inference is that the Legislature intended that the discretion be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose."[2] But, of course, even such a nuisance may be tolerated in the case of necessity. As Lord Blackburn put it: "when the disease is infectious, there is a legal obligation on the sick person and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shown that there was a sufficient cause to execute what is *prima facie* wrong."[3]

2824. The fact that the accused was entitled to do an act, does not, then, necessarily imply that the doing would be justified if it created a nuisance. The defendant, a canal company, were indicted for collecting and continuing, in their canal, polluted matter or water, so as to be a public nuisance. They defended themselves on the ground that the water was polluted higher up by another and that all that they did was to receive as it came to them. The nuisance was also justified on the ground of delay, it being contended that the water had been received in that state for twenty years. Both the contentions were, however, overruled, Wood, V. C., observing: "The only authority the Act of Parliament gives them is to draw water; it does not say that they are to draw foul or filthy water, or that they are to draw all these nuisances into the canal."[4] Then the learned judge dealt with the contention raised, that the stoppage of the defendant's nuisance would lead to a worse nuisance, in that the whole of the filth would be thrown back, to which the judge replied, "That is an argument which might be presented in every case where there are four or five evils at once assailing those who complain. It would be impossible for the Court to wait till bills were filed in three or four other cases and be governed, to some extent, by the decision in those other cases."[5] As to delay it was observed that the public always take time to wait for a considerable time before it can be ascertained that a case has arisen for them to put themselves in motion. They wait for a time to see if the evil will

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(1) See *per* Pollock, C. B., in *Bamford* v. *Turnley*, 31 L. J. Q. B. 29.

(2) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193 (213).

(3) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193 (204), following *Burnett*, 4 Mall. & S. 272.

(4) *Attorney-General* v. *Proprietors of the Bradford Canal*, L. R. 2 Eq. 71 (79).

(5) *Attorney-General* v. *Proprietors of the Bradford Canal*, 2 Eq. 71 (81).

diminish, and in no case, any defence, founded on the defendant's faith in being allowed to continue the nuisance, can be supported.[1]

2825. In the case of Railway Companies, where the Legislature authorizes them to acquire and build a railway station, godowns and cattlepens, it also impliedly legalizes any nuisance that may be thereby necessarily occasioned.[2] But they must do all they can to minimize the annoyance to the public.[3] This is the rule, and whether a railway company, or for that matter, any other company, can be indicted for a public nuisance depends upon two questions: (*a*) Could the nuisance have been avoided? and (*b*) did the defendant take reasonable care to avoid it? The one without the other is not sufficient. In one case, the defendants, who were a tramway company were empowered by their act to lay down and construct two lines of tramways according to deposited plans, together with the works and conveniences connected therewith. The Act gave no compulsory powers for taking lands and made no special mention of building stables. The defendants constructed large stables near the plaintiff's house, from which exuded smells, of which the plaintiff complained. The defence was that the company had taken all reasonable care to prevent the nuisance, but it was held to be no defence.[4] Of course, if, in this case, the Legislature had authorized the construction of the stables at the place, then it would have been a sufficient answer, for the nuisance would, then, be regarded as legalized in the interest of the public,[5] and it would be one, the propriety of which could not even be examined by the Municipal Courts.[6] Of course, in such a case, license to commit nuisance must be either expressly conferred, or, at least, necessarily implied. It cannot be assumed that it was legal, because the act authorized could only be done by committing the nuisance. In such cases, it is no answer to say that the defendant had taken reasonable care not to create a nuisance. For, in such cases, the only legal right is the right which is subject to the general law of the country—that no one shall commit a nuisance.[7]

2826. Of course, there may be cases of only temporary nuisances regarding which a different view is possible. As William, J., remarked, in considering what constitutes a nuisance; "law takes into consideration both the object as well as the duration of that which is to constitute the nuisance."[8] The injury or annoyance must not be "fleeting or evanescent"[9] But as Fry, L. J., pointed out that "nothing can be deemed to be fleeting or evanescent which results in substantial damage and that the question, therefore, is to be answered, not by time, but by the effects upon the plaintiff."[10] But this was the case of a private nuisance in which special damages were alleged and proved. The case of a public nuisance stands upon a different footing. For in that case, if the annoyance occasioned was temporary and for a lawful object, it could not be objected to. As William, J., said: "It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next-door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbours by the works of demolition."[11]

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(1) *Attorney-General* v. *Proprietors of the Bradford Canal*, 2 Eg. 71 (82).

(2) *London and Brighton Ry. Co.* v. *Truman*, 11 App. Cas. 45.

(3) *Plate*, 4 B. & Ad. 30; *Freemantle* v. *London and North-Western Railway Co.*, 10 C. B. (N. S.) 89.

(4) *Raper* v. *London Tramways Co.*, (1893) 2 Ch. 588 (593).

(5) *Ib.*, p. 593.

(6) *Ib.*, 597.

(7) *Ib.*, 600.

(8) *Harrison* v. *Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409 (414); following *Ball* v. *Ray*, L. R. 8 Ch. 567.

(9) *Per* Lord Esher in *Benjamin* v. *Storr*, L. R. 9 C. P. 400 (407).

(10) *Fritz* v. *Hobson*, 14 Ch. D. 542 (556).

(11) *Harrison* v. *Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409 (414).

2827. Of course, whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey, and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.[1]

2828. Again, the annoyance complained of must not only be real but reasonable. A number of persons may object to the erection of a hospital for the treatment of cases of small-pox. It must, then, be shown not only that small-pox was popularly dreaded but that it was scientifically dreadful as that it was disseminated by aerial conviction. That small-pox can be so conveyed has not received the unequivocal sanction of medical science, so that a hospital for the treatment of that disease is not necessarily a serious source of danger to persons resident, working or passing within fifty feet of it.[2]

2829. Injury to Exercise of Public Right.—It is also a public nuisance where an act *necessarily* causes injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. In such a case, the injury may not be caused in *common*, but it must have been caused *necessarily*. In that case, three things are essential : (*i*) there must be a public right, and (*ii*) in exercise of that right the act must cause injury, obstruction, danger or annoyance, and (*iii*) it must be caused necessarily. For instance, the right of way on land or on a navigable river or sea is a public right,the infringement of which may constitute a nuisance, if it necessarily causes obstruction, whatever may have been the object or intention of the accused. So persons placing a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such stockade a narrow opening for the passage of boats, which was closed except when required, were held to have brought themselves within the provisions of this section, though the accused kept the passage lighter and watched by men to prevent accidents.[3]

2830. This question was considered in another case in which it was said that the section was not intended to penalize an obstruction however slight.[4] In that case, the prisoner had been charged with having erected a *jag* in a tidal navigable river constructed of trees and dams which was 45 cubits long by 20 feet broad, erected on the silted side of the river, where it was about 300 cubits broad and it did not obstruct the ordinary navigation of the river. It was held that as there was no obstruction to the ordinary navigation of the river the accused could not be convicted under s. 290.[5] All that this case is intended to lay down is that the nuisance to be indictable must be such as to amount to an injury or obstruction to the ordinary exercise of a public right.

2831. But this is not the view taken in Madras where it was said : "The public is entitled to the use of the full width of the public street, however wide it may be. Whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over. The act must necessarily cause obstruction to persons who may have occasion to use their public right over the part encroached upon."[6] This view accords with the view of Couch, C. J., who said "certainly, persons are not at liberty to place a quantity of earth upon any part of the public road, whether it is a part which is actually used for the passage of vehicles or not. In either case, a person has no right to interfere with the use

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(1) *Per* Thesiger, L. J., in *Sturges* v. *Bridgman*, 11 Ch. D. 852 (865).

(2) *Attorney-General* v. *Corporation of Nottingham*, (1904) 7 Ch. 673.

(3) *Umesh Chandra Kar*, 14 C. 656.

(4) *Jugal Das Dalal*, 20 C. 665.

(5) *Ib.*

(6) *Virappa Chetti*, 20 M. 433 ; followed in *Nisar Muhammad*, 6 L. 203.

of it according to the public rights."[1] So the accused who had thrown earth dug from a tank on a drain causing its obstruction was held to have committed an offence under s. 290, though not one under s. 447, for which he had been erroneously convicted by the Magistrate. The High Court, however, declined to interfere holding that the error had not prejudiced the accused.[2]

2832. The existence of a house abutting on a highway in a dilapidated and dangerous state is a nuisance, as it is dangerous to the passers-by.[3] So it is a nuisance to disturb the stillness of the night by making a great noise with a speaking trumpet.[4] So acts indecent or immoral constitute public nuisances, as they cause annoyance to the public and are otherwise subversive of morality. So a nude exposure of one's person to the public, whether from the balcony of one's own house[5] or from a public place, such as a urinal,[6] an omnibus[7] or a bathing place, however ancient, by which females pass,[8] or the exhibition of a nude figure covered with sores as an advertisement by a herbalist,[9] are all instances of such a nuisance. So there can be no doubt but that the exhibition made by the beggars in the bazaar of their loathsome ailments, with a view to exciting pity is none the less a public nuisance because it is tolerated by the apathetic masses. Indeed, anything is a nuisance which annoys one whether by immoral suggestion or revolting representation, and whether it is done in a public place, or in a private place in the view of the public. The same view was taken of a booth or tent erected by the prisoners at the Epsom races to which the public were admitted on payment, who were then shown an indecent exhibition. In all such cases, both the act as well as the object were immoral. But, if the act is calculated to injure public morality, it is a nuisance, whatever may have been the object. The accused were indicted for publishing a pamphlet entitled "The Confessional Unmasked, showing the Depravity of the Romish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession." This pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On the side of the page were printed passages in the original Latin, correctly extracted from the works of these writers, and opposite each extract was placed a free translation of it into English. Half the book dealt with controversial matters, but the remainder related to the exposition of obscene, impure and filthy acts, words and ideas of the Church of Rome. It was held that the exposure of immorality, though made with the avowed object of upholding morality, was in itself immoral and as the accused must be deemed to have intended the natural consequences of his act, he had been rightly indicted for a public nuisance.[10]

2833. Disposal of the Dead.—The disposal of corpses by cremation is customary now amongst high caste Hindus. It was in vogue amongst the ancient Romans, but with the advent of Christianity cremation gave place to burial as the correct method of disposing of the dead, and the right of a Christian burial became the recognized mode of the disposal of human remains, the denial of which is regarded a posthumous punishment analogous to the excommunication of the living.[11] In this view, law presumes that, in the case of Christians, the ordinary mode of disposal of the dead is by burial, as in the case of Hindus the presumption would be in favour of cremation. But there is nothing illegal in burning the body in the one case, or in burying it in the other, unless the burning or burying is done in a manner so

(1) *Roopnarain Dutt*, 18 W. R. 38.
(2) *Ib.*
(3) *Watts*, 1 Salk. 356.
(4) *Smith*, 2 Stan 704.
(5) *Thallman*, 9 Cox. 388.
(6) *Harris*, 40 L. J. (M. C.) 61; *Sir Charles Sedley*, 1 Keli 620.
(7) *Holmes*, 22 L. J. (M. C.) 122.
(8) *Grey*, 4 F. & F. 73; *Reed*, 12 Cox 1. So MacDonald, C. B., overruled the contention that the right to bathe had existed from before the erection of the houses by holding that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced; *Cruden*, 2 Camp 189.
(9) *Saunders*, 1 Q. B. D. 15 (18, 19). By 20 & 21 Vict., c. 83, the exhibition of obscene prints, etc., is made a misdemeanour.
(10) *Hicklin*, 37 L. J. (M. C.) 89.
(11) 2 Van Espen, pt. 2, s. IV, pt. 7; *per* Lord Stowel in 2 Hag. Con. Rep. 333.

as to amount to a public nuisance.[1] As Stephen, J., remarked : "To burn a dead body in such a place and in such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight or to smell can be imagined."[2] The question whether such an act amounts to a nuisance then depends no less upon the nature and situation of the place, as upon the manner in which it is done.

2834. But the question, whether a cremation ground constitutes a public nuisance depends upon the higher considerations of general convenience or the necessities of the whole community. And it has been accordingly held that when persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act, as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to.[3] "To hold that an act so properly done, not only in the exercise of a right, of which the people of this country are generally so very tenacious, but also in the discharge of a serious duty, amounts, as the prosecution contends, to an offence, would be highly unreasonable and unjust. It follows, therefore, that the conviction of the accused cannot be sustained simply on the ground that their acts caused material annoyance and discomfort to the Thiruvaduthorai people, who were near the place on the occasion referred to ."[4] The existence of a burning ghat or cremation-ground is not in itself a nuisance, if it is one set apart or so used from time immemorial, as if its use was sanctioned by the usage of the community. But, even in such a case, the fact that it is a cremation-ground does not excuse a nuisance. If it is in an offensive state or the cremation is carried on upon it in such an offensive manner as to be a source of injury, danger or annoyance to persons living in the vicinity it is a nuisance, and the Magistrate has jurisdiction to abate it under s. 133 of the Procedure Code. In such case, it is immaterial whether the cremation-ground is public or private, for, the same considerations arise in each case, and the same rules dictate the course justifiable whether the ground be public or private.

2835. It will be observed that, in order to amount to a public nuisance, when it is an encroachment on a public right, it is not necessary that any actual injury or obstruction should be caused. It is enough that the act is such as must necessarily cause injury. This difference means the difference between the offences described in ss. 283 and 290.

2836. Master Liable for Act of Servant.—The offence of public nuisance is probably an exception to the general rule which makes criminal liability dependent upon the existence of criminal intention or knowledge, the reason being that the primary object of the offence is to abate the nuisance and not to punish the wrongdoer.[5] If the law had made the offence dependent upon the existence of *mens rea*, the master might go on innocently encouraging the nuisance, though the servant directly responsible might be tried for it. It has accordingly been held that the owner of works carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by the acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.[6] In one case, the accused was the proprietor of a slate quarry adjoining a navigable river, the refuse of which was shot into it by his workmen, contrary to his orders and without his knowledge, but with the result of obstructing its navigation. Blackburn, J., held that the questions of knowledge and authority were immaterial, and he directed the

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(1) *Price*, 12 Q. B. D. 247 (254, 255).
(2) *Ib.*, p. 256.
(3) *Saminadha Pillai*, 19 M. 464; followed in *Muhammad Mohidin* v. *Municipal Commissioners*, 25 M. 118 (131).
(4) *Indra Nath Banerjee*, 25 C. 425.
(5) *Medley*, 6 C. & P. 292; *per* Eyre, C. J., in *Bush* v. *Steinman*, I B. & P., at 407; *Turberville* v. *Stampe*, 1 Ld. Raym. 264; *Laugher* v. *Pointer*, 5 B. & C. at p. 576; *Dixon*, 3 M. & S. 11; *Pedley*, A. & E. 822; *Moore*, 3 B. & Ad. 188, *Stephens*, L. R. 1 Q. B. 702.
(6) *Stephens*, L. R. 1 Q. B. 702.

jury " that if a substantial part of the rubbish went into the river from having been improperly stacked so near the river as to fall into it, the defendant was guilty of having caused a nuisance, although the acts might have been committed by his workmen, without his knowledge and against his general orders." It was held that the direction was right.[1]

2837. So Littledale, J., remarked in another case that, although it may not be the defendant's object to create a nuisance, yet if it be the probable consequence of his act, he is answerable, as if it were his actual object,[2] and so it has been held that, if a man let land with a nuisance on it, he is responsible for the acts of his tenants.[3] In another case, the directors of a gas company, together with the superintendent and engineer, were indicted for a nuisance for permitting the refuse of gas to be conveyed into a public river. It was proved that the directors left the management of the works to one Leadbeter, the Superintendent, who directed the engineer, who gave orders to the rest of the workmen. The directors pleaded their ignorance in support of their innocence, but Lord Denman thus directed the jury: " It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think, that they gave authority to Leadbeter to conduct the works, they will be answerable. It seems to me both common sense and law that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."[4] There appears to be nothing in this chapter to make this statement inapplicable to similar cases in this country.

2838. Convenience or Advantage No Defence.—Where an act is unquestionably a nuisance, the fact that it causes some convenience or advantage is no defence. That fact is material to show that the act could not be a nuisance, because it was conducive to the convenience or advantage of a large section of the public, though, in cases affecting the public health, even the consideration of convenience may be immaterial. Of course, when once a case of nuisance is made out, the question of convenience or advantage is then no longer relevant; nor can the nuisance-feasor be heard to say that his act was reasonable and therefore could not be a nuisance.[5] In one case, the defendants carried on the trade of fat-melters at Southfields, and the nuisance complained of was alleged to arise from noxious gases emanating from their works. The Court found that the defendants were carrying on their trade in a reasonable manner, and took precautions to prevent it from causing a nuisance to their neighbours. Kekewith, J., held that as the defendants had taken precautions to prevent their trade from being a nuisance to their neighbours, they were from their own point of view acting reasonably. But it was no defence, for the Court was satisfied that in spite of their precautions, they were creating a nuisance.[6] In short, such a thing as committing a nuisance reasonably is a contradiction in terms.

269. Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of disease dangerous to life.

[***Reasons to believe***—s. 26. ***Act***—ss. 32, 33. ***Life***—s. 45.]

2839. Analogous Law.—This section is taken from the English Digest,[7] but it is even more comprehensive[8] than the corresponding article which is limited to the offence of exposing, in public places, persons labouring under infectious

(1) *Stephens*, L. R. 1 Q. B. 702, p. 708.
(2) *Moore*, 3 B. & Ad. 184 (188).
(3) *Pedley*, 1 A. & E. 822; cited *per* Shee, J., in *Stephens*, L. R. 1 Q. B. 702 (705).
(4) *Medley*, 6 C. & P. 292.
(5) *Attorney-General* v. *Cole*, (1900) W. N. 272.
(6) *Attorney-General* v. *Cole*, (1900) W. N. 272; explaining *Reinhardt* v. *Menfastoi*, 42 Ch. D. 685; *Sanders Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373; *Ball* v. *Ray*, L. R. 8 Ch. 467; *Bamford* v. *Turnley*, 3 B. & S. 62.
(7) Ch. XII, art. 6.
(8) 2nd Rep., s. 224.

and contagious diseases. It was suggested by the law Commissioners, that as "death" is defined to denote the death of a human being, life should be similarly defined, which was done.[1] In view of that definition the "life" spoken of in the section must be understood to refer only to *human* life.

2840. Procedure and Practice.—This offence is cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.

2841. Proof.—The points requiring proof are :—

(1) That the accused did an act.
(2) That he then knew or had reason to believe it to be likely to spread infection.
(3) That such infection was of a disease dangerous to human life.
(4) That the accused did the act unlawfully or negligently.

2842. Principle.—It is an essential rule for the preservation of society that no member thereof should jeopardize its existence by any act criminal, unlawful or negligent. Indeed, individual responsibility for its preservation is not limited by those words, but it is so limited by criminal law which enforces it within those limits by its pains and penalties. The offence extends as much to wilful acts, as to acts done heedlessly but in presence of the danger hereby threatened to society of which the accused had knowledge or belief. His responsibility will, therefore, vary with his knowledge of the infectious character of the disease. His ignorance of that fact is, then, a sufficient defence, whatever havoc his act may have played on his fellow-beings.

2843. Criminal Dissemination of Infection.—This and the next two sections are intended to avert the great danger to society from the spread of infection. The spread of infection from human intercourse cannot, of course, be altogether prevented by the measures here enacted, but they lay down the limit within which a certain course of action is compulsory, and which is consistent with the underlying principle of criminal law that no one shall be punished for what he could not avoid. Under this section, the elements of criminality are thus present (*i*) in the infectious nature of the disease, (*ii*) its knowledge or belief in the accused, and (*iii*) his precipitating the danger by his act at least unlawful or negligent.

2844. In the first place, then, the disease must be infectious. In the medical science diseases communicated by man to man are spoken of as being either infectious or contagious. The former are those which are communicated through the atmosphere without actual contact, the latter being those which are communicated through the medium of touch. But in either case, the communication of the disease is by contact direct or indirect, and the term "infectious" is here used as including all diseases so communicated, whether they be called infectious or contagious. There are a number of diseases upon which the medicial authorities are agreed that they are infectious. There are others which are suspected to be, but have not yet been proved to be infectious. The section deals only with the former and not with the latter.

(1) Disease must be Infectious.

2845. Infectious diseases have been defined in the Public Health (London) Act, 1891,[2] to include small-pox, cholera, diphtheria, membranous croup, erysipelas the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names, typhus, typhoid, enteric, relapsing, continued or puerperal. The section is confessedly inexhaustive but the diseases named may be taken to be those which are regarded as undoubtedly infectious. As regards small-pox, however, the theory of the aerial convection or dissemination of the disease has not received the unequivocal sanction of medical science.[3] So Fitz Gibbon, L. J., in a case[4]

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(1) S. 45.
(2) 54 & 55 Vict., c. 76, s. 55 (6).
(3) *Attorney-General* v. *Nottingham Corporation*, (1904) 1 Ch. 673 (678).
(4) Farwell, J., in *Attorney-General* v, *Nottingham Corporation*, (1904) 1 Ch. 673. citing *Rathmine's case*, (1904) 1 Ir. R. 161.

remarked : " It seems probable that the dread of small-pox is to a great extent the result of tradition. The scourge of the eighteenth century retains its terrors for those who do not realize that it has been deprived of most of its dangers. Vaccination is not only a preventive, but it also modifies the disease." But though small-pox may not have been proved to be infectious, the fact that it is so believed to be, and as such held in great terror by the people, is sufficient to render the negligent march of a person suffering from small-pox through a crowded street as public nuisance punishable, though not under this section.[1]

2846. In India plague,[2] cholera[3] and glanders[4] have been judicially held to be infectious diseases within the meaning of this section. Persons suffering from plague and cholera which have been the scourge of this country now for years, may well be presumed to know or believe that after having come in close contact with patients stricken with these diseases, they should not travel by train[5] or tram or hackney carts, and that if they do so they are likely to spread the infection. The accused in a case resided in a plague-stricken house in the Umballa Cantonment, and had been in contact with a plague patient. He was taken to the plague shed in company with the patient who died there. The next day, the accused left the shed against orders, and travelled by rail to the neighbouring town of Shahabad, and from thence to Karnal. He was held to have committed an offence under this section as he had sufficient reason to believe that his act was likely to spread the infection of plague, a disease dangerous to life.[6] The same view was taken of the accused in another case, who had removed a plague-stricken person to a house where several persons were living, one of whom caught the infection.[7] The case would, of course, have been different if the patient had been removed to an unoccupied house or some other means adopted to safeguard the inmates.[8] So where a person brought a horse infected with glanders into a public place to the danger of infecting other people, he was held to be guilty of an indictable offence.[9]

(2) Accused's Knowledge or Belief.

2847. The question whether the accused knew or believed that his act was likely to spread the infection is one of fact dependent upon many circumstances. The knowledge of the infectious character of an infectious disease would, as a matter of course, be assumed in a medical man. But it cannot be assumed in the case of any other man. For, there is no presumption that everyone knows what diseases are infectious. It is, indeed, a subject upon which, in many cases, even doctors, disagree. Take, for instance, the case of plague. Approved medical testimony is doubtful as to its infectious character. That it is contagious, admits however, of no doubt. In the decided cases the Courts do not appear to have observed any distinction between contagious and infectious diseases, and diseases that are contagious are necessarily regarded as infectious. So in Madras the accused Krishnappa was fined for travelling by train while suffering from cholera, and his companion Murugappa was similarly convicted of abetting him by purchasing his ticket and accompanying him.[10]

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(1) *Vantandillo*, (1815) 4 M. & S. 73 ; *Burnett*, 4 M. & S. 73.

(2) *Niadar Mal*, (1902) P. R. No. 22 ; *Chabumian*, 12 M. L. T. 664 ; 18 I. C. 269.

(3) *Krishanppa*, 7 M. 276.

(4) *Thomas Henson*, Dears 24.

(5) *Niadar Mal*, (1902) P. R. No. 22, *Krishnappa*, 7 M. 276. There was indeed, an old Statute enacted in England (2 Vulgo I, Jac. I. C. 31, s. 7 ; 37 & 38 Vict., c. 35 ; 1 Hale, P. C. 432, 695 ; 3 Inst. 90) making persons guilty of felony, who, being infected with the plague, went about with infectious sores upon them, after being commanded by the Magistrates to stay at home. This Statute has now expired.

(6) *Niadar Mal*, (1902) P. R. No. 22.

(7) *Chabumian*, 12 M. L. T. 664, 18 I. C. 269.

(8) *Kandaswamy*, 43 M. 344, following, *Cahoon* v. *Mathews*, 24 C. 494 ; *Vantam Dills*. 4 M. & S. 73 ; *Metropolitan Asylum District* v. *Hill*, (1880) A. C. 193.

(9) *Henson, Dears* C. C. 24.

(10) *Krishnappa*, 7 M. 276.

(3) Act must be Done Unlawfully or Negligently.

2848. In this case, the sick person by becoming a passenger in a train, at a time when he was to his knowledge suffering from cholera, did an act which he must have known was likely to spread the infection of a disease dangerous to life; and he did so "negligently," that is, neglecting the precautions which would have obviated risk to his fellow-passengers, in that he gave no notice of his condition to the Railway Company's servants, who would have either provided separate accommodation for him, or have lawfully prevented him from travelling.[1] The question then whether an act is or is not done negligently must depend upon the nature of the act done, and the amount of care which was under the circumstances necessary. A person suffering from an infectious disease may not be negligent in taking his stroll leisurely in a lonely place. But he would be clearly negligent, if he did the same in a crowded fair. The measure of diligence necessary in such cases is then the care required to reasonably safeguard other persons from the danger of contagion. The act may be done either negligently or unlawfully. The word "unlawfully" has not been defined in the Code though the word "illegal" has been.

2849. There are, indeed, several sections of the Code in which the two terms have been used indiscriminately. An act, however, may be lawful though it may be illegal; and an act may be "unlawful" though not illegal.[2] Lord Ellenborough, C. J., speaking of such offences referred to the act as done *unlawfully* and *injuriously*[3] which words he said precluded all legal cause or excuse.[4] The word unlawfully would then appear to mean inexcusably or unjustifiably, and not necessary illegally in the sense in which that term has been defined in s. 43. A person whose act unnecessarily exposes the public to the risk of contagion would be deemed to have done that act unlawfully. But the mere omission to fulfil the dictates of one's moral duty is not unlawful. Where, therefore, the mother of a child suffering from small-pox refused to part with her child who had been ordered by the Magistrate to be removed to a hospital, was convicted under this section, the High Court in quashing the conviction observed that the accused's act in opposing the removal could not be held to be unlawful or negligent within the meaning of this section, as indeed, "it may well be said that the carrying of a patient through a public street would be more risky to the public than keeping her in a private house."[5]

2850. Syphilis and gonorrhoea are contagious diseases and a question has arisen whether a prostitute, who, while suffering from syphilis, communicates the disease to a person, who has sexual intercourse with her, can be convicted under this section "for a negligent act and one likely to spread infection of any disease dangerous to life." In the view of West, J., she could not be convicted under this section, though she might be of cheating if the intercourse was induced by misrepresentation on the part of the diseased person. But for this, the accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person, and himself generally an accomplice.[6] But it is submitted that there is a fallacy in this reasoning. In the first place, it is scarcely correct to describe the complainant as an accomplice. He was *ex-hypothesi* ignorant of the disease and the communication of the infectious disease to him *did* spread the infection to him within the meaning of the section. The act was, to say the least, negligent, and it, therefore, amounted to an offence under this section. Indeed, this is in accordance with the view of Lord Hale[7] and the case is not unlike one in which the accused, an apothecary, having inoculated children, while they were suffering from small-pox allowed them to be carried along the public street. Lord Ellenborough, C. J., said that the charge laid would be made out if it was shown that what was done was, in the manner of doing it, incautious, and

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(1) *Krishnappa*, 7 M. 276.
(2) *Cahoon* v. *Mathews*, 24 C. 494.
(3) *Vantandillo*, 4 M. & S. 73; *Sutton* 4 Burr. 2116.
(4) *Sutton*, 4 Burr, 2116.
(5) *Cahoon* v. *Mathews*, 24 C. 494; following Lord Blackburn in *Metropolitan Asylum District* v. *Hill*, 6 App. Cas, 193.
(6) *Rakma*, 11 B. 59.
(7) 1 Hale P. C 432.

likely to affect the health of others.[1] This case is, of course, no authority for condemning inoculation altogether. It is, indeed , a useful prophylactic against certain diseases, but it must be done by a qualified man in a proper manner.[2] If it is done negligently, so that it has the effect contrary to what are its avowed virtues, the inoculator would be justifiably convicted under this section.[3]

Malignant act likely to spread infection of disease dangerous to life.

270. Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[***Reason to believe***—s. 26 ***Act***—ss. 32, 33. ***Malignantly***—s. 153]

2851. Analogous Law.—The offences described in this section and the last are the same, the only difference between them being that the offensive act under this section is done " malignantly ", while, under the last section, it is done merely " unlawfully or negligently." The presence of malice then aggravates the crime for which this section prescribes the higher penalty. The distinction between an unlawful or negligent act on the one hand, and a malignant act on the other, is one which was recognized in English Law from very early times. Lord Hale puts the question whether, if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the Common law. And he considers it clear, that if it cannot be murder, because the intent is wanting, yet, should one be affected by the conversation of another, it would be a great misdemeanour.[4] It is needless to add that Lord Hale's view has received legislative sanction in the Code.

2852. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

2853. Proof.—The points requiring proof are :—

(1) That the accused did some act;
(2) That he did it malignantly;
(3) That his act was likely to spread a disease;
(4) That the disease so spread was both infectious and dangerous to life;
(5) That the accused then knew or had reason to believe his act to be likely to spread the infection of a disease dangerous to life.

2854. Principle.— In this case the act of the accused is 'malignant', or malicious, otherwise his act is the same as is punishable under the provisions of the last section. It is comparatively easy to conceive of an unlawful or negligent act disseminating infection, but it may not always be possible to trace an act to a malignant origin. Indeed, if it could be unmistakably traced, the case would then be one of homicide and not a mere nuisance under this section. As the Law Commissioners observed : " If any person died of plague, and his death could be traced to infection so caused maliciously, the person who caused it would be chargeable with homicide.[5] On the other hand, it is contrary to the principles of the Code to punish acts which, the doer, when he committed them, knew to be likely to cause certain results, if, in fact, such results were not produced in the same manner as if such evil consequences had actually followed from them.[6]

2855. This section is then intended to deal with those intermediate cases in which the malignant act is not the proximate cause of death, but at the same time, it is ultimately traceable to it. The difference between the one case and the other would be one of degree and not of kind. For instance, suppose *A* intending

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(1) *Burnete*, 4 M. & S. 272.
(2) *Vantandillo*, 4 M. & S. 73
(3) (1886) 1 Weir 226 ; *San Hla*, (1900) 1 U. B. R. (1897-1901) 280.
(4) 1 Hale P. C. 432.
(5) 2nd Rep., s. 226.
(6) 2nd Rep., s. 226.

to kill *B* conceals under his pillow a rag charged with plague bacilli, whereof *B* catches the infection and dies. Here, if death could be unerringly traced to the act of *A*, the latter would undoubtedly be held guilty of murder. Otherwise, he could only be punished under this section. The section requires that the means adopted must, not only be believed to be likely to spread infection, but it must, in fact, be capable of spreading it. If the accused wrongly believed in the potency of an act, he could not be punished for his fancy.

2856. The rest of the questions must be decided in the light of the remarks made under the last section.

Disobedience to quarantine rule.

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[***Government of India***—s. 16. ***Any Government***—s. 171.

2857. Analogous Law.—This section deals with the disobedience of any published rule of Government whether such rule had or had not the effect of law and whether it was or was not made under any legislative enactment. As a matter of fact, Government has been empowered to frame and promulgate rules under the provisions of the Indian Ports Act,[1] and the Epidemic Diseases Act[2] the disobedience of which would be punishable under this section. But the disobedience of a lawful order passed by a public servant is not punishable under this section though it may be punishable under s. 188.

2858. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.

2859. Proof.—The points requiring proof are:—

(1) The existence of a rule of quarantine or for segregation ;
(2) That the rule was made by Government;
(3) That it had promulgated it;
(4) That the accused knew of the rule;
(5) That he disobeyed it;
(6) That he did so knowingly.

2860. Disobedience of Preventive Rules.— The disobedience of a lawful order passed by a public servant is punishable under s. 188, which, however, does not include Government, obedience to which orders has been otherwise insured. This section is an example of one such provision. It relates only to a knowing disobedience of its rules, which must, however, be legal, but which must, having regard to the language of the section, be presumed.[3] These rules must, so far as this section is concerned, relate to (*a*) quarantine ; or (*b*) regulating the intercourse between places where an infectious disease prevails and other places, or in short, segregation. The rules must be made by the Government of India or any Government. Rules made under the authority of such Government may be otherwise enforceable, but they are not subject to the coercion of this section. As the words " Government of India " and "Government " in this connexion mean the imperial and local Governments of British India, rules made by any other State are not enforceable under this section. But the rules made and promulgated by the Government of this country would be binding on ships of whatever nationality, so long as they are

(1) The Indian Ports Act (III of 1901).
(2) Act III of 1897, s. 2.
(3) *Cf.* s. 188, where the words "lawfully empowered, etc.," make proof of legality incumbent on the prosecution.

within the territorial jurisdiction of that Government (§§ 71-72). Once they are outside that jurisdiction, the rules remain but the power to enforce them is gone. But, apart from this section, the rules of quarantine have now an established place in the criminal Codes of all civilized countries, and masters of ships touching their ports do so on condition that they obey them (§ 41). In fact, the rules being made as much for the safety of the vessels concerned as of those holding communication with them, it is the mutual interest of both parties to obey them, and their disobedience is punishable, whoever is guilty of infringing the rules regulating the intercourse of such vessels.

2861. The knowledge required to convert a disobedience of the rules into an offence under this section may be gained in a variety of ways. All ships in quarantine are required to hoist a yellow flag when approaching a harbour or at anchor and persons who communicate with them must be presumed to have knowledge of that fact.

2862. The case of segregation of infected place from another is different. Here the Government publishes the regulation in the official gazette, but such publication cannot be taken to be a notice to all the world. It will be observed that the only rules here contemplated are for regulating the intercourse between infected and non-infected places. No rule can, therefore, be made to regulate the intercourse between two places both infected or non-infected.

2863. Where the rule is clear and disobedience wilful, the question of motive or intention or injurious consequence is immaterial. The Government is the best judge of the propriety and wisdom of the rules and he who disobeys them is liable, whatever may have been his individual feeling on the subject.

Adulteration of food or drink intended for sale.

272. Whoever adulterates any article of food or drink so as to make such article noxious as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

2864. Analogous Law.—This section[1] is not the only provision penalizing the sale and exposure for sale of adulterated articles of food or drink ; for, the various Municipal Acts contain several other provisions for seizure and destruction of noxious articles, and in the case of meat, a previous examination of the animals for slaughter is a part of a bye-law of most municipalities. This section however, is not confined to food and drink intended only for human consumption. The purveyor of noxious food for cattle is equally liable to punishment under this section, while cl. 5 of s. 521 of the Code of Criminal Procedure authorizes the Court to order destruction of the food or drink in respect of which the conviction is had.

2865. Procedure and Practice.—This section is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.

2866. Proof.—The points requiring proof are :—

(1) That the accused adulterated.
(2) That the thing adulterated was an article of food or drink.
(3) That the adulteration made is noxious as food or drink.
(4) That the accused adulterated it intending to sell it, or knowing it to be likely that it will be sold as food or drink.

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(1) As was to be expected, the provisions of this and the next section are in accordance with the English Common Law; *Stevenson*, 3 F. & F. 106; *Jarvis*, 3 F. & F. 108.

2867. Sale of Noxious Food.—This section is directed only against the adulteration of an article of food or drink which renders it noxious for consumption. The word "noxious" means injurious to health, and not repugnant to one's feeling.[1] Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under this section. For example, the mixing of water with milk is adulteration, but it is not noxious,[2] so that such adulteration is not punishable under this section, nor is it an offence to sell inferior food though it is not adulterated but is still noxious, the seller being thus punishable under the provisions of the next section. So, though the mixing of pig's fat with *ghee* and sale of the mixture would be regarded as noxious to the religious and social feeling of Hindus and Mahomedans, yet it is not noxious to health, against which alone this section is directed.[3]

2868. The provisions of this section are in accordance with English Law, under which a person is indictable at common law for publicly exposing or causing to be exposed for sale in a market, meat unfit for human consumption.[4] But a person there is not indictable at common law for sending such meat to a salesman in a market, unless he intended it to be sold for human food.[5] As the section is worded, such a person would be obviously liable in this country.

Sale of noxious food or drink.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

2869. Analogous Law.—This section is a necessary adjunct of the last and provides against the sale or exposure for sale of an article unfit for human consumption. Its terms are necessarily wider, for it comprises not only articles adulterated, but also those rendered noxious by lapse of time as tinned provisions kept too long, or those rendered unfit for consumption by long exposure, neglect or contamination.

2870. Procedure and Practice.—This section is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or Magistrate of the first or second class, and may be tried summarily. Under section 521, cl. 3 of the Code of Criminal Procedure, the Court may, on conviction of the accused, order that the article of food or drink, in respect of which the conviction was had, be destroyed. The Procedure Code does not justify a general order given by a Magistrate to his orderly to produce before him all persons found selling fruit unfit for human consumption. The delegation of such magisterial discretion to the orderly peon can never be legal; and an orderly compelling the sellers of fruit to accompany him to the Magistrate cannot complain of resistance, though such resistance could not be justified except under s. 99.[6]

2871. Proof.—The points requiring proof are :—

(1) That the accused sold or offered or exposed for sale.
(2) That the thing so sold, offered or exposed was an article of food or drink.
(3) That the said article had been rendered noxious, or was in a state unfit for food or drink;
(4) That the accused then knew or had reason to believe that the same was noxious or unfit for food or drink.

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(1) *Ram Dayal*, 83 I. C. 1004, (1924) A. 214.
(2) *Abdul Rahman*, (1902) 1 L. B. R. 153; *Dhava*, 89 I. C. 961.
(3) *Ram Dayal*, 21 A. L. J. 875.
(4) *Stevenson*, 3 F. & F. 106 : *Jarvis*, 3 F. & F. 108.
(5) *Crawly*, 3 F. & F. 109.
(6) *Perumalu*, (1885) Weir 344.

2872. Sale of Unfit Food or Drink.—This section is important and deals with an evil which requires to be rigorously repressed. The offence here described deals with an article of food or drink, which includes a drug or a medical preparation. The last section deals with the adulteration of such articles so as to render them noxious. This section deals, not only with the articles so adulterated, but also with those which have been otherwise rendered noxious or unfit for human consumption. As the section is worded, it is clear that the article sold must be "as food or drink." The sale of a noxious article which is not itself usable as food or drink is, therefore, no offence under this section. So in an English case decided under the analogous provisions of the Sale of Food and Drugs Act. 1875,[1] it was held that the sale of a packet of baking powder which contained 20 per cent. of bicarbonate of soda, 40 per cent. of ground rice and 40 per cent. of alum—an article which is injurious to health was not punishable, as it was not by itself an article of food. As Hawkins, J., remarked: "The mere sale of an article, not itself an article of food, even though it be sold with the knowledge of the vendor that, if it is the buyer's intention to mix it with the ingredients of which an article of food, *e. g.*, bread, is to be composed, is no offence under s. 3, and it makes no difference in a legal point of view that, when sold, it is mixed with other ingredients, not in themselves hurtful, some or one of which might, in an unmixed state, be used as articles or an article of food, if the injurious and harmless ingredients are so inseparably mixed and in such quantities that the mixture, as a whole, forms an injurious compound, which nobody would dream of using as food."[2] Of course, this does not mean that nothing that is not made up into an eatable and drinkable form and fit for immediate use can be deemed to be an article of food. For example, flour, butter salt, mustard, pepper and the like, are all articles of food, though no one would ordinarily dream of using them alone, but being articles intended to form substantial components of articles of food, or to be eaten as adjuncts thereto, they are themselves regarded as articles of food.

(i) Sale must be as Food or Drink.

2873. The true test whether an article is an article of food is, then, whether it is a substantial and requisite material for making food.[3] But is grain an article of food? It is a substantial and requisite material for making bread, and if this test be applied it is certainly an article of food within the meaning of this section. But Banerji, J., held otherwise in a case in which, as a matter of trade, the owner of a grain pit had sold its contents, before it was opened, with all faults at a certain sum per maund and on the pit being opened it was found that a large proportion of the grain was found to be unfit for human consumption, whereupon the seller was convicted under this section, but his conviction was quashed on revision, the Court holding that the sale of grain was not sale of an article *as* food or drink.[4] But the learned Judge might have supported his finding on the unquestionable ground that the seller having sold the closed pit could not be said to have known or believed that the grain underneath was unfit for human consumption.

2874. Again, the article of food or drink must, according to the section, be sold or offered or exposed for sale. If it is served at dinner for which no price is charged there is no offence. The pledge of an article of food, such as rice, which may result in its sale, is not sale, nor an offer of a sale, so long as it remains a pledge. A person who sends unsound meat to a salesman for sale "offers" it for sale within the meaning of this section. In this respect this section

(2) There must be Exposure, Offer or Sale.

(1) 38 & 39 Vict., c. 63, s. 3 of which runs thus: "No person shall mix any article of food with any ingredient or material so as to render the article injurious to health with intent that the same may be sold in that state, and no person shall sell any such article so mixed under a penalty."

(2) *James* v. *Jones*, (1894) 1 Q. B. 304 (308).

(3) *Ib.*, p. 309.

(4) *Saligram*, 28 A. 312; in *Narumal Jawarmal*, 6 Bom. L. R. 520, grain was assumed to be an article of food within the meaning of this section.

is an improvement on the English Law under the similar provisions of which[1] it was held by Day, J., that where the accused, a farmer in the country, sent to a salesman in London meat, which he knew to be unfit for human consumption, and the latter merely held it in deposit in his shop but did not expose it for sale and informed the Inspector of its condition, the accused could not be convicted, as the Statute only referred to exposure for sale, and did not extend to a deposit in the shop. The learned Judge, however, regretted that a person in the country who knowingly sent unsound meat up to a London market should escape punishment, because there has not technically been an exposure for sale.[2] But where a butcher, intending to sell mutton, killed and hung up a sheep in the slaughter-house where it was condemned, he could not be convicted of this offence as he had neither offered nor exposed it for sale.[3]

(3) The Article must be Noxious or Unfit for Consumption.

2875. Thirdly, the article of food or drink must be noxious or unfit for consumption whether of man or of the lower animals, for the section does not limit its operation only to man.[4] The article must be noxious or unfit as food or drink for which it was sold. Its noxiousness or unfitness may be brought about by any cause whatever, but it must be noxious or unfit. Now what do these words mean? The word "noxious" means injurious to health. Anything unwholesome as food is noxious to health. The word "unfit" is of larger conception. But it does not merely mean unsuitable for food or drink, on account of its inferior quality brought about by harmless admixture or adulteration. For instance, the admixture of a large quantity of dirt, wood, matches, charcoal and black seeds in wheat offered for sale does not make the wheat unfit for consumption within the meaning of this section.[5] The seller of such stuff may be dealt with under the various municipal laws and bye-laws and it may even amount to cheating;[6] but the section is intended to strike at a different evil. It does not apply to the sale of merely inferior articles, but of articles which have become so unfit for consumption that they can be no longer made fit for that purpose.

(4) Knowledge Necessary.

2876. Lastly, the accused must have sold the article knowing or having reason to believe that the same was, or had been rendered noxious or unfit for human consumption at the time it was sold. The section says nothing about the knowledge of the purchaser, the offence consisting in the sale of an unwholesome article of food, and not on the ignorance of its condition by the purchaser. So Parke, B., said: "Victuallers, butchers, and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances that they are, so that if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue of an ancient Statute,[7] certainly if they do so knowingly, and probably, if they do not."[8]

2877. The sale of unwholesome food is reprobated not because it may be an imposition on the purchaser, if it is punishable otherwise as cheating, but because the sale of noxious food is injurious to the public health. If, therefore, the vendor sells noxious food to the purchaser and apprises him of the fact, he is none the less guilty because law would not permit a man to poison himself by noxious food and to this extent it helps him against himself. But the question of

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(1) Nuisances' Removal Act, 1863 (26 & 27 Vict., c. 117), s. 2 of which penalizes the owner of bad meat "at the time of sale or of exposure for sale or in whose possession or on whose premises the same is found."

(2) *Barlow* v. *Terret*, (1891) 2 Q. B. 107 (109).

(3) *Madar Sahib*, (1884) 1 Weir. 227.

(4) *Cf. Narumal*, 6 Bom. L. R. 520.

(5) *Narumal*, 6 Bom. L. R. 520.

(6) *Baishtab Charan Das* v. *Upendra Nath Mitra*, 3 C. W. N. 66.

(7) 51 Hen. III, St. 6, repealed by 7 & 8 Vict., c. 24, & re-enacted in 54 and 55 Vict., c. 76, s. 47.

(8) *Buruby* v. *Botlett*, 16 M. & W. 644.

notice is material as it may, then, be urged that the purchaser with notice could not have purchased it as food or drink. So where the accused sold a quantity of old and gritty flour, unfit for human consumption, at the reduced rate of 18 seers per rupee, which was 3 seers more than the prevailing market-rate, and the seller told the purchaser that the flour was bad and was, therefore, sold cheap, he was held to have committed no offence under this section.[1] In such a case, the accused might well have believed that the purchaser was not likely to use the flour as food on account of its inferior quality.

2878. The knowledge or belief may be inferred from the condition of the food, the probability of its having become noxious, the foul smell it has begun to emit, or its altered appearance. In order to be punishable it is not necessary to show that the article had become unfit owing to anything done by the vendor, for it may have become so by natural deterioration. So a vendor was convicted for selling toddy in which worms had germinated owing to its having been kept too long.[2] But where the accused had sold some ghee which, on chemical analysis, was pronounced to be " somewhat rancid," the accused's conviction was quashed on the ground that there was no evidence that the accused knew it to be noxious at the time. The principle deducible from this case, then, is this, that merely expert evidence is not sufficient to bring the offence home to the accused. There must be such evidence from which the Court would be justified in inferring that the accused knew it to be noxious at the time of sale.[3]

2879. Master Liable for Act of Servant.—Under the English Statute[4] and common law[5] the master is criminally liable for the act of his servant, and the husband for the act of his wife,[6] if the master or husband knew that the article offered for sale was noxious and the sale was made by the servant in the course of his employment. In such a case, the sale by the servant is really a sale by the master. *Qui facit per alium, facit per se.*[7] But in this, as in the other case of direct dealing with the customer, the proof of knowledge or belief is essential.[8]

274. Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Adulteration of drugs.

2880. Analogous Law.—This section is even wider in its terms than the last section dealing only with victuals. As the purity of drugs is a *sine qua non* for their efficacy and as tampering with drugs may have serious consequence upon those to whom it is administered, it is a matter of public concern that the puiity and efficacy of drugs should be insured by the imposition of condign penalty.

2881. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily. Besides inflicting the punishment authorized by the section, the Court is empowered to order destruction of the drug or medical preparation in respect of which the conviction was had.[9]

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(1) *Gunesha*, (1873) P. R. No. 15.
(2) *Ediga Narasappa*, (1894) 1 Weir 228.
(3) *Sheo Lal*, 26 A. 387.
(4) 35 & 36 Vict.. c. 74 ; 38 & 39 Vict., c. 63 ; Public Health Act, 1875, ss. 116-119.
(5) *Lixon*, 3 M. & S. 11 ; *Siddon*, 1 Tyreo, 51 ; *Riddell*, 2 Tyrw. 523.
(6) *Lyons* v. *Martin*, 8. A. & E. 512.
(7) "Whoever does an act through another is in the same position as if he had done it himself."
(8) *Sheo Lal*. 26 A. 387.
(9) S. 521 (2), Cr. P. C.

2882. Proof.—The points requiring proof are :—

(1) That the article in question is a drug or a medical preparation ;

(2) That the accused adulterated it ;

(3) That he then intended or knew it likely :—
  (*a*) that it will be sold or used for any medicinal purpose ; and
  (*b*) that it will be so used as if it were unadulterated.

(4) That the adulteration—
  (*a*) lessened the efficacy ;
  (*b*) changed the operation of the drug or medicine ;
  (*c*) made it noxious.

2883. Principle.—It is the duty of the State to conserve the health of its people. The purity of food and drink and of the atmosphere, and the existence of sanitary surroundings are some of the essentials, for warding off the existence of disease ; when it comes the purity of the drugs administered is essential to arrest its ravages. The preceding sections are intended to provide against the contamination of food, drink and air while this section is intended to insure speedy cure in case of illness. The section is, however, salutary but not drastic in this respect. It punishes fraudulent adulteration of drugs but not the purveying of drugs of inferior quality. To do so would shut many people of from the advantage of procuring cheap drugs, and it may then frustrate the very object the section has in view.

2884. Fraudulent Adulteration of Drugs.—This section punishes the intentional adulteration of drugs and medical preparations. It only punishes the adulteration which is a fraud on those who may have to use it. The section, therefore, adds that the intention or knowledge should be that it will be or was likely to be used for any medical purpose as if it had not undergone such adulteration. The adulteration of drugs for medical purposes is sometimes necessary, but in certain cases the sale of adulterated drugs is prohibited. The section does not deal with offences like these. It only deals with cases in which adulterated medicines are sold as unadulterated. The punishment is, again, reserved for the person actually adulterating them. Others adulterating at his instigation or with his knowledge or connivance may be similarly dealt with, the instigator being then liable for abetment.

2885. The question whether any act constitutes adulteration, must be judged by the test appointed by the section, namely, did it have the effect of lessening its efficacy, or had it changed its operation. In some cases, the lessening of efficacy may have a beneficial effect upon the patient to whom the drug is administered but it is the business of the physician to see to. The purveyor of drugs must sell them pure and unadulterated—not as pure as they can be made, but pure enough to be marketable. The chemist may mix, say, cod-liver oil of inferior quality with the oil of superior quality and sell the oil so adulterated, as pure cod-liver oil. Its efficacy is lessened, but the oil has not been adulterated in the sense in which the terms has been used in this section. The word is probably intended to suggest the admixture of a substance in the drug, which greatly diminishes its known efficacy, so that it fails of its effect. The change of the operation of a drug may be similarly brought about by adulteration. But if the change is beneficial it is an improvement and not an adulteration. Take for instance, the case of tasteless quinine or smell-less iodine. The pure substance in each case has been subjected to chemical treatment, but it has not materially changed its operation or diminished its efficacy. The offence, here, really consists in the fraud or deception practised on the public by selling them as pure, something which is impure, for which the public would not have paid the same price, if they had been made aware of its inferior quality. Knowledge or belief in its intended use as medicine confines the offence within its proper limits ; but otherwise the offence is only a part of the wider subject in which fraud and deception are always actionable, and when they assume a more serious form, they become indictable.

275. Whoever knowing any drug or medical preparation to have been adulterated, in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Sale of adulterated drugs.

2886. Analogous Law.—This section bears the same analogy to the last as its predecessor bears to s. **272**. That section (s. 273) and the last punish the adulterators, and thus punish the purveyor of such goods. There is, however, this difference between s. 273 and this, that while the former only punishes a *sale* of noxious food or drink, this section punishes both the sale as well as its issue from any dispensary for medical purposes as unadulterated. This was, of course, necessary, for dispensaries are paid for the medicine they issue, and, the fact the price was not set upon the drug sold could be no defence to dispensing it in an adulterated form. The last section and this correspond with section 49 of the English Sale of Food and Drugs Act[1] the provisions of which are similar to those here enacted.

2887. Procedure and Practice.—This offence is non-cognizable, and summons must ordinarily issue in the first instance. It is bailable but non-compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily. On a conviction under this section the Court is further empowered by section 521 (1) of the Procedure Code to order the destruction of the drug or medical preparation in respect of which the conviction was had.

2888. Proof.—The points requiring proof are:—

(1) That the article in question was a drug or medical preparation.
(2) That it had been adulterated in such a manner as to—
  (*a*) lessen its efficacy; or
  (*b*) change its operation; or
  (*c*) to render it noxious.
(3) That the accused—
  (*a*) sold it; or
  (*d*) offered it for sale; or
  (*c*) exposed it for sale; or
  (*d*) issued it from any dispensary; or
  (*e*) caused it to be issued.
(4) That he sold or issued it as unadulterated, or caused it to be so issued by a person not knowing of its adulteration.
(5) That the accused then knew that it was adulterated with the effect mentioned in (2).

2889. Principle.—This section lays down, in small compass a rule which has been dealt with, with great elaboration in English Law and the English Statute.[2] But the object, in each case, was the same, *viz.*, to prevent the issue and sale of adulterated or noxious drugs, and in this respect neither the English Statute nor this section makes any distinction between master and servant, principal or agent, between one who himself dispenses, and one who employs a compounder to do it for him. In England, the sale of drugs by unqualified persons is strictly prohibited. In this country there is no such restriction and it consequently abounds with quacks and charlatans who impose on the gullible public their drugs and medicines of resounding names and reputation for efficacy. It may be difficult to apply the section to them, but there is no reason why it should not be so applied. Besides these, there are those who set themselves up as chemists or druggists or pharmacists who profess to sell pure drugs and medicinal preparations of known make or composition. The section will easily apply to such persons dispensing adulterated

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(1) 31 & 32 Vict., c. 121, ss. 4-9, cited in 1 Penal Law (4th Ed.) pp. 1376, 1377.

(2) 31 & 32 Vict., c. 121.

preparations. The object of the section is, of course, to protect the public health by penalizing the sale and issue of adulterated inefficacious and noxious drugs. But the enforcement of the section requires further provisions like those of the English Statutes, otherwise it is likely to remain a dead letter.

2890. Sale of Adulterated Drugs.—It is necessary to clearly grasp the meaning of the terms " drug or medical preparation." There are a large number of articles which are put to this use but which cannot be so described. There are others which the native *Hakim* uses as drugs, but which are not in the British pharmacopœia. The article in question must be a recognised drug or a medical preparation of fixed consistency, otherwise, it would be difficult, if not impossible, to put the last two sections in practice. For instance, that native *Hakim* prescribes the use of kerosine oil as an embrocation for muscular rheumatism. But it is not a drug or a medicinal preparation. It is an article of household necessity. The words " drugs and medical preparations " must be understood to mean only such articles as are primarily used for medical purposes. Other articles may possess medicinal virtue, but they do not thereby assume that character. In order to determine whether an article is a drug or a medicinal preparation, the test to apply is : was it its ordinary and normal use or was it only its secondary use. The term " drug " is defined in the English Sale of Food and Drugs Act to include medicine for internal or external use.[1]

2891. The term adulteration has already been the subject of some comment. It is here used in the same large sense in which it is used in English Law. Its description in the English " Sale of Food and Drugs Act " is probably as complete a definition as is possible. The term includes not only an admixture of foreign matter or substance but also an alteration of the composition of the drug by extracting therefrom any of its vital constituents. The extraction of starch from wheat or cream from milk would be an adulteration. So in the case of drugs where the composition of a certain article is prescribed by the British pharmacopœia, it will be presumed that the article sold is of the standard quality as there prescribed. For example, the " tincture of opium " is one such article, and a well understood term in the trade, and its sale implies a guarantee that its ingredients are as given in the British Pharmacopœia. Where, therefore, the " tincture of opium " sold by the accused was deficient in opium to the extent of one-third, and in alcohol to the extent of nearly one-half as compared with the standard prescribed by the British Pharmacopœia, the accused was convicted under section 6 of the Food and Drugs Act, 1875 (§ 2886), although the purchaser had not specially asked for tincture of opium prepared according to the recipe in the British Pharmacopœia.[2] The same view was taken in another case where the " mercury ointment " sold by the accused did not contain the requisite proportion of mercury, as prescribed by the British Pharmacopœia.[3]

2892. The enforcement of the section in the case of drugs mentioned in the British Pharmacopœia, is thus likely to present no difficulty. For the British Pharmacopœia supplies a fixed and certain standard which is as much a guide to the pharmacist as to those who have to enforce its standard in the preparation of drugs and medicines. But the same invariable standard is wanting in the case of other drugs, and it may, then, be a question whether an article sold is of the requisite quality or not. In such case, there being no standard there can be no test, and until a standard is fixed, the section is likely to remain a dead letter.

2893. Of course, even where the other elements of criminality are present, no one can be convicted of this offence, unless he " sells, offers, or exposes for sale " an adulterated drug in his possession. If he is merely in possession of such a drug he cannot be convicted. So where the accused a grocer was found to possess in his cellar a quantity of unlabelled margarine, the exposure of which for sale without

Sells, Offers, Exposes.

(1) 38 & 39 Vict., c. 63, s. 2.
(2) *White* v. *Bywater*, 19 Q. B. D. 582.
(3) *Dickins* v. *Randerson*, (1901) 1 K. B. 437.

a printed label is an offence,[1] he was held to have committed no offence as the words "exposed for sale" were held to mean exposed to view in the shop in the sight of the purchaser.[2] But as was explained by Lawrence, J., in a subsequent case, the word "exposure" does not mean that the article itself should be exposed to view. It is sufficient exposure of the article, if the packet containing it is exhibited in the shop for sale.[3] The addition of the words "offers it for sale" enlarge the terms of the section, but an offer implies a proposal, which cannot be presumed from the mere fact of deposit in the shop.

2894. In an English case, decided upon the Statute in which the words "offer for sale" do not occur, the words "whoever sells" have been held to include he who sells, whether he be a master or servant, principal or a person to whom the conduct and management of sales is delegated.[4] But a mere canvasser who gets commission for receiving orders, is excluded as not being a seller.[5] And the question may arise whether a canvasser, though not a seller, does not "offer for sale" within the meaning of this section. The only reason why he should not be so regarded is that he is a mere intermediary, bringing the seller and buyer together, and that he does not really offer for sale, but communicates the seller's offer to intending purchasers. He cannot, therefore, be regarded as "offering for sale" so as to be liable under the section.

Sale of drug as a different drug or preparation.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from dispensary for medicinal purposes any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

2895. Analogous Law.—The section is held to be covered by the provisions of section 6 of the English Sale of Food and Drugs Act, 1875.[6] For an article which is not of the nature, substance and quality of the article demanded by the purchaser may be as much the same article of inferior quality as it may be a different article altogether.[7] Such would be the case where lard is supplied for butter, chicory for tea, or savin for saffron.[8] The section deals specifically only with medical preparations, the case of food and drink would have probably to be dealt with under section 290.

2896. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and may be tried summarily.

2897. Proof.—The points requiring proof are :—

(1) That the accused sold or offered or exposed for sale, or issued from dispensary;
(2) That the article so sold, etc., was a drug or medical preparation;
(3) That the accused sold, etc., a drug which was different from what it was professed to be;
(4) That he knew of such difference at the time it was so sold, etc.

2898. Principle.—This is only a continuation of the offence described in the last section. All the elements of criminality in the two cases are the same, the only difference between them consisting in the sale being not of the same article as required but of one different. This latter may or may not be a good substitute

(1) Margarine Act, 1887 (50 & 51 Vict., c. 29), s. 6.
(2) *Per* Smith, J., in *Crane* v. *Lawrence*, 25 Q. B. D. 152 (155).
(3) *Wheat* v. *Brown*, (1892) 1 Q. B. 418 (420, 421) explaining *Crane* v. *Lawrence*, 25 Q. B. D. 152.
(4) *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857.
(5) *Pharmaceutical Society* v. *White*, (1901) 1 K. B. 601.
(6) 38 & 39 Vict., c. 63, s. 6.
(7) *Knight* v. *Bowers*, 14 Q. B. D. 845.
(8) *Per* Mathews, J., in *Knight* v. *Bowers*, 14 Q. B. 845 (847, 848).

for the drug actually requisitioned, but it is an offence to issue it as a different article, for its chemical and therapeutical properties may be different, and the difference unknown to the purchaser may, at times, entail serious consequences. But the offence consists not in the injury done or threatened, but in the fraudulent disposal of one thing for another. There can, of course, be no offence where the seller apprises the purchaser of the difference. For the sale is then really a new contract in which, at the suggestion of the vendor, the purchaser modifies his proposal, and buys what is recommended to him as a suitable substitute. For other terms used in the section reference should be made to the commentary under the last section.

Fouling water of public spring or reservoir.

277. Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

[***Voluntarily***—s. 39.]

2899. Analogous Law.—According to Denman, J., it is an indictable offence to render the water of a great public river corrupt, insalubrious and unfit for human consumption, and he held the director of a gas company responsible for the act of their engineer who had conveyed the refuse of gas into a river, though they were ignorant of his act, and indeed, though they knew that the plan adopted for the disposal of the refuse was different, "for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants."[1]

2900. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate and summarily.

2901. Proof.—The points requiring proof are :—

(1) That the accused corrupted or fouled the water;
(2) That the water was of any public spring or reservoir;
(3) That he did so voluntarily;
(4) That he did so to render it less fit for the purpose for which it was ordinarily used;
(5) That it was in fact so rendered less fit, etc.

2902. Principle.—The water of a public spring or reservoir is a *res communiæ*, to which every one has a right in common. Its ownership may be said to have been jointly vested in the public, for it is for their joint use and benefit that it exists. No one should, therefore, disturb its public enjoyment by an act inconsistent with its beneficial use. Such an act is actionable as a private nuisance. But when the act is voluntary and done on purpose to prevent its user, it constitutes a public nuisance for which the section prescribes a punishment.

2903. Fouling Water of Public Spring.—As stated in the preceding paragraph, it is a public nuisance to voluntarily foul the water of a public spring or reservoir, so as to render it less fit for its ordinary use. Three things are, then, essential to constitute this nuisance: (*i*) the act must be voluntary, (*ii*) it must relate to a public spring or reservoir, and (*iii*) it must foul the water to the extent of contaminating it.

2904. If the Act was not voluntary the accused cannot be convicted whatever may be the consequence. Now a person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.[2] Intention and knowledge that the act done will foul the water is

(1) Act must be Voluntary.

(1) *Medley*, 6 C.& P. 292.

(2) S. 39.

then essential. It must be, at least, prominently present in the mind of the accused, if it was not indeed his primary object. The fact that a certain act is followed by a certain result is not sufficient, for the act may have been prompted by any other intention, and the knowledge of the effect may be wanting. For instance, it cannot be held, to be a nuisance under this section, if a person bathe in a tank not set apart by any lawful order for bathing purposes,[1] unless the accused was aware that its water was used for drinking purposes, and that the bathing will necessarily foul it.[2] So, while merely angling in a tank, the water of which was used for drinking purposes, is not such a nuisance still it may become a nuisance, if the bait used is of a foul kind,[3] or the finishing is done with basket nets which rake up the mud and so render the water less fit for drinking purposes.[4] So cultivating paddy in the bed of a tank, the water of which was used as of right by the public for drinking purposes, would be a nuisance punishable under this section, as it would necessarily lead to the contamination of water so as to render it the less drinkable.[5] In all such cases, the act was deemed to be "voluntary" because the accused could not but have foreseen the evil result of his action.

2905. But where a man acts negligently and the evil consequence is conceivable but not apparent, his act could not be said to have been done voluntarily within the meaning of this section. Such was the case of a dog-killer who buried the carcass of a dog in the bed of a public river near a town, the water of which was used by the people for household consumption, but for which the accused was acquitted because the Court held a river to be neither a spring nor a reservoir within the meaning of the section[6] (§§ 2906-2908). The fact that an act is done on purpose does not make for the crime, unless the purpose was to render water less fit for the purpose for which it is ordinarily used. A person bathing, fishing, or navigating in a river may do so on purpose, but his object may be to exercise his public right without detriment to the water used by him, or he may consider the fouling so temporary and insignificant as not to imperil the right of the public to its use. The nuisance, the section punishes, is one which is in the nature of mischief, the object of which is to inconvenience those who draw their supply of water from a public spring or reservoir.

(2) Public Spring or Reservoir.

2906. This raises the next question. The nuisance being public, must relate to a public spring or reservoir. A well is an example of a spring, and a tank or a cistern is an example of a reservoir. A river is, however, neither a spring nor a reservoir, so that the section cannot apply to it,[7] or even to stagnant pools formed therein, which are not "springs," nor can they be reservoirs.[8] The latter term conveys the sense of an artificial pool or lake from which pipes convey water to a town. In its extended sense it would include a tank or cistern from which water is drawn, but would it include a canal which is an artificial water-course? Probably not, if its water is not stagnant but flowing. If it is stagnant, a canal may become a reservoir and it would, then, be treated as such.

2907. So an open channel of water used for drinking purposes would probably be similarly construed. But the question whether a river or a canal is a "spring or reservoir" has only a limited bearing on the question, for, if they cannot be so regarded, it does not necessarily follow that the nuisance-feasor cannot be reached under the more general provisions of section 290, if the act was such as to cause common injury or danger to the public.[9]

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(1) (1878) 1 Weir 228.
(2) *Muthian*, (1896) 1 Weir 229.
(3) *Srinivassa Naik*, (1882) I Weir 231.
(4) *Panni Besoy*, (1883) 1 Weir 231.
(5) *Ramatripati*, (1881) 1 Weir 229.
(6) *Anthony*, (1884) 1 Weir 230; following *Hulodhur Poroe*, 2 C. 383.
(7) *Hulodhur Poroe*, 2 C. 383 *Vitti Chokkan*, 4 M. 229; *Anthony*, (1884) 1 Weir 230; *Patha*, (1869) B. U. C. 140; *Hari*, (1885) B. U. C. 215; *Nilappa Dayappa*, (1898) B. U. C. 963; *Nana Rama*, 6 Bom. L. R. 52.
(8) *Hari*, (1885) B. U. C. 215.
(9) *Nana Rama*, 6 Bom. L. R. 52.

2908. The term "public" as used in connection with the "spring or reservoir" has not been defined. In ordinary parlance, a place is said to be public, if it is a *res publicæ*, but the term is also applied to a place where the public have a right to go. As Grove, J., remarked in a case cited before: "A public place is one where the public go, no matter whether they have a right to go or not. The right is not the question."[1] A spring or reservoir would then be "public," if the public use it, no matter whether they have a right to use it or not. The offence depends upon considerations of public health, and no one, because he is the owner of a spring, can foul it to injure the public health. He may ban its use by the public, but so long as the public are allowed access to it, there remains the legal obligation implied by the section.

(3) Fouling Necessary.

2909. Thirdly, the act must "corrupt" or "foul" the water, so as to render it less fit for the purpose for which it is ordinarily used. The words "corrupt" or "foul" are here used in their normal etymological sense as meaning rendering putrid, filthy, turbid or muddy, as against their figurative sense as rendering it unholy, as by the touch of a person of a low caste.[2] A person of low caste who draws water from a public well cannot, therefore, be said to corrupt or foul the water within the meaning of this section.[3] The section, indeed, only safeguards the public health and not the public prejudice. It punishes those who endanger public health by contaminating their supply of water in cases where contamination is easy. In the case of flowing rivers the case is different, though in England even the contamination of public rivers is indictable at common law (§ 2899).

2910. The water may be corrupted or fouled in a variety of ways. A person may foul water by spitting[4] or by watering or washing cattle, or by washing himself or his clothes therein.[5] He may deposit rubbish therein, or sow waternuts or other acquatic plants which have necessarily the effect of corrupting and fouling it. He may strew branches of trees for fishing purposes and thus set in its putrefaction.[6] He may bathe or throw corpses therein, or he may extract its lime and mud for manuring purposes, and thus, make it foul and muddy. The section is not confined to fouling water as affecting human health. Any fouling, interfering with its purity, is enough to bring the offender within the penal visitation of this section. And the section is not confined only to water used for drinking purpose. A tank reserved for the bathing of men cannot be used for washing cattle. A tank reserved for the drinking of cattle cannot be used for wallowing buffaloes. The purpose for which it was ordinarily used must not be defeated by an act which fouls the water and has that effect.

2911. Degree of Fouling Immaterial.—As the section is worded the degree of fouling is immaterial. The offence is complete, if the act renders it less fit for the purpose for which the water is ordinarily used. So, where a person spat into a public well the water of which was used for drinking purpose, he was held to have been rightly convicted of this offence, since it rendered the water less fit for drinking purposes.[7]

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Making atmosphere noxious to health.

[*Voluntarily*—s. 39.]

(1) *Wellard*, 14 Q. B. D. 63 (66, 67).

(2) "Corrupt"—from Lat. *con*, together and *rumpo*, to break—*lit.*, to change from a sound to a putrid or putrescent state, to cause to rot; *figuratively*, it means to deprave, defile, impair or desecrate. "Foul"—from Lat. Skr. *puteo, puy*, to be putrid. The two words primarily thus convey a similar sense—the sense in which they have been used in the section.

(3) *Ganpatya*, 5 C. P. L. R. 20; *Pandia*, 13 C. P. L. R. 20.

(4) *Ramkaran Lal*, 13 N. L. R. 68. 40 I. C. 298.

(5) *Bhagi*, Bom. L. R. 1078.

(6) *Hulodhur Poroe*, 2 C. 383.

(7) *Ramkaran Lal*, 13 N. L. R. 68, 40 I. C. 298.

2912. Analogous Law.—The contamination of atmosphere is as injurious to public health as the fouling of water punishable under the last section. But as a contaminated atmosphere only affects the neighbours, it is an element of the offence that the vitiated atmosphere should be injurious to the health of the neighbours or of those who pass along a public way. The latter would, then, be those to whom the nuisance necessarily causes injury or danger when they have occasion to use the public right, within the meaning of the last clause of s. 268.

2913. Procedure and Practice.—This offence is non-cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily.

2914. Proof.—The points requiring proof are:—

(1) That the thing vitiated was the atmosphere.
(2) That it was vitiated by the accused.
(3) That he did so voluntarily.
(4) That such vitiation was noxious to health.
(5) That it was noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way.

2915. Vitiating Atmosphere.—This section applies to trades producing noxious and offensive smells, such as making candles in a town by boiling stinking stuff,[1] a manufactory for making spirit of sulphur, vitriol and aqua fortis,[2] or a tannery where skins are steeped in water by which the neighbouring air is vitiated.[3] So, it is apprehended, would be the burning of bricks or lime in a kiln, the smoke from which is peculiarly noxious. The setting up of a noxious trade in the proximity of crowded population is always a nuisance. But in this connection a question often arises: is the carrying on of such a trade in the neighbourhood of such similar establishments justifiable, and is the fact that it has been suffered for long any defence to an indictment? As to the former, it was held that a person who set up a noxious trade in the neighbourhood of other similar manufactories, which emitted noxious smells, he could not be indicted unless the annoyance was materially increased by the new addition.[4] As to the latter, it was laid down in the same case,[5] that the fact that a noxious trade had been carried on for fifty years would be good defence to an indictment for causing a public nuisance. But this case is not reconcilable with the view that the right to nuisance cannot be acquired by prescription.[6]

Old Nuisances.

2916. But the Courts have discriminated between the nuisance for the first time created in a neighbourhood, and a nuisance of long standing before the neighbourhood became populated. If a noxious trade is established in a place remote from human habitation and public roads, and persons afterwards come and build houses within the reach of its noxious trade, or new roads are laid out in its neighbourhood, the new arrivals cannot put an end to the trade by complaining of its nuisance, for in such a case, the nuisance did not go to them, they went to the nuisance.[7] But, even in such a case, the only nuisance they are bound to suffer is the nuisance which existed at the time of their occupation. They can, therefore, still complain if the nuisance has since increased, and, if it has thereby occasioned more inconvenience. So in an indictment for carrying on the business of a horse-boiler, it appeared that the trade had been carried on before the defendant set up the same business. It was urged for him that the neighbourhood was full of horse-boilers and other anxious trades, and evidence was given of the trade being carried on in an improved manner. Lord Tenterden observed that the trade was a nuisance, but considering that the neighbourhood had always been occupied by the trade, it would not

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(1) *Tobayle*, cited Cro. Car. 510.
(2) *White*, 1 Burr. 333.
(3) *Pappineau*, 2 Str. 686; *St. Helen's Co.* v. *Tipping*, 35 L. J. Q. B. (H. of L.) 66.
(4) *Nevill*, Peake 21.
(5) *Ib.*
(6) *Weld* v. *Hornby*, 7 East 199; *Fowler* v. *Sanders*, Cro. Jac. 446.
(7) *Cross*, 2 C. & P. 483.

be a nuisance unless it occasioned more inconvenience. He left it to the jury to consider whether considering the improved method adopted, there had been any increase of the nuisance with the increase of the trade, in which case the defendant must be convicted.[1]

Foul Smells.

2917. Another question whether a person has a right to substitute a smell of one kind by a smell of another kind due to a change in the process of manufacture is suggested by a case in which, the plaintiff, a riparian owner, questioned the right of the defendant to pollute his stream, by letting into his river the waste from his paper mills of a new material called *es-parto*, a Spanish grass which he had substituted for rags, from which he had been formerly making paper, and the waste of which he had a right to shoot into the river. It was held that the right possessed by the defendant was not to foul the stream by discharging into it the refuse of his mill, whether it be refuse of rags or grass, and that the question at issue was whether the change in the material had increased the pollution.[2]

2918. A similar question was raised in another case, in which the defendant, who was the plaintiff's next door neighbour, kept a number of horses, but not so as to be an annoyance. Latterly, he built his stables on a new plan securing the horses with iron chains fixed to the iron-manger fastened to the party wall which divided that house from the best living room of the plaintiff's house. Lord Selbourne, L. C., in granting the injunction, observed that it was not the keeping of horses but the manner of keeping them that created the nuisance, of which the plaintiff had a right to complain: "In making out a case of nuisance of this character, there are always two things to be considered, the right of the plaintiff, and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence, it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes, in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his property: and his neighbour, shewing substantial injury, is entitled to protection.[3]

2919. A nuisance of this description has sometimes to be tolerated because it has been sanctioned by the Legislature. Such is the nuisance of smoke and smell from locomotive steam-engines on the railway. In such cases, sanction to construct a railway necessarily implies authorization to create the nuisance which is necessary for its working. But even in such cases, it is the duty of a company laying out a line to pay due consideration to the protests of the people, but once the line is ready, the nuisance, if any, would have to be tolerated.[4]

2920. The accused was convicted under this section for performing the office of nature in front of his door-step in a public street, but his conviction was reversed[5] presumably because there was no proof that the atmosphere was thereby vitiated, or that it had been vitiated voluntarily.

2921. The words noxious to the health of persons *in general* dwelling in the neighbourhood are important as they exclude sectarian prejudices, and only appeal to the general sentiment of the neighbours, regardless of caste or creed. The setting up of a slaughter-house may be strenuously objected to by high caste Hindus, but it is not *per se* an offence under this section, unless it is a nuisance under

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(1) *Watt*, Moo. & Mal. N. P. C. 281.

(2) *Baxendale* v. *McMurray*, L. R. 2 Ch. 790 (795); *Lurrel's case*, 2 Rep. 493; *Bishop* v. *North*, 11 M. & W. 418; *Daud* v. *Kingscote*, 6 M. & W. 174 (196); *Moore* v. *Webb*, 1 C. B. (N. S.), 673.

(3) *Ball* v. *Ray*, L. R. 8 Ch. 467 (469, 470.

(4) *Please*, 4 B. & Ad. 30; *Morris*, 1 B. & Ad. 441.

(5) *Mahadshet*, (1884) B. U. C. 200, *Rahim Mian*, 116 I. C. (Pat) 48.

s. 268, or emits noxious smells, in which case, it would be a nuisance punishable under this section.

279. Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Rash driving or riding on a public way.

[*Injury*—s. 44. *Hurt*—s. 319.]

2922. Analogous Law.—In England, 1 Geo. IV, c. 4, was enacted to punish wanton and furious driving or racing. The Statute was however, confined to stage coaches and public carriages. This section is now extended and re-enacted by 24 and 25 Vict., c. 100, section 35, which enacts as follows :—

"35. Whoever having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect do or cause to be done any bodily harm to any person whatsoever, shall be guilty of misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

2923. This is not the only section dealing with rash and negligent acts. Other sections, *e.g.*, ss. 304A, 336-338, deal with the same offence. The only distinguishing feature in this section, is that the rash and negligent act here made punishable consists of driving or riding on a public way, the other sections being more generally worded. But they are all offences of the same nature and illustrate the same principle. This offence is now also punishable under the Motor Vehicles Act.[1]

2924. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily. A person cannot be convicted both of this offence and of mischief which implies that the act was done wilfully and not merely negligently.[2] Nor can he be convicted both of this offence as of that punishable under s. 5 of the Motor Vehicles Act.[3] (§ 2923). A person, convicted of a major offence. *e.g.*, an offence under s. 337, or s. 304, cannot be convicted of this offence as well.[4]

2925. Proof.—The points requiring proof are:—

(1) That the accused was driving a vehicle or was riding.
(2) That he was driving or riding on a public way.
(3) That he was doing so rashly or negligently.
(4) That it endangered human life, or was likely to cause hurt or injury to any other person.

2926. Meaning of Words.—"*Likely to cause*," *i.e.*, the actual causing of hurt or injury is not necessary. Its likelihood is sufficient.[5] "*Any other person*" means a person outside the carriage and not a person inside, injury to him being punishable under s. 337.[6]

2927. Doctrine of Criminal Negligence.—There are at least thirteen sections in the Code dealing with offences due to criminal rashness or negligence.[7] They all possess one feature in common, namely, that the act is not pre-meditated and done on purpose to produce the consequence. In all of them, the act is rash, that is to say, an overhasty act done without due deliberation and caution. It produces a result which the offender never expected, and which he may most regret. But he is punished, not for the effect produced which he could not perhaps foresee, but for the *manner* of

What is Rash?

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(1) S. 5, Act VIII of 1914; *Charan*, (1925) A. 798.
(2) *Akidullah*, 5 S. L. R. 263; 15 I. C. 808.
(3) VIII of 1914.
(4) S. 75, *Collet*, 1929 M.W.N. 395.
(5) *Nabi Baksh*, (1913) P. W. R. No. 2.
(6) *Md. Jamal*, 119 I. C. (S.) 536, (1930) S. 64.
(7) Ss. 279, 280, 283, 284, 285, 286, 287, 288, 289, 304A, 336, 337, 338.

doing act which was fraught with danger. The words "rash or negligent" are terms closely allied, but they are none the less distinguishable. In cases of negligence, the party does not perform an act to which he is obliged; he breaks a positive duty, he does not advert to the act which it is his duty to do. In rashness, the party does not act which he is bound to forbear; he breaks a negative duty. Here he adverts to the act but not to the consequences of the act he does. Both in rash as well as in negligent acts, no thought is bestowed on the consequences. In the one, there is a knowledge of the consequence, but there is over confidence which makes one believe its happening unlikely. In the other the consequence is never adverted to.

What is Negligent?

2928. Negligence may be defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations, which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do.[1] Negligence is not an affirmative word; it is the absence of such skill, care and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed.[2] The difference between culpable rashness and culpable negligence is this: culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous result will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection.[3]

2929. The distinction between the two terms is not of any great practical importance in the interpretation of the sections of the Code dealing with offences involving criminal negligence, for in all the sections, the two words have been used together. But it is otherwise important as marking the limit of criminal responsibility. "The question of liability for negligence cannot arise at all until it is established that the man, who has been negligent, owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world, if he owes no duty to them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property. For instance, if a man is driving along a road it is his duty not to do that which may injure another person whom he meets on the road, or his horse or his carriage. In the same way, it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So too, if a man is driving along a street in a town, similar duty—not to drive carelessly—arises out of contiguity or neighbourhood.[4]

2930. These remarks not only apply to this section but also to criminal negligence as appearing in other concatenation. In all cases, the act is an offence because it involves the violation of some duty. For instance, the duty implied in this and the next section is the duty which a person using a public way owes to

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(1) *Blyth* v. *Birmingam Water Works Co.*, 11 Ex. 784.

(2) *Grile* v. *General Iron Screw Collar Co.*, 35 L. J. C. P. 321 (330).

(3) *Nidamarti*, 7 M. H. C. R. 119.

(4) *Per* Lord Esher, M. R., in *Le Neve* v. *Gould*, (1893) 1 Q. B. 491 (497); following *Heaven Pender*, 11 Q. B. D. 503; *Scooles* v *B ook*, 63 L. T. (N. S.) 835; *Derry* v. *Peek* 14 App. Cas. 337, holding *Cann* v. *Wilson*, 32 Ch. D. 39 as overruled by *Derry* v. *Peek*, 14 App. Cas. 337. To tho same effect, Sir Barnes Peacock, C. J., in *Gorachand Gope*, B. L. R. (Sup. Vol.) 443; F. B.

other similarly exercising the same public right. As they owe the same duty to him, so does he owe it to them. The question whether the person was himself exercising a public right is immaterial, for what is material is that persons exercising the public right of way should not encounter an injurious impediment in the exercise of that right. This explains section 283 where the danger, obstruction or injury is caused by neglecting to take order with any property in one's possession, and the same idea pervades the next six sections. In all such cases, the nuisances are indictable because the act done is injurious or dangerous to the public or those exercising a public right. The act is an offence, not because the danger is present, but because it is probable and imminent. The sections are in this sense preventive and not punitive. Where the act causes hurt[1] or grievous hurt[2] or death[3] the offence assumes a graver form, and it is then otherwise punishable.

2931. Rash or Negligent Driving.—So far as regards the offence here described its essential ingredients are (*i*) rash or negligent driving, (*ii*) on a public way, so as to (*iii*) endanger human life.

2932. In the first place there must be rash or negligent driving or riding.

(1) Rash or Negligent Driving.

The meaning of these words has already been explained (§§ 2927, 2930). The question whether a certain act is rash or negligent cannot be answered in the abstract. It must depend upon the time, place, and he nature of the road. A person driving by daylight in a deserted street has not to exercise the same degree of caution as one driving at night or by the dim light of the street lamps and in a street crowded at the time. But the fact that at a particular time the street was vacant does not justify rash driving, for the horse driven may get out of control and then overrun people when the driver is helpless. To avoid such danger, the pace of traffic is in many places regulated by the municipal bye-laws, and it is then an offence to drive or ride at more than the regulated rate. But apart from them, it is the duty of all persons driving on a public way to exercise that degree of care and caution for the safety of others which a prudent man might reasonably be expected to exercise. If he was riding so fast that he would be unable to stop the horse if a foot-passenger got in the way, he would be liable, provided that the foot-passenger acted in a reasonable manner.[4] The fact that the horse was going faster than a walk does not constitute rash or negligent driving, nor is it rash or negligent, if the driver through some cause, not due to his own fault, lost control of his animal. The question is one to be decided on reasonable commonsense grounds.

2933. A rider may reasonably expect that persons will take proper care not to get in the way of horses and vehicles. At the same time, he is bound not to assume that it is solely their duty to get out of his way, and not his duty to keep out of theirs.[5] The driving may be of any vehicle, whether an autocar or one driven by animals. So a person may ride a horse or a bicycle. In neither case should he drive or ride furiously so as to endanger life or limb. Of course, the section does not prohibit the driving of vicious animals, but in such a case, the driver has to be additionally careful. So it was held that the section does not extend to punishing the mere driving of a cart, the bullocks of which are without nose-strings.[6] But here again, the municipal bye-laws may intervene. The section really incriminates a person for the *manner* of his driving and not for the animals driven. No doubt the former must be regulated having regard to the age, temper and nature of the latter, but this is all. Again the fact, that a person was ringing his bell or shouting out to people to get out of the way does not excuse rash driving.

2934. A person is guilty of rash driving if he races on the public way, for racing begets rashness, and rashness involves risk of danger. In many places,

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(1) S. 337.
(2) S. 338.
(3) S. 304-A.
(4) *Balunki*, 1 C. P. L. R. 112.
(5) *Bayne*, 8 Bom. L. R. 414 (419).
(6) *Ganpatee*, (1869) B. U. C. 19

there is a rule of the road which drivers and riders are bound to observe. The ordinary rule is "keep to the left," though there are places where the rule is different. It would be a negligent act not to observe the rule where it exists, and a person endangering others by his non-observance of the rule may well be punished under this section. But the mere non-observance of the rule is not punishable under this section *provided* that his act was not otherwise either rash or negligent.[1] In crowded streets there is a rule for crossing, which drivers and riders are equally bound to study and observe. And it would be rash driving with a vengeance not to modulate the pace when turning round a corner or passing a congested crossing. The fact that streets are unusually crowded due to a public procession, or any other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious and may tend to render him criminally liable for any accident ensuing from rash driving.[2]

(2) Rash Driving must be on "public way."

2935. Again, rash driving is only an offence when it is on any public way. A public way means, the same thing as a highway, so called because it was originally a raised track for the passage of man and beast over which all had an equal right to pass. But a *public* way is distinguished from a highway in that the latter is a generic term and includes every public way whether on land or on water.[3] A public way according to Lord Coke is of three kinds: (*i*) a footway; (*ii*) a foot and horseway which is also a pack and prime-way; and (*iii*) a foot, horse and cart way.[4] But in latter times, the term was indiscriminately used to denote any of them, when common to all the king's subjects, whether directly leading to a market-town or, beyond a town, as a thoroughfare to other towns, or from town to town; and the last way was by way of eminence called the king's highway.[5] The chief characteristic of a public way, therefore is that, over it all persons have an equal right to pass. Such a way must be distinguished from a way to a private house or for the benefit of a particular person,[6] or class or community or one limited to the inhabitants of two or three villages only,[7] which is not a public way, though the public may be permitted to use it.[8] A short-cut through a common, used by the people for convenience, which they crossed whenever they liked, but which had left no definite enduring tract, except those which lasted for a few weeks or months could not be described as a public way.[9] So the fact that a defined and definite number of persons had the right to use a way does not make it a public way to which are entitled *all* the king's subjects. So where the Commissioner under the Inclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of the parishes to keep it in repair, the way was held to be private.[10]

2936. A private way may become public, if it is dedicated by the owner to the public use. Such dedication may be presumed from the free passage of people over it for a number of years without let or hindrance.[11] The erection of a bar across the way though broken down for years,[12] or its closure for only a day each year are facts, sufficient to rebut the presumption. Indeed, no dedication can be presumed unless the facts are such as will justify an inference that the owner meant to give the public an unqualified right of way over his soil.[13] There must be, in short, an *animus dedicandi*, of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon

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(1) *Babu Santu*, 23 Bom. L. R. 358, 61. I. C. 52. *Ram Sewak*, 146 I. C. (O.) 28.
(2) *Murray*, 5 Cox 509.
(3) *Saintiff*, 6 M. 255.
(4) Co. Litt, 56*a*.
(5) 1 Hawk P. C. C. 76, s. 1; Bac. Abr., tit. "Highways" (A); *Allen* v. *Ormond*, 8 East 4.
(6) 1 Hawk P. C. C. 76, s. 1; *per Hale*, C. J., in *Austin's Case*, 1 Vent. 189.
(7) *Pr an Nath Kundu*, 57 C. 526.
(8) *Stone* v. *Jackson*, 16 C. B, 199.
(9) *Schwinge* v. *Dowell*, 2 F. & F. 845, *Chapman* v. *Cripps*, 2 F. & F. 864.
(10) *Richards*, 8 T. R. 634.
(11) *Trustees of the Rugby Charity* v. *Merryweather*, 11 East 375; *Woodyer* v. *Hadden*, 5 Taunt, 125.
(12) *Roberts* v. *Karr*, 1 Camp. 216, Note (*b*)
(13) *Woodyer* v. *Haddon*, 5 Taunt; 125 *Hudson*, 2 Str. 909.

a question of intention to dedicate than many acts of enjoyment.[1] Moreover, it is not sufficient that the public using the way believed from the conduct of the owner that they had acquired a right to it ; for what is necessary to prove dedication is an *actual intention* on the part of the owner to dedicate.[2] Where the owner charges a fee, let it be a pepper-corn, for use of the way, there is not dedication but a mere license resumable at the owner's pleasure.[3]

2937. Where there is a dedication, the owner may dedicate it with the reservation which may amount to a nuisance, and the public cannot then complain of it. Such was the case where a road was dedicated with an opening therein made to communicate with an underground cellar and a flap which shut, but which was only shut at night when it slightly projected above the footway. Such an obstruction would have been undoubtedly a nuisance in the case of a highway, but the public were held to have no right to remove it as the dedication to them was held to have been made with that reservation.[4] This may be taken as an instance of a partial dedication which seems to be unobjectionable. Thus the owner may stipulate that the public may use his way for any purpose except that of carrying coals, which stipulation would then be enforced.[5] So a dedication might allow passage only at stated hours,[6] though it may be only for a limited time[7] or for a limited purpose, as for a footway, horseway or driftway, but what it does allow it must allow to the public generally and not to any section or members of it only.[8]

2938. Now assuming that a driver or rider is rash or negligent and that he drives or rides a vehicle on a public way, the offence is still not complete for its third most essential element is that the driving or riding must be " in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person." This does not mean that the hurt or injury should, in fact, have been caused,[9] or indeed that at the time there was some person actually in a position of danger.[10] All that is necessary is that the manner of the accused's driving or riding was such that there was the probability of persons using the road being placed in danger by the act of the accused. This is the mischief struck at by the section.[11]

(3) The Act must be Dangerous.

2939. There may, of course, be cases where a person is knocked down or run over, but that fact alone is not sufficient to bring the offence home to the accused.[12] For if the accused did not drive or ride rashly or negligently, he could not be held accountable for a death caused by misadventure. On the other hand, if his driving was rash or furious or negligent he would be liable, though no one may have been hurt, if the manner of his driving or riding was such as to make the causing of hurt or injury likely, or if it put the lives of men in jeopardy. The fact that they had run away to save themselves would not then matter. If they were injured, it will be a fact having an important influence upon the relation of cause and effect between the act of the accused and the consequences ensued.[13] In such a case, the question will not, then, be whether an offence only under this section has been committed, for the accused would then be liable to the higher penalties provided by other sections.[14] As the hurt or injury must have been caused to any *other* person the accused cannot be convicted for injuring himself.

2940. Respondeat Superior.—As the section is worded it only refers to the person actually driving or riding. But the question remains and has been raised

(1) *Poole* v. *Huskinson*, 11 M. & W. 827.
(2) *Broke*, 1 F & F 514 ; *Ferrand* v. *Milligan*, 7 Q. B. 730.
(3) *Barraclough Johnson*, 8 Ad. & E. 99.
(4) *Fisher* v. *Prowse*, 2 B. & S. 770.
(5) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257 (Littledale, J., *dubitante*); *Cowling* v. *Higginson*, 4 M. & W. 245.
(6) *Northampton*, 2 M. & S. 262; *Roberts* v. *Karr*, 1 Camp. N. P. C. 262-n ; *Marquis of Buckinghum*, 4 Camp. N. P. 189.
(7) *Lordesmere*, 15 Q. B. 689.
(8) *Poole* v. *Huskinson*, 11 M. & W. 927.
(9) 6 M. H. C. (App.) 33.
(10) *Hormusji*, 19 B. 715.
(11) *Ib*.
(12) *Fillagon*, (1894) 1 Weir, 232.
(13) 6 M. H. C. R. (App.) 31.
(14) *Bali*, (1888) B. U. C. 396.

whether, in such a case, the master will escape scotfree, though the driver may have driven in obedience to his command. In England, in such cases, the responsibility rests as much on the servant as on the master, the act of the one being regarded as the act of the other, on the doctrine of identification.[1] And in this country there can be no doubt, that in the case supposed, the master would be guilty but of abetment. As the Madras Court remarked: "Looking at passive submissiveness of the native servants, it would be a very dangerous doctrine, indeed, to hold the master inside entirely guiltless, if his directions procured the rash and negligent act."[2] But this does not mean that a mere order to drive fast would expose the master to the penalties of this section. In such a case, he may render, himself civilly liable for an accident, but he cannot be prosecuted without *mens rea*, which in this case must be supplied by personal negligence. It is only then that it can be said that, though it was the hand of the servant that rashly drove the vehicle, it was the master who guided it. And where the driver is not a servant but a contractor, as for example, a hackney driver, the employer cannot be held responsible for the act of the driver unless, indeed, his act amounts to abetment.[3]

2941. Contributory Negligence.—Another question that rash driving suggests is the defence of contributory negligence to repel the charge of rash or negligent driving. Now, contributory negligence has a distinct and recognized place in the law of tort, and it is a good defence to a civil action for damages.[4] And it is also a recognized canon of common law that no person can be indicted for an act for which he is not civilly liable,[5] and this was relied upon by Willes, J., in a case in which he extended the doctrine to an indictment for manslaughter;[6] but his view was not acceded to by Lush, J., who remarked that it was quite at variance with what he had always heard laid down,[7] and Byles, J., overruled the plea of contributory negligence as being any defence to an indictment for criminal negligence.[8] So Pollock, C. B., said, that where there is a loss of life "each party is responsible for any blame that may ensue, however large the other's share may be; and so highly does the law value human life that it admits of no justification wherever life has been lost and the carelessness and negligence of any one has contributed to the death of another person.[9]

2942. These were all cases of manslaughter but their principle was held to extend to all cases of criminal negligence.[10] And it is difficult to see how any other view is possible. In a civil suit between the tort-feasor and the aggrieved party, it may be perfectly right for one to place the blame upon the shoulder of his adversary. But in a criminal case, the issues are not the same; and it is no answer for the accused to say "I was rash and negligent, but then I must not be punished, because there is another person equally rash and negligent elsewhere." So Lord Bramwell remarked: "In such cases, the defendant is a wrong-doer, without whose wrong-doing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrong-doer who contributed to the damage."[11] It may be added that, as the Crown is the prosecutor in all criminal cases, the plea of contributory negligence could not be heard unless it is a contributory negligence of the Crown. But though the plea of contributory negligence is never a defence to a prosecution for rash and negligent driving, it is nevertheless an element which must necessarily enter into consideration of the question whether the act of the accused

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(1) *Lowe*, 3 C. & K. 123; *Swindell*, 2 C. & R. 230.

(2) 6 M. H. C. R. (App.) 31.

(3) *Miles Armstrong*, 13 App. Cas. 1 (8, 9), overruling *Thorogood* v. *Bryan*. 8 C. B. 115.

(4) *Martin* v. *Great Northern Ry*, 16 C. B 192; *Wise* v. *Great Western Ry.*, 1 H. & N. 63. *Bernina*, 13 App. Cas. 1 *Reynolds* v. *Thomas*. *Tilling Ltd.* (1903) T. L. R. 539.

(5) *Hammack* v. *White*, 11 C. B. N. S. L. & C., 567 (598); *Haines*, 2 C. & R. 368, *Swindell*, 2 C. & R. 230; *Longbottom*, Rus. C. & M. 871; *Thorogood* v. *Bryan*, 8 C. B. 129: *The Millan*, Lush 388.

(6) *Birchall*, 4 F. & F. 1087.

(7) *Jones*, 11 Cox 544.

(8) *Kew*, 12 Cox 355.

(9) *Swindell*, 2 C. & R. 230.

(10) 6 M. H. C. R. (App.) 31.

(11) *Per* Lord Bramwell, *The Bernina*, 12 P. D. 58; O. A. 13 App. Cas. 1 (17),

was so rash or negligent as to be punishable under this section. For it may be that the act, though rash and negligent, lacked that degree of rashness and negligence so as to make it culpable, and its culpability would not be judged by the effect produced, as it was not the natural and probable consequence of the act (§ 2952).

Rash navigation of vessel.

280. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Injury*—s. 44. *Vessel*—s. 48. *Rash or negligent*—s. 279.
Endanger human life—s. 279. *Hurt*—s. 319.]

2943. Analogous Law.—This section extends the provisions of the last section to a water-way. As remarked in the last section, the word "highway" as understood in English Law, is sufficient to include both a public way on land as well as on water. The use of that word in the last section would have, however, covered the present provision, as it is not confined only to a public way on water, but extends also to all waterways public or private.

In other respects the two sections are identical.

2944. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate, or a Magistrate of the first or second class, and summarily.

2945. Proof.—The points requiring proof are :—

(1) The existence of a vessel ;
(2) That the accused navigated it ;
(3) That his manner was so rash or negligent ;
(4) That it endangered human life, or caused hurt or injury to any person other than the accused.

2946. Rash Navigation.—Rash or negligent navigation is even more dangerous than rash or negligent driving. One may escape with a bruise in the one, case, but one runs the risk of losing one's life in the other. The section, therefore extends to all navigation, whether on the highway or private way, or the sea, or public river, or a private lake or canal. The section is, of course, intended only to apply to inland navigation, for rash navigation on the high seas is not punishable by the Code (§§ 41, 42). It is the primary duty of steam vessels to keep out of the way of vessels lying at anchor, and where a launch runs into a cargo boat, at anchor, it is, in itself, *prima facie* evidence of negligent navigation.[1] Elaborate provisions, however, exist to ensure the safety of cargo and passengers on the high seas. But they form no part of the Code.[2]

2947. To support a conviction under this section, there must be proof of rashness or negligence which endangers human life, or is likely to cause hurt or injury to any other person. The *immediate* cause of the accident should be rashness or negligence on the part of navigator. In considering the question of degree, the question of contributory negligence has also to be taken into account, not as a defence as to the indictment, but for the purpose of determining causation and fixing a measure of the liability of the accused.[3]

2948. So far as this section is concerned, assuming that the offence is committed within the territorial or admiralty jurisdiction of the Courts, the only questions that are likely to arise are ; (*i*) Was the accused's navigation rash or negligent ? and (*ii*) was it such as to endanger human life, or to cause hurt or injury to any other person. The first question raises the same

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(1) *Lal Meah*, 4 Bur. L. J. 140; 12 I. C. 846.
(2) Indian Merchant Shippi ng Act (VII of 1880) ; Pilgrim Ships Act (XIV of 1895) ; Native Passengers Ships Act (X of 1887).
(3) *Kamdar Ali*, 15 C. W. N, 835, 11 I. C. 130.

points as the last section ; and in each case, the nature of the evidence required would be similar. Of course, persons who navigate on sea have need to be more careful than those who drive or ride on land, for the consequences in the one case are necessarily more serious than in the other. This difference in the consequence dictates the difference between the last section and this which has been already noticed (§ 2943). But in each case, there must be proof of negligence.

2949. A ferry-boat contractor was convicted for the abetment of this offence, on the evidence that the boat hired by him in fulfilment of the contract was upset from not containing sufficient ballast, it was held that there being, no evidence to show that the contractor intentionally omitted to provide the ferry-boat with what he knew to be necessary for safe navigation, his conviction for abetment could not be sustained.[1] So the owner of a vessel sunk by accident without his default in a public water-way, the possession and control of which he had abandoned, was held not liable either criminally or civilly for the nuisance and harm thereby caused.[2] But, where certain country boats were anchored at a wrong place, that is in deep water, and in the fair way of the river Hoogli, at Diamond Harbour, the accused in charge of a steam launch who had no reason to suppose that the boats which had no lights were stationary, blew a whistle on seeing the boats ahead and did all he could to avoid them but could not prevent a collision, sinking the boats and drowning its passengers, it was held that he was not guilty of any rashness or negligence and could not be convicted under this section.[3] It is, of course, not negligence to navigate a boat in an extremely slovenly manner, provided it endangers no human life nor causes injury to property.[4]

2950. There may be negligence, but it must be the *causa causans* or the proximate cause of the injury and not merely, a *causa sine qua non*.[5] In this case, the defendant's vessel, by the negligence of the captain and crew, grounded upon a shoal or sandbank within three-quarters of a mile of the plaintiff's wall, the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew : and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and thus effected the injury in question. The question then was whether the negligence was the proximate cause of the injury, which was so held by Kelly, C. B., who, delivering the judgment of the Court observed : " The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled, in whatever direction the wind and tide were going at the moment to the sea, and this was directly upon and towards the plaintiff's wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once immediately been carried by the tide with great force and violence against the rock, and had become a wreck."[6] But this was a case of civil liability, in which the degree of negligence required is not the same.

2951. But though negligence may differ in degrees, it does not differ in quality. And the only question then to consider is, was the negligence such as to amount to rash and dangerous navigation so as to be criminally punishable, or was it only of such low degree as to give rise to no more than a civil liability? This was the *ratio decidendi* in a case in which the master and pilot of a steam vessel were indicted for running down a smack and so drowning a man. They were both on the bridge directing the steamer at the time, but though they had placed a man

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(1) *Sakaram*, (1870) B. U. C. 35.
(2) *White* v. *Crisp*, 10 Exch. R. 312.
(3) *Kamdar Ali*, 15 C. W. N. 835, 11 I. C. 130 ; following Park, J., in *Green*, (1835) 7 C. & P. 156.
(4) *Rahimtullah*, 87 I. C. 914, (1925) S. 284.
(5) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Exch. 204 (208).
(6) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204 (208, 209).

on the look-out, the man either left his post or neglected his duty, and the charge against them was for neglecting to see that the man was on the look-out, as the night was dark and a look-out was necessary. This raised the question stated by the Judge to the jury: "Is the captain bound to have a person on the look-out"? The answer given was: "Civilly he is, but not criminally."[1] But it is conceivable that, if the captain had removed the man from the look-out or omitted to put one there, he would probably have been as well criminally liable.[2]

Contributory Negligence Material.

2952. As already observed (§§ 2946-2950), in considering the question of degree, the question of contributory negligence has also to be taken into account, not as a defence to the indictment, but as necessary for fixing causation and the measure of the accused's liability. Suppose for instance, that two ships collide and the master of one of them is prosecuted under the section. How is his liability to be determined? His negligence must be the *causa causans*, which here means that it would have made him run into the other boat even if the latter had been stationary. This is indeed necessary, or if a new force or power has contributed to the catastrophe, how can one person bear undivided responsibility for an act which is not solely his own? In such a case, it may even be difficult to apportion the liability between the two opposing negligent navigators, unless one had been guilty of the non-observance of some rule or regulation or the ordinary dictate of prudence, which the other was not. Such would be the case where in a collision between two tugs at night, one had a headlight which the other had not. Apart, however, from the difficult cases of collision not likely to arise, or to be dealt with under the section, the measure of criminal negligence is the probability of danger, hurt or injury to human life or limb, where actual hurt or injury has been caused—then *res ipsa loquitur*. In any other case, it must be established by evidence, and it will then be a question of fact whether the negligence was such as might have, but in fact did not, endanger human life. But in such cases, the Courts are slow to be convinced, unless the accused has been, at the same time, flagrantly guilty of some breach of rule or duty.

Exhibition of false light, mark or buoy.

281. Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

2953. Analogous Law.—The intentional misleading of a navigator by exhibiting false signals is a grave crime, for he may be thereby misled into self-destruction. The exhibition may be unintentional but negligent, or it may be intentional. The section only punishes in the latter case, in any other case the act is not here punishable, though it may be under section 290.

2954. Procedure and Practice.—This section is cognizable, and warrant must ordinarily issue in the first instance. It is bailable but not compoundable, and is exclusively triable by the Court of Session.

2955. Proof.—The points requiring proof are:—

(1) That the accused exhibited a light, mark or buoy.
(2) That it was false.
(3) That it was so exhibited with the intention or knowledge of misleading any navigator.

2956. Charge.—The charge should run thus.—

"I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows.—

"That on or about the——day of——at——you exhibited a false light, namely——(*or* false mark or false buoy) to——(*specify the vessel*) when the said vessel was sailing at——(*mention the place*) intending (*or* knowing it to be likely) that the exhibition of the said false light (*or* mark *or* buoy) would mislead the navigator of the said vessel, and thereby committed

(1) *Allen*, 7 C. & P. 153.

(2) Cf. *Green*, 7 C. & P. 156.

an offence under s. 281 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

2957. Showing False Signals.—This section applies to all alike, whether servants of a navigation company or not. It, however applies only to an act and not to an illegal omission. For instance, a lighthousekeeper extinguishing the beacon light and thus misleading a navigator could not be punished, because he has misled not by exhibiting a false light but by exhibiting no light at all. A light is a false light if it is of a wrong colour and thus conveys wrong instructions. Thus, if there is danger ahead and the accused exhibits a light which means "Pass on: All's well," he is guilty of misleading the ship to which he has thus signalled. The same remark applies to marks and buoys which are similarly used as signals to guide a navigator, the displacement of which may amount to an offence under this section. Of course, if the false signal was shown by pirates with a view to plunder the ship, the offence is then one which is punishable with the extreme penalty, and this section would then be inapplicable.

Conveying persons by water for hire in unsafe or overloaded vessel.

282. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

2958. Analogous Law.—This section is intended to punish the overloading of ships, which involves danger of loss of life by their sinking through overweight. The rule is only confined to common carriers by water, though common carriers by land, *e.g.*, the railways, do not escape altogether scot-free for the same offence, as the following provision of the Indian Railways Act will show -—

Compelling passengers to enter carriages already full.

"S. 102. If a railway servant compels or attempts to compel, or causes any passenger to enter a compartment which already contains the miximum number of passengers exhibited therein or thereon under section 63, he shall be punished with fine may extend to twenty rupees."

2959. There is a noticeable disproportion between the penalties provided in the two cases. But they are evidently well justified. The carrier by sea may imperil the lives of all on board by overloading his ship. The carrier by land does not more than incommode his passengers by his overcrowding them. The offence here consists not only in overloading but also in carrying a person in an unsafe boat.

2960. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and summarily.

2961. Proof.—The points requiring proof are :—

(1) That the accused conveyed a person or caused him to be conveyed for hire,
(2) That the mode of conveyance was in a vessel by water,
(3) That the vessel was then unsafe or overloaded.[1]
(4) That the accused either knew it or if he did not know it, then he acted negligently.[2]

2962. Conveying in Unsafe or Overloaded Boat.—This section only punishes those who convey persons on hire. They then become common carriers. If they carry persons *exempt* from the payment of a ferry due, such persons are deemed to have been carried for hire, though they may not themselves have to pay it. The common carrier by water has his duty much more strictly defined than a

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(1) *Tofail Ahammad Mia*, 61 C. 253.

(2) *Tofail Mahammad Mia*, 61 C. 253. [In this case the lessee of the Ferry was convicted because there was gross negligence on his part inasmuch as he allowed the boatmen to overload the boats.]

carrier by land. His boat plies on an unstable element and he has, therefore, need to see that it is safe and capable of holding the persons he receives to convey. If he plies a boat with a crack at the bottom, he knows that his boat may sink, and even if the crack is small he may not have the requisite means to bale the water out. If, therefore, he undertakes to ferry across a hundred men in such a boat, he would be punishable under this section, and not under section 336.[1]

2963. In another case, the ferryman was charged for culpable homicide. He had a *donga* or a dug-out boat in which ordinarily eight fishermen went out to fish. It was old and bad, with some holes in the bottom, over which planks had been nailed. He had ferried across some men, when he met on the other bank four men who had been waiting to cross, for two hours. They induced the prisoner to put them across the river with two banghy loads of goods for four annas. As the prisoner was rowing them across, the river came down in floods and high wind set in. The canoe began to fill up through the leak which the passengers strove to check unsuccessfully. It sank in midstream and two of the passengers were drowned. The prisoner was thereupon convicted of homicide but on appeal the conviction was altered to this section, the Court holding that in trying to convey the passengers across he was only guilty of a rash and negligent act.[2]

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

Danger or obstruction in a public way or line of navigation.

[***Property***—s. 22. ***Possession***—s. 27. ***Injury***—s. 44. ***Public Way***—s. 279]

2964. Analogous Law.—This is a somewhat general section and its provisions may conceivably overlap those of other sections in this chapter. It, however, deals with the special case of not using one's own property to the detriment of another. So far it illustrates the maxim: *Sic uteri tuo ut alienum non lædas.*[3]

2965. Procedure and Practice.—This offence is cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class, and summarily.

2966. Where no actual danger, obstruction or injury to any person is occasioned, it is preferable to proceed under section 290.[4] A conviction under this section does not justify the passing of an order under section 133 of the Procedure Code. It may justify a proceeding under that section, but the Magistrate taking action is then bound to follow the procedure there laid down.[5] That section is wider than this section in that it applies to *any* way, while this section applies only to a *public* way.[6]

2967. Proof.—The points requiring proof are :—

(1) That the accused did some act or omitted to take order with a property in his possession or charge.
(2) That the said act or omission caused danger, obstruction or injury.
(3) That the said danger, obstruction or injury was caused to some person in any public way or public line of navigation.

2968. Principle.—This section once more illustrates the civil duty of circumspection which requires that no one shall use any property in his possession or charge to the danger, obstruction or injury of any person using a highway. This civil duty is independent of law, and though it may be enlarged by it, it cannot be so limited. The act contemplated may be of any kind, but it must be

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(1) *Khoda Jagla*, 1 B. H. C. R. 137.
(2) *Magenee Behara*, 11 W. R. 3.
(3) "You must so use your own so that you cause no injury to another."
(4) *Virappa*, 20 M. 433; *Venkappa*, 38 M. 305.
(5) *Ramnath* v. *Jaladhar*, 3 C. L. J. 360.
(6) *Pran Nath Kundu*, 57 C. 526.

an act of positive commission, involving as its result a public nuisance in the right sense of the term. The omission is, however, limited to such as relates to some property, moveable or immoveable, it may be otherwise legal or illegal, but if it has the effect mentioned in the section, it constitutes a public nuisance, whatever complexion it might otherwise present. The offence is section to protect persons in the exercise of their public right.

2969. Meaning of Words.—"*By omitting to take order,*" that is by omitting to arrange or manage the property so as to prevent obstruction, etc. "*In his possession or under his charge,*" that is, in his possession or control, in whatever right it may be held. "*Causes danger——to any person in any public way*": These words are narrower than those which occur in section 268, where the words used are "which must necessarily cause injury, etc." In the one case, there is the certainty of causing, but not the actual causing of injury; in the other case, injury must be actually caused. If then the injury is only threatened but was not caused, the offence may be punishable under sections 279-282 and 284-290, but not under this section.

2970. Endangering a Highway.—A public way by land or sea is a highway (§ 2935). This offence is therefore confined to protecting highways against "danger, obstruction or injury." A person using a highway has the right to be assured against such danger, obstruction or injury, and any risk of danger is a nuisance under section 268. This section belongs to the group which comprises sections 279-281. The section specifically applies to an obstruction caused by any act or omission of a certain kind described. As regards the "any act" spoken of, it must evidently be an act different from those expressly mentioned in the other sections. The act would have to be in connection with property in the actor's possession or charge. Such would be the case if the accused was to make a hedge across a highway, or lay logs of timber on it,[1] or plough it up where another has a right of way over it, even though the accused may be the tenant of the land, for it is not then so easy for the other to pass as it was before.[2] But in the last case the question depends upon whether the right of way has been acquired subject to that inconvenience, which would be the case if the accused had been from time to time and of right ploughing up parts of the highway as he thought fit,[3] in which case it would be the right of the accused to restrain those in charge from repairing it with hard materials, so as to prevent it from being ploughed up so easily as before. So the erection of a new gate in a highway, though it be not locked and opened and shut when desired, is a nuisance, because it interrupts the people in that free and open passage to which they are entitled.[4] But if the gate existed since time immemorial, it will be presumed that it had been set up by consent on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a free passage than what they continue to enjoy.

2971. So an obstruction caused to a highway by a waggoner loading and unloading his waggons for several hours at a time both day and night, and when he had at least one waggon standing before his warehouse so that his side of the street was thereby closed to traffic which sometimes even incommoded foot-passengers by heavy goods lying on the ground on the same side for loading, was held to be a public nuisance; and it was held to be no defence that there was always enough room left on the opposite side of the road for two carriages to pass at the same time.[5] So drivers of stage and hackney carriages commit a nuisance when they stand on the road awaiting custom. As Lord Ellenborough, C. J., said: "A stage-coach may set down or take up passengers in the street,

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(1) Hawk, P. C., c., 76. s. 144; 2 Roll Aler "Nuisance" (B).

(2) *Griesley*, 1 Vent., 4; *Leach*, 6 M. 145.

(3) *Mercer* v. *Woodgate*, 39 L. J. M. C. 21, affirmed in *Arnold* v. *Blaker*, 40 L. J. Q. B. 185.

(4) 1 Hawk, P. C., c., 75. s. 9; c. 76 s. 146; *James* v. "*Hayward*, Cro. Car., 184; 2 Roll Aler "Nuisance" (C).

(5) *Russell*, 6 East., 427; *Gerring* v. *Barfield*, 16 C. B. (N. S.), 597.

this being necessary for public convenience; but it must be done in a reasonable, time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another."[1] So again, while the highways may be used in a reasonable manner, it will be their unreasonable use if a carrier blocks the way by carrying an unreasonable weight and with an unusual number of horses.[2] So it is apprehended will be the case, if an enterprising advertiser was to parade through a street an unusually large number of sandwichmen, or, if, as is only too often the rule in this country, persons were to spread their cots on the side road and go off to sleep at night, thus at the same time obstructing the road and endangering themselves.

2972. So again, there is nothing illegal in marching a procession through a highway, but it may amount to a nuisance, if by its number and movement it leads to the suspension of traffic. So persons living on a street do not acquire any more right to its use than a casual passer-by. He may use the side road for loading and unloading his goods, but he cannot do so to the inconvenience of the passers-by. So Lord Ellenborough, C. J., said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's drug into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if the inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantage would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."[3]

2973. That a tram-line or a railway laid across a street is a great public convenience is no answer if they cause obstruction for, if they are a source of danger and inconvenience to a portion of the public, who have a right to use the highway, they are a nuisance without reference to their being for the general convenience."[4] In such cases, the question depends not upon whether the obstruction is a convenience, but whether it is not a practical obstruction to the public using the highway, or withdrawing from their use so much of it as was taken up by the obstruction. On this ground Martin, B., told the jury in a case in which the defendants had erected telegraph poles along a road to amount to a nuisance, that if they believed that the defendants placed posts with the intention of keeping them there, and the posts were of such a size as to obstruct the passage of carriages, horses, or foot-passengers on the part of the road where they stood, the jury ought to find the defendants guilty; and that the circumstances that the posts were not placed on the hard part of the road, or upon a foot-path formed upon it, or that sufficient space for the public traffic remained, were immaterial.[5]

2974. It has been held to be a nuisance to break up the streets in a Town for the purpose of laying down gas pipes.[6] But any obstruction whether it is permanent or temporary may be legalized by the legislature, and if an act is legal it follows that a reasonable mode of the execution of that act cannot be illegal. But in such a case the powers conferred will be strictly construed. For instance, where certain Commissioners had power to light the public streets of a town, they became entitled to lay down the necessary pipes, but it did not imply a power to lay down pipes for the supply of private houses.[7] So where a Railway Company had been empowered to cut through a highway on their making

(1) *Cross*, 3 Camp. 224.
(2) *Egerly*, 3 Salk. 183.
(3) *Johnes*, 3 Camp. 230.
(4) *Per* Erle. C. J., in *Train*, 2 B. & S. 640; *Morris*, 1 B. & Ad. 441.
(5) *The United Kingdom Electric Telegraph Co.*, 6 L. T. 378; O. A. 9 Cox 137 (174).
(6) *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767.
(7) *Longhton Gas Co.*, 8 Cox 317.

another road convenient to the public, their cutting through the highway without making the diversion was held to amount to an indictable nuisance.[1]

2975. The construction of an overbridge may or may not be a nuisance. It is a question of fact, for it is conceivable that a bridge may be so constructed as to incommode no one making use of the highway. But in one case the right itself was doubted,[2] but whatever may be the right of the public to over-head space, they have undoubtedly a right to all the space constituting the road, and not, only to the metalled part of it.[3]

2976. The same rules apply to an obstruction caused to a public line of navigation.[4] So Mellish, L. J., said: "It is true there may be spots in the river where space is not wanted, and where that which otherwise would be a nuisance might not be such an obstruction of the highway as to make it the duty of this Court to interfere; but it appears that the space is actually wanted for the purposes of navigation, and in such a case there is no difference between a highway on land and a highway on water. It is no answer to say that there is room for the ships, and that if they are navigated with skill and care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; and in my opinion it is not any answer that the obstruction occurs only at certain times of the tide and that in some respects the alteration would be advantageous. The advantage of one person cannot be set off against the disadvantage of another."[5] These remarks were made in a case in which a wharf owner had driven piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation. But still it was held to be an indictable nuisance. The same view would be taken of a canal cut out of a public navigable river whereby its current is weakened or its depth reduced so that vessels of the same draught as used to ply before can no longer be navigated. So if a number of logs are laid in it or carried on it to the interference of the general navigation, it will be a nuisance. So the construction of a bridge over it may have the same effect. And, indeed, anything which has the effect of causing obstruction, danger or injury on land may likewise cause an obstruction, danger or injury on water, and the act would then be a nuisance in each case.

2977. Omission to Take Order.—Hitherto the examples have been confined to illustrate acts constituting a nuisance. But as the section makes it clear there may be no act and yet there may be a nuisance. Such would be the case, where the danger, etc., is caused by an omission to take order with any property in the possession or under the charge of the accused. Such a case arose where the accused allowed a prickly-pear fence between his yard and the road to overhang the road and thus obstructs it. The Court said "Prickly-pear is a plant which naturally extends itself very rapidly; and it is the duty of those who use it as a hedge by the side of a public road to take care that the road is not obstructed by its growth."[6]

2978. It will be noticed that the omission here spoken of is not illegal. On the other hand it may be perfectly legal so far as it is not prohibited by law. No one, for instance, is under the legal obligation of trimming his fence. But the obligation arises from the civil duty of circumspection. The owner may neglect his property, no one has the right to complain. But the moment his neglect becomes a source of danger to the public, law interferes, and the accused is then called upon to account. So the owner of a house near a highway would be indicted for allowing it to be in a ruinous state and dangerous to the public,[7] while the owner of the

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(1) *Scott*, 3 Q. B. 543; *Birmingham and Gloucester Ry. Co.*, 2 Q.B., 47; *Burt*, 11 Cox 399.

(2) *Hole* v. *Sittingbourne and Sheerness Ry. Co.*, 6 H. & N. 488.

(3) *Wright*, 3 B. & Ad. 681, *Elwood* v. *Bullock*, 6 Q. B. 383; *To the same effect Wadilal Deochand*, 33 Bom. L. R. 663.

(4) *Ward*, 4 Ad. & E. 384 overruling *contra* in *Russell*, 6 B. & C. 566.

(5) *Attorney General* v. *Terry*, L. R. 9 Ch. 423 (432).

(6) *Palakora Kathirsa*, (1883) Weir (3rd Edn.) 140.

(7) *Watts*, 1 Salk. 356, followed in *Attorney-General* v. *Tod Heatley*, (1897) 1 Ch. 560 (566).

similar house elsewhere could not be proceeded against. The accused was the owner of a vacant piece of land in the midst of a populous neighbourhood. He enclosed it by a hoarding, six feet high, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a continuing public nuisance. The defendant was sued for an injunction, and his defence was that the nuisance complained of was committed by other people, but Lindley L. J., said: " If the owner of a piece of land does permit it to be in such a state, *e. g.*, smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to indiment for such a public nuisance. It is no defence to say 'I did not put the filth on but somebody else did.' He must provide against this if he can. His business is to prevent his land from being a public nuisance."[1]

2979. In another case, the accused a toy dealer, exhibited in his shop windows certain mechanical toys which drew a huge crowd in front on the public road, obstructing the traffic and causing many accidents in consequence of the dangerous rushes. The accused urged that he had the right to use his business premises to its best advantage; but the Court convicted him holding that every house-holder was bound to make a reasonable use of his premises and that in any case in such circumstances a private right must yield to the public good.[2] (§ 2803). So in another case the accused were indicted for collecting in their canal a large quantity of liquid filth, sewage and polluted water, and the defence was that the pollution was higher up, and that they were using only what they had a right to use; but the Court held that persons who maintain their property so as to be a public nuisance are indictable.[3] So in another case where the defendants were indicted for collection of seaweed upon their foreshore, Lush, J., said: " I have no doubt whatever, that it is the duty of the appellants to prevent the accumulation of seaweed, so that it shall not become a nuisance, and that, whether produced by natural or artificial causes."[4] The property here spoken of may be of any kind either moveable or immoveable. A mastiff going in the street unmuzzled is from the ferocity of his nature held to be dangerous, causing terror to the passers-by and the owner may then be punished for suffering him to go at large.[5]

2980. Respondeat Superior.—It is an essential feature of a public nuisance that no one is exempted from liability on the mere ground that he was not cognizant of the nuisance. A Railway Company or other Incorporated Company may then be prosecuted for a public nuisance, though they could not be prosecuted for treason, murder or other offences requiring criminal consciousness and in which criminality necessarily depends upon an intention and knowledge as possessed by each individual. But criminal negligence is an infraction of civic duty, and its punishment is one mode of relief to the community at large.[6] For this reason the master has been held to be liable for the acts of his servant done within the scope of his ordinary duties. And so the owner was held liable for an encroachment on a highway caused by the servant during the re-building of his master's house, for as Eyre, C. J., argued: " Suppose that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hoarding in the street (which being for the benefit of the public they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway; it is clear that the owner would be guilty of a nuisance."[7] But while the

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(1) *Attorney General* v. *Tod Heatley*, (1897) 1Ch. 560 (566).

(2) *Noor Mahamed*, 35 B. 368, following *Attorney-General* v. *Brighton and Hove Co-operative Supply Association*, (1900) 1 Ch. 276.

(3) *Bradford Navigation Co.*, 6 B. & S. 631 (651).

(4) *Poprietors of Margate Pier* v. *Town Council of Margate*, 20 L. T. (N. S.) 564 (568).

(5) Burns' Just., tit. "Nuisance," 1; 3 Chit. Cr. L. 643; 33 & 34 Vict., c. 56 now confers summary jurisdiction in respect of dangerous dogs.

(6) *Great North of England Ry. Co.*, 9 Q. B. 312.

(7) *Bush* v. *Steinman*, 1 Bos. and Pul. 407, (408).

master is within limits liable for the act of his servant, the same liability cannot be extended to the employer for the act of his contractor. Where for instance, the accused had employed a contractor to supply materials, which he stocked on the road, there was nothing to shew that he had done so by the authority of the accused and the latter was held not liable for the act of his contractor.[1]

2981. Danger of Obstructions to Some Person Necessary.—Again, since the enjoyment of one's property is only subject to the rule that it shall not cause injury to another, a mere apprehension of injury apart from the actual injury caused to some one in particular is not sufficient to support a conviction. So where the accused had spread by the road side " his bad smelling " fishing-net " so as to cause obstruction to persons passing by," the High Court quashed the conviction, holding that in order to support a conviction under this section there must be evidence that obstruction was in fact caused to any particular individual or individuals.[2] Of course, even on a failure to prove injury to a determinate person, the act, if a nuisance, may be punished under s. 290.[3] That section was held to apply to an encroachment on the public way without evidence of actual injury caused to some one ;[4] also to one who had placed a bamboo stockade across a tidal navigable river for the purpose of fishing, leaving, however, a narrow opening for the passage of boat, which was however, kept closed except when required for the actual passage of a boat.[5] The fact that an encroachment must necessarily cause obstruction or injury to passers-by may be used in evidence to support the fact of the actual injury, but it does not dispense with the proof of that fact.[6]

2982. Lastly, the only person who could be proceeded against under this section is a person who is in possession or charge of the property which is the means of obstruction or injury. This raises the question, when may a person be said to be in possession or charge of property. And does the fact that the possessor is convicted exonerate the owner ? The question arose, but was not considered in a case in which the accused, described as a hirer of the hut, was prosecuted for causing obstruction to a public way. It appeared that the hut was an encroachment on the way ; but that it had been erected by the owner who had let it to the accused, who was thereupon convicted under this section ; but his conviction was set aside on revision by Ghose, J., with the short remark that as the obstruction was stated by the Magistrate to have been caused by the erection of the hut the accused could not be convicted for using it.[7] It may be that the facts of this case have not been fully reported, otherwise it is difficult to see why the accused who was in possession of the hut could not be dealt with under this section.

2983. A person who is in charge of the property has not the same right as one who is in its possession. A manager is in charge of a factory of which the directors are in possession, while its share-holders are the proprietors. Both possession as well as charge imply control, only possession implies control and temporary dominion over the property (§ 233).

Negligent conduct with respect to poisonous substance.

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person.

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(1) *Lalta Prasad*, 19 A L. J. 125, 61 I, C. 59.

(2) *Khadar Moidin*, 4 M. 235 ; dissented from in *Venkappa*, 38 M. 305, (*per* Ayling, J., on the ground that actual obstruction is unnecessary to sustain a conviction ; but the language of the section does not beat out this view). *Ram Singh*, 11 C. L. R. 462; *Kamala Prasad*, 10 A. L. J. 362, 17 I. C. 574 ; dissented from in *Ramakrishna*, (1935) A. 746.

(3) *Virappa Chetti*, 20 M. 433, explained in *Venkappa*, 38 M. 305 ; *Vankipuram*, (1893) 1 Weir 232.

(4) *Virappa*, 20 M. 433 ; *Venkappa*, 38 M. 305.

(5) *Umeshchandra Kar*, 14 C. 656 ; *Jugal Das Dal*, 20 C. 665; *Maud Aliy*, (1906) 7 Bur. L. R. 125.

(6) *Beni Madhav* v. *Chakravarti*, 25 C. 275.

(7) *Narain Adhikari*, 8 C. W. N. 369.

or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[***Possession***—s. 27. ***Act***—s. 32. ***Injury***—s. 44.
Rash or negligent—s. 279 ***Endanger human life***—s. 279.
To take such order—s. 283. ***Hurt***—s. 319]

2984. Analogous Law.—Substances which are poisonous, combustible or explosive are naturally dangerous to life; they, therefore, require careful handling—not the less so because they are articles of daily use. This and the next two sections deal with criminal negligence relative to these substances. In each case the language used is the same, and, indeed, all the three offences deal with an evil which is similar in its nature and result.

2985. Procedure and Practice.—This offence is non-cognizable, and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and summarily.

2986. Proof.—The points requiring proof are :—

(1) That the substance in question was poisonous.
(2) That it was capable of endangering life or of causing hurt or injury to any person.
(3) That the accused did some act with it.
(4) Which act was rash or negligent, so as to endanger human life or to be likely to cause hurt or injury to any person.

Or instead of (3) and (4) prove—

(3) That the accused was in possession of the poisonous substance.
(4) That there was probable danger to human life from it.
(5) That the accused omitted to take such order with it as to guard against the said probable danger.
(6) That his omission was negligent, or that it was with knowledge of the probable danger.

2987. Principle.—This section furnishes another instance of an offence the principal ingredient of which is negligent act or omission, the object aimed at being the same—protecting people from the danger, hurt or injury from substances which are naturally dangerous. It will be noticed that all the three sections bearing on the subject are divided into three clauses; the first clause deals with a rash or negligent act, while the second clause deals with knowing or negligent omission : in the former case the substance may be or may not be in the accused's possession, in the latter case, the poisonous substance must be in his possession, and consequently, he is necessarily called upon to exercise greater vigilance. In the first case, therefore, he cannot be charged for an omission, but in the second case his responsibility being undivided he may be charged *both* with an act under the first clause and an omission under the second clause. In short, a person in possession of a poisonous substance may as much be charged for a rash or negligent act as for a mere negligent omission, but a person not in possession cannot be charged for a mere omission, however negligent. Again the commencing period of liability in each case varies. In the first case there is no liability until the accused does some act, in the second case, his liability commences with and continues during his possession. Lastly the *quantum* of diligence required in each case also varies with possession. In the one case, the act must be regulated to guard against not only danger to human life, but also the probable hurt or injury to any person. In the other case the measure of diligence is the probability of danger to human life.

2988. Nuisance with Respect to Poisons.—The general policy underlying this section has been already set out (§ 2660). In order to sustain a conviction under this section, the first thing to enquire is : Was the accused in possession

of the poison, or was he not in possession? If he was not in possession, the next question is comparatively a simple one, what was his act and was it so "rash or negligent as to endanger human life or to be likely to cause hurt or injury to any person."

2989. In the second case, if he was in possession of the poison, it is sufficient to sustain a conviction that he had omitted to take order with it, as is sufficient to guard against any probable danger to human life from such substance. It is not necessary that the negligent omission here punishable should be followed by any disastrous consequences. Where such consequence does ensure, it is of course an aggravating circumstance, but the offence remains the same so long as the consequence is traceable to nothing more than culpable negligence. So where the accused, a police sergeant at Ludhiana, took over a desk containing poisonous powders, and other powders, which might be easily mistaken one for the other, without taking any precaution whatever to guard against this misuse of the poison, and the only order he took with the poison subsequently was to hand over the key of the receptacle in which the poisonous powders were kept to a subordinate official, who by mistake issued some of the poisonous powders to a Deputy Inspector suffering from fever, who took one of the powders and died. It was held that on the above facts, a conviction under this section was sustainable, but that such conviction did not attribute to the accused criminal responsibility for the death of the Dep uty Inspector as being the result of his negligence.[1] This case is not unlike that of the chemist's assistant who delivered laudanum in a phial with a paregoric label to a customer who had come to purchase a penny worth of paregoric. The mother of a child for whom the medicine was sent, gave six or seven drops of the contents of the phial supposing it to contain paregoric, of which the child died. The laudanum and the paregoric bottles had stood side by side in shop, and the assistant being indicted, Bayley, J., told the jury: "If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him."[2]

2990. Hurt or Injury to the Accused.—It has been stated before (§ 2984) that the language of this section generally corresponds with that used in ss, 285 and 286. In one particular, however, the language of this section is different, for, while ss. 285 and 286 speak of injury to any *other* person, this section only speaks of the injury to *any* person, from which it may be inferred that in case of poisons a person may be convicted of negligently injuring himself. But it may be doubted if it was really the intention of the legislature.

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

Negligent conduct with respect to fire or combustible matter;

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Possession*—s. 27. *Acts*—s. 32. *Injury*—s. 44.
Rashly or negligently—s. 279. *Endanger human life*—s. 279.
Take such order—s. 283. *Hurt*—s. 319.]

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(1) *Hosein Beg*, (1882) P. R. No. 16.

(2) *Tessymond's case*, 1 Lew, 169.

2991. Analogous Law.—This section extends the provisions of the last section to fire or any combustible matter. In urgent cases the Procedure Code prescribes the action which a Magistrate may take to prevent the commission or continuance of a public nuisance.[1] This section only applies to an act which is rash or negligent. It has no application where the act is deliberate or wilful. The accused would then have to be dealt with under ss. 435, 436.

2992. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily.

2993. Proof.—The points requiring proof are :—

(1) That the accused did an act with fire or any combustible matter.
(2) That his act was rash or negligent.
(3) That it—
  (*a*) endangered human life ; or
  (*b*) was likely to cause hurt or injury to any other person.

Or instead of (2) and (3) prove :—

(2) That he was in possession of it.
(3) That he omitted to take such order with it as would have been sufficient to guard against any probable danger to human life from such fire or combustible matter.
(4) That the omission was negligent or with a knowledge of such probable danger.

2994. Nuisance by Fire.—This section deals with a public nuisance by fire or any combustible matter. Matter is combustible if it is inflammable or capable of taking fire. A combustible thing must be distinguished from an explosive, in that the latter is not only combustible but it also instantly bursts and expands with force and noise. Thus straw and dry leaves are combustible, while gunpowder and dynamite are explosives. But whether the nuisance be by a combustible or by an explosive, the penalty in each case is the same—only the accused would in the one case be punishable under this section, while in the other case, he would be more appropriately punishable under the provisions of the next section.

2995. Adverting now to the terms of this section, it will be observed that it makes the same difference between combustibles in possession and those not in possession. In the one case a person may be punished for a mere omission if it is negligent while in the other case no one can be punished for an omission howmuchsoever negligent (§§ 2988, 2989). Then, again, liability in the case of possession commences with possession and it continues so long as the possession continues. In the other case, there is no continuous liability, but it arises as soon as some act is done with the combustible. Lastly, the degree of vigilance required in each case is not the same. For, when it is an act done the actor possesses the consciousness that he is dealing with a dangerous substance. He is, therefore, naturally called upon to take more pains than one who has only a continuous duty to perform.

2996. The two clauses are not, however, mutually exclusive and exhaustive. For it is conceivable that a person may be guilty both of an act as well as an omission. Such, for instance, would be the case where the owner of a thatched hut surrounded by other thatched huts was in the habit of lighting a fire or leave it burning when he could have seen that the hut might catch fire any day and it would then cause a general conflagration in the village. But a person merely smoking in such a hut could not be deemed to be so negligent as to bring himself within the penalties of this section, if a flue from his pipe escapes and fires the roof. The danger in such a case was too remote and the act could not, therefore, be said to be done negligently so as to endanger human life. It is impossible to lay down a general rule as to what degree of diligence will suffice in each case. It must depend upon the circumstances. A person may be safe in cooking his meal under his thatch when there is no wind. He may be sure of setting it on fire if he lights a

(1) Ss. 133, 144, Cr. P. C.

fire when high wind is blowing. Even the season of the year may make all the difference. The circumspection required in the hot weather is necessarily greater than what is called for in the rains. A person marching through a forest may strike fire to light his cigarette. If he throws away the lighted match-stick he may set the whole forest ablaze and thus cause general conflagration and wide-spread injury.

Meaning of "Injury."

2997. Of course, the term "injury" is wide enough to include any harm illegally caused to the property of any other person. It is not confined to injury to the person only.[1] Any act likely to cause injury to any other property is, therefore, within the rule. A person who smoked a *bidi* close to half-pressed cotton bales lying near the presshouse may be punished under this section, if his act could be held to be so negligent as to have endangered the cotton bales lying by.[2] So in another case, the accused, who was in a marriage procession let off fireworks while it was marching past the complainant's loft, thatched with straw, which caught fire, it was held that the act, if negligent, was punishable under this section.[3] In such cases the danger was so imminent that no one could prudently ignore it. But the same degree of danger is not present before a person letting off fire-balloons.[4]

2998. It may alight on combustible matter and work great mischief, but in order to make a man responsible for his act it is not enough that the mischievous consequence should have happened. What is required is to connect it with his negligence or omission under such circumstances as must have brought home to his mind the probability of the future mischief.[5] So it has been held that the owner of a house in which a fire originates cannot be convicted under this section without proof of actual carelessness or an illegal omission from which rashness or negligence can be inferred.[6]

2999. Where the act is attributable to something more then a mere negligence or omission, the act of the accused would constitute the graver crime of arson, for which he would be punishable under the provisions of ss. 435 and 436. Such was the case of the irate husband who having had a quarrel with his wife about some rice, smashed the crockery, and then went out and set fire to his house, thereby causing risk of injury to the neighbouring houses, but doing no actual mischief. It was held that the act being wilful and not merely rash or negligent, the only section appropriate to his case was s. 436 and not this section.[7]

Negligent conduct with respect to explosive substance.

286. Whoever does, with an explosive substance, any act rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Possession*—s. 27. *Injury*—s. 44. *Rashly or negligently*—s. 279. *Endanger human life*—s. 279. *Take such order*—s. 283. *Hurt*—s. 319.]

3000. Analogous Law.—This section is the same as the last section, only its provisions apply to an "explosive substance" as against the fire or combustible matter" which is the agent employed in the offence described under the last section.

3001. This section does not define an "explosive substance" but the Explosives Act[8] defines it as follows:—

(1) S. 44; *Natha Lalla*, 5 B. H. C. R. 67.
(2) *Krishna*, (1878) B. H. C. R. 134.
(3) *Nath Lalla*, 5 B. H. C. R. 67.
(4) *Nga Bo Gale*, (1899) P. J. L. B. 628.
(5) *Nga Ya Po*, (1885) P. J. L. B. 337; *Nga Cho*, (1887) P. J. L. B. 411; *Ngwka*, (1903) U. B. R. (P. C.) 7.
(6) *Mion*, (1881) S. J. L. B. 134; *Nga Sein*. (1891) S. J. L. B. 569.
(7) *Hari*, (1877) B. H. C. R. 126.
(8) Act IV of 1884.

"4. (1) Explosive means (*a*)—gunpowder, nitro-glycerine, dynamite, gouncotton, blasting powder, fulminate of mercury or of other metals, coloured fires, and every other substance, whether similar to these above-mentioned or not, used or manufactured with a view to produce a practical effect; by explosion, or a pyrotechnic cifect and (*b*)—includes fog signals, fireworks, fuses, recokets, percussion caps, detonators, cartridges ammunition of all descriptions; and every adaptation or preparation of an explosive as above defined."

This act makes elaborate provisions for the custody and transport of explosives.

3002. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate and summarily.

3003. Proof.—The points requiring proof under this section are the same as those mentioned under the last section, with this difference that the nuisance here is caused by an explosive substance instead of by fire or an inflammable substance.

3004. Nuisance by an Explosive.—The provisions of this section are closely analogous to the English rule of common law, under which the erection of gunpowder mills or keeping gunpowder magazines near a town is a nuisance for which an indictment or information will lie.[1] So in several cases in which the accused were indicted for keeping great quantities of gunpowder near certain buildings, or for depositing in a populous neighbourhood an explosive fluid called wood naphtha, it was held that the charge was good, though it did not state that the substance emitted any noxious odour or effluvia so as to do any harm yet the offence was complete because to deposit a substance of such a nature in such large quantities was in itself a danger to life and property. But "the substance must be of such a nature and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well-founded apprehensions of danger, which would alarm man of steady nerves and reasonable courage passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent by pronouncing it a misdemeanour."[2]

3005. In England,[3] as in this country,[4] the subject of explosives has been elaborately dealt with by the Act bearing that name. Petroleum is not an explosive, but it is almost as dangerous and the legislature has consequently made special provisions for its carriage and storage.[5] A gun or revolver, though it uses a cartridge which is an explosive does not thereby become an explosive substance itself.[6] An Assistant Collector left a loaded six-chambered revolver upon his office-box on the platform of a railway station, while he went nto the station-master's room to change his clothes. His peon took up the revolver, and apparently not knowing how to handle it, one chamber went off wounding a police constable who was standing near, in the leg. He was convicted under this section, but his conviction was quashed by the High Court on the ground that a revolver is not an explosive substance, though, it was added, that if there had been evidence of rashness or negligence the accused could have been convicted under section 337.[7]

3006. This case does not refer to an earlier case of the same Court[8] in which the fact of the gun being an explosive substance was assumed. In that case the accused had carried his loaded gun to his field for watching his crops. He returned home after dawn, and finding his door locked placed the gun with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbour. During his absence, a child four years old came to the cot and would seem to have played with the gun, which went off killing the child. The

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(1) *Williams*, E. 12 W; cited Burn's Inst., *viz.*, "Gunpowder."
(2) *Lister*, 26 L. J. M. C. 196.
(3) Explosives Act, 1875 (38 Vict., c. 17).
(4) Explosives Act (IV of 1884).
(5) Indian Petroleum Act (VIII of 1899).
(6) *Kasiya Pillai*, (1886) 1 Weir 235; *Abdus Sattar*, 28 A. 461.
(7) *Kasiya Pillai*, (1886) 1 Weir 235.
(8) *Chenchugadu*, (1885) 8 M. 421.

accused was thereupon convicted under this section, but Brandt, J., reversed the conviction holding that there was nothing to suggest culpable negligence. "If the gun had been left at full cock, the case might have been different; but there is no evidence that the hammer could be left at half cock, and the accused states that he put the hammer down on the cap for safety. There is no evidence that the gun in that position would go off easily, and it is not impossible that the child who played with it gave it a severe shock from letting it fall or otherwise, or indeed the child may have lifted the hammer and let it fall on the cap. It would, no doubt, have been more prudent not to have left the gun there, loaded and capped as it was, but the question is whether the accused can be held responsible for the result as a probable result; and this, I think, he cannot be of."[1]

3007. The section is not intended to punish every careless act apart from the probability of danger. On the other hand, what the section punishes is an act in which the accused sees or could foresee the danger. In another case the accused went out shooting with some friends, and a pellet from his gun lodged in the thigh of one Birklie, who was at work in a corner of his field. The accused at once went up and gave his name and address. There was no evidence of rashness or negligence against the accused. The Magistrate inferred negligence from the fact that the accused fired and the complainant was injured, and the fact that in the month of July people are out working in their fields. On revision, it was conceded for the Crown that the section applicable was not this but section 337, and Aikman, J., held that under that section it was on the prosecution to prove rashness or negligence which could not be inferred from the facts alleged. There was nothing on record to show at what distance the accused was from the complainant, when he fired, or even that the complainant was in the direct line of fire. For aught the Court knew, the complainant might have been injured by a stray pellet accidentally deflected from its course. The conviction was therefore quashed.[2]

3008. In another case the prisoner was the pawnee of a gun belonging to the deceased, who took it away from the prisoner's house during his absence without repaying the loan. The prisoner went after the deceased for his gun, and meeting him, he demanded its return. The deceased refused, and thereupon the prisoner attempted to seize it by force. The deceased cautioned him that the gun was loaded, but the prisoner continued the struggle and as he was in the act of wrenching the gun away he fell down, and the gun went off accidentally and killed the deceased. The accused was indicted for manslaughter and Lord Campbell, C. J., told the jury that though the prisoner had a right to the possession of the gun, to take it away from the deceased by force was unlawful, and that as the discharge of the gun was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter.[3] But as the force used was not excessive this case is not good law now,[4] though in such case a conviction for public nuisance would probably be still right.

3009. In another case, the accused had loaded a gun and gave it to a servant girl to hold for a while till he returned from business. He left instructions with the landlord to take the priming out, which he did. The girl pointed it in sport towards a child and drew the trigger, and the gun went off and the child was injured. The defendant was held liable for negligence, as Lord Ellenborough, C. J., said: "The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innocuous. This might have been done by the discharge or drawing the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to the landlord was not sufficient; consequently, as by this want of care the instrument

(1) *Chenchugadu*, (1885) 8 M. 421.
(2) *Abdus Sattar*, 28 A. 464.
(3) *Archer*, 1 F. & F. 351.
(4) *Blades* v. *Higgs*, 10 C. B. (N.S.). 713.

was left in a state capable of doing mischief, the law will hold the defendant responsible."[1]

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person,

Negligent conduct with respect to machinery.

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[*Possession*—ss. 27, 183. *Act*—s. 32. *Injury*—s. 44. *Rashly or negligently*—s. 279. *Endanger human life*—s. 279. *Take such order*—s. 283. *Knowingly or negligently*—s. 286. *Hurt*—s. 319]

3010. Analogous Law.—This is the last section of the series commencing with section 284, which deal with the same offence, but in which the agency employed is in each case different. In section 284, it is poison, in s. 285, it is fire or a combustible substance, in the last section it was an explosive, and in this section it is machinery.

3011. The language of all those four sections is the same. There is, however, a slight noticeable difference in clause 2 which speaks of the machinery in his possession *or under his care*—an addition which is intended to reach all mechanics employed on the machinery, such as engineers, firemen or the like. The words here present noticeable contrast to the phrase "*under his charge*" which occurs in a similar collocation in section 283. The words here used have been evidently selected to include those who though not in charge are still employed to take care of it. Under English law the inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam is a nuisance,[2] and the Court is empowered to abate it by ordering the construction of the furnace[3] before passing a sentence on the defendant. The Public Health Act, 1875[4] now embodies such provisions for the removal of nuisances.

3012. Procedure and Practice.—This offence is non-cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate, or a Magistrate of the first or second class, and summarily.

3013. Proof.—The points requiiing proof are :—

(1) That the accused committed some act with a machinery.
(2) That he did it rashly or negligently.
(3) That his rashness or negligence was such as to endanger human life or to be likely to cause hurt or injury to any other person.

Or prove instead the following :—

(1) That the accused was in possession of some machinery, or the same was under his care.
(2) That he omitted to take care with it, as was sufficient to guard against a probable danger to human life therefrom.[5]
(3) That such omission was negligent or with a knowledge of such probable result.

3014. Nuisance by Machinery.—Neither this section nor any other section in the Code defines the term "machinery" which must then be understood in its ordinary sense as meaning a combination of mechanical powers designed to increase, regulate or apply motion and force. The section punishes "any act" done with a machinery it it is so rash or negligent as to endanger

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(1) *Dixon* v *Bell*, 5 M. & S. 198.
(2) 1 & 2 Geo. IV, c. 41, s. 1.
(3) *Ib*. s. 2.
(4) 38 and 39 Vict., c. 55.
(5) *Mohri Ram*, (1930) L. 453.

human life, or to be likely to cause hurt or injury to any person. The act may be done by the maker, proprietor or working mechanic, and it may consist of an act or an illegal omission.[1] Such an omission may arise by non-compliance with the precautionary provisions of some statute or rule. So under the Factory and Workshop Act 1878[2] it is necessary to fence all "dangerous parts of the machinery" in a factory, and the question then arose, what are dangerous parts of a machinery which required to be so fenced, upon which Wills, J., said: "It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once, therefore, the machinery was dangerous. On the other hand it is equally out of the question to say that machinery, cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.[3]

3015. The question, what degree of care is required to safeguard against accidents, must then be decided with reference to the nature of the machinery, the amount of technical knowledge required to manage it and the precautionary measures which are useful in such cases. But the test is not the possibility but the probability of danger which calls for precautionary measures in such cases.[4] An employer putting a wholly incompetent person in charge of a machinery may conceivably be guilty of doing a rash act endangering human life. So where certain parts of a machinery have become worn out, it is the duty of those in charge to see that they are replaced, and the employment of workmen on such machinery would expose the employer to the risk of a prosecution under this section. The act may be rash or negligent if a machinery is overcharged so that it hurts or explodes and endangers human life. A person who employs another to work at a certain pressure in consequence of which an accident happens, may be guilty of this offence, if he was aware of the risk he ran in so working.

3016. The accused Kanhaya Lall was the proprietor of a certain mill in Delhi in which there were three boilers. The engineers in charge notified to him the unsafe condition of two of the boilers, in consequence of which he got them examined by the Government Inspector who pronounced them to be unsafe, if worked at a higher pressure than 80 to 85 lbs. An engineer of another firm was also called in and he was of opinion that the boilers could be safely worked at 100 lbs. pressure. Thereupon the two engineers employed by the accused were dismissed and another engineer was employed to work the boilers at 100 lbs. pressure. He was a qualified engineer, but was engaged on accepting the responsibility of working at 100 lbs. pressure. The accused was thereupon prosecuted under this section for doing a rash or negligent act, in that he was endangering human life by working the engines at 100 lbs. pressure. It was suggested that the boilers were working at 100 lbs. pressure, but the Court held that if it was so the accused could not be held liable unless he was shown to have known of it. As for what he had authorized it was found as a fact that the boilers working at 100 lbs. pressure were not unsafe, but it was thrown out that if that finding had been against the accused, his conviction under this section was inevitable. For as the Court remarked, when an owner of machinery employs a competent man to work it and *leaves him unfettered, the* owner cannot be held criminally responsible for any accident due to the errors of his employee, but if he discards employees who contend for safety, and seeks out one, who, although technically competent agrees to 'take the risk,' can he shelter himself behind the employee in such a case?"[5]

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(1) S. 32.

(2) 41 and 42 Vict., c. 6, s. 5, sub-s. 3; amended by 52 and 55 Vict., c. 75 s. 6, sub-s. 2.

(3) *Hindle* v. *Birtwistle*, (1897) 1 Q. B. 192 (195, 196).

(4) *Mulraj Dhir*, 1930) Pat. 507.

(5) *Kanhaya Lal*, (1906) P. R. No. 8.

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

Negligent conduct with respect to pulling down or repairing buildings.

[*Knowingly or negligently*—s. 286.]

3017. Analogous Law.—This section is drawn in harmony with English Law. A building abutting on a public way may be a standing menace to the passers-by if it is in a dangerous and dilapidated state. That danger may increase if it is being dismantled and reconstructed or repaired. In the former case the nuisance is punishable under the provisions of s. 283. In the other case it is punishable under this section.

3018. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class, and summarily.

3019. Proof.—The points requiring proof are:—

(1) That the accused was pulling down or repairing a building.
(2) That he omitted to take such order with the building as was sufficient to guard against probable danger from the fall of the building or any part thereof.
(3) That the probable danger was to human life
(4) That the omission was negligent or with a knowledge of such probable danger.

3020. Nuisance from Falling Buildings.—This section could only be brought into requisition in a case where the building is situate in a populous neighbourhood or where it abuts on a highway. It has obviously no application to a building standing on an isolated ground where its fall can endanger no one. In the former case, the building pulled down need not be old, for, the danger lies in dismantling it whether it be old or new. If it is old, it will naturally require more care—for old buildings are apt to fall when least expected. The measure of diligence in each case must be such as is sufficient to guard against any probable danger from its fall. It will not do to say that the work of dismantling was done when the highway was deserted, for it is not during dismantling but afterwards that a building may fall and endanger the neighbourhood. The section is, of course, not confined to buildings near the highways.

3021. It will be observed that the liability of persons rebuilding is only confined to causing danger to human life from the fall of the building. It does not depend upon the annoyance and inconvenience caused to the neighbours or passers-by. And it is so for a very good reason. For as remarked by Vaughan Williams, J.: " It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours ; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one, no doubt, causes considerable inconvenience to his next-door neighbours during the process of demolition ; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the work of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance to such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and

dust. For, the law in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance."[1]

Negligent conduct with respect to animal.

289. Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[***Possession***—s. 27. ***Animal***—s. 47. ***Take such order***—s. 283.
Knowingly or negligently—s. 286. ***Grievous hurt***—s. 320.]

3022. Analogous Law.—This section is not confined to animals *feræ naturæ* such as a tiger or a bear. It applies to all animals whether wild or domestic. It is the right of persons living in society to be guarded against the danger which may befall them from the negligent care of animals, and the more savage the animal the greater would be the degree of care necessary. The section is in one respect narrower than the English Law. In England, the nuisance is confined to permitting fierce and dangerous animals to be at large, as for example a fierce bull-dog which is used to bite people.[2] But where the animal is not by its nature ferocious, no indictment can be supported, unless it is shown that the accused was aware of its ferocity.[3] If the animal is ferocious, it is a nuisance, not only because of the danger to human life, but also because it causes terror to the public if it is permitted to move about without proper safeguards. In both these respects the rule in the section is divergent. The section is in one respect wider than the English rule, inasmuch as it applies to all animals and not merely to dangerous animals—in another respect, it is narrower inasmuch as it only punishes as nuisance an act endangering human life or occasioning any probable danger of grievous hurt. This was necessary, for any other rule would have been obviously unworkable.

3023. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily.

3024. Proof.—The points requiring proof :—

(1) That the accused was in possession of an animal.
(2) That he omitted to take such order with it as was necessary to guard against any probable danger to human life or of grievous hurt.
(3) That his omission was negligent or with knowledge of the probable danger.[4]

3025. Negligent Management of Animals.—This section only punishes what is criminal negligence consisting in an omission to take order with an animal in one's possession. It does not apply where the danger to human life is caused by any act or illegal omission, in which case, the accused's act may, probably it would, amount to an offence, but it is not an offence under this section. It only deals with criminal omissions and not with criminal acts.

3026. What Omissions are Criminal.—Now, the facts constituting criminal omission are, in accordance with the general scheme of this chapter, generally indicated in this section with reference to the result. But it is obvious that the probability of danger is not uniform in each case. Nor is the same degree of care sufficient in each case. In the case of animals *feræ naturæ* such as tigers, wolves, bears or serpents, the owner knows of the danger every moment. In their case, therefore, that danger would be presumed, and the *onus* will then be on the accused to show that he had taken such precautions as were necessary to safeguard the public against their savagery. But with domestic animals the

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(1) *Ball* v. *Ray*, L. R. 8 Ch. 467, followed *per* Williams in *Harrison* v. *Southwork and Vauxhal Water Co.*, (1891) 2 Ch. 409 (413, 414).

(2) 4 Burn's Justice. 578.
(3) 2 Ld. Raym. 1852.
(4) *Shivbharan*, 18 Bom. L. R. 682, 35 I. C. 815.

case is different. They are presumed to be docile and gentle and it will be for the prosecution to shew that the accused's handling of them was negligent. This may be proved by evidence of the general ferocity of the animal, and its knowledge on the part of the accused.[1] It is not necessary to show that the animal had actually bitten or injured another person before it bit or injured the complainant; it is enough to show that to the knowledge of the owner it had evinced a savage disposition, *e.g.*, in the case of a dog attempting to bite.[2] Even a single attempt to bite a human being may be sufficient. For, what the accused has then to see is that the dog does not bite again, and this creates an obligation between him and the public, the omission to discharge which, is criminal. Such obligation, however, does not arise from the mere knowledge, that the dog is in the habit of attacking animals. For dogs may be savage towards animals and quite gentle to man. In such cases then the evidence that is required is not that the animal had shown himself to be savage towards other animals but that it had attacked or was savage to man.

3027. So where a buffalo belonging to the accused attacked the complainant's buffalo breaking its leg, whereupon the accused was prosecuted, it was proved that the animal had a year before similarly injured two other buffaloes, for which the accused had to pay compensation, from which it was argued that the accused was sufficiently aware of its savage disposition; but the contention was overruled, the Court holding that it led to no inference, and that before a person could be convicted of this offence on the general presumption arising from his knowledge of the savage disposition of his animal, what was necessary was to show that the animal was of a savage disposition against a human being.[3] In another case, there was evidence that the accused's bull-buffalo had on previous occasions attacked several people, notwithstanding which, he let it out to graze in an open field which the villagers frequented, against which he took no special precautions. One day while so grazing, it attacked an old woman who was passing through an adjoining field, and gored her to death. Both the master as well as the herdsman then in charge of it, were thereupon convicted under this section and it was held that their conviction was right, as they were both culpably negligent.[4]

3028. In order to justify an inference as to the likelihood of the consequence from the deduction of facts antecedent to the actual event, the facts must be of the same nature as the consequence, otherwise the inference would be fallacious. In the absence of any evidence as to the general savage disposition of a domestic animal known to the accused, the latter may still be liable for not taking that care which is usual and necessary in the case of all animals. A person who negligently ties a pony in a crowded bazaar, so that he gets loose and runs about, may well be convicted under this section, because he was negligent in not fastening him securely.[5] So where the horsekeeper harnessed his master's horse and put him in his master's carriage and left the horse and the carriage standing in the road in his master's compound, he was held to have brought himself within the penalties of this section, as the leaving of a horse unattended to by a man was a source of probable danger to human life.[6] If the animal was securely fastened it would then be no negligence, if being violently strained the rope broke, and the animal then escaped causing mischief.[7] And even if the animal be insecurely fastened it cannot be laid down as a general rule, that it was in all cases likely to lead to danger to human life, or of grievous hurt. As the Madras Court remarked in another case: "If the pony had been proved to be vicious, and the defendant was cognizant of the fact, there would have been evidence of the commission of the offence defined in this section. It is not, in the opinion of the Court, the quality

(1) *Lachmi Narain*, 42 I. C. (A.) 913.
(2) *Thankera Aung*, (1885) S. J. L. B. 353.
(3) *Pandu*, (1884) B. U. C. 197; *Shamlay*, 3 Nag. L. R. 90.
(4) *Shamlay*, 3 Nag. L. R. 90.
(5) *Chand Mahal*, 19 W. R. 1, *Shikbharan*, 18 Bom. L. R. 682, 35 I. C. 815.
(6) *Natha Reva*, (1881) B. U. C. 163.
(7) *Subbaraya*, (1890) 1 Weir 237.

of an ordinary pony to endanger life or inflict grievous hurt. The likelihood of the consequence must be determined by a deduction from facts antecedent to the actual event, and certainly a man cannot be held criminally liable for a consequence of which, so far as appears by the evidence, nothing has occurred to show the probability."[1]

3029. Degree of Negligence that is Criminal.—Of course, any negligence in the management of animal is not criminal, nor does it assume that complexion merely because the animal has caused grievous hurt. To hold otherwise would be to make the owner liable for all acts of his animals however unexpected and unconnected with his negligence. In order to make a person liable what has to be shown is then this, that the accused was not only negligent, but that he was so negligent that he did not take the precautions sufficient to guard against any probable danger to human life, or of grievous hurt. What these precautions are must depend upon the nature and temper of the animal, and the time and place of its custody. In such cases the Court naturally sets before itself the standard of a reasonable man, and if the accused has taken such care as might be expected from that conventional standard he is deemed to have taken the care that was sufficient to safegurad human life and limb. That he did not take such care must, however, be proved by the prosecution, for by the terms of the section, the burden of proof is on the prosecution.[2] In one case the accused had a pet monkey, which escaped, breaking its chain. It was afterwards caught, but escaped again. It broke some flower pots and street lamps and the accused was thereupon convicted under this section. But Banerji, J., quashed the conviction holding that the prosecution had failed to make out in the affirmative that (*a*) the accused knowingly or negligently omitted to take proper care of the animal, (*b*) in consequence of which the animal was likely to cause grievous hurt or danger to human life.[3] This was the *ratio decidendi* of another case in which the accused's bullock having escaped from a herd, found its way into a hospital close by the house of the accused, and there chewed up some cloths. It was said that the negligence of the accused consisted in not looking for him at the hospital which was close to his house, and where he ought naturally to have suspected he would go. It was held that that did not amount to such negligence as is punishable under this section.[4] In this case, the accused had searched for the bullock though he did not go to the hospital, and to have held the accused's failure to search there was culpable would have been to punish him for what was probably an error of judgment.

3030. Only Person in Possession Liable.—Again, the only persons primarily liable under this section are those who have the animal in their possession. But of possession the section does not say when— whether at the time of the mischief or generally. But it is clear that in either case a person may be liable if coupled with such possession, there was the requisite negligence. For instance, a groom taking out a horse to exercise for his master is undoubtedly as much in possession of it, as his master who is its owner. If, therefore, he is guilty of negligence, and the horse commits mischief, he could not escape on the plea that the possession was with his master.[5] It was so held in a case in which the accused, a horse-keeper had harnessed his master's horse to his carriage and left the horse and carriage standing on a road in his master's compound.[6] It would appear to be sufficient for the purposes of the section that the person to be charged is only in custody, or charge of the animal. But there must be possession even as understood in this sense. A bull set at large in accordance with the general religious practice of the Hindus, ceases to be in the possession of its late owner though the latter may maintain it. If, therefore it becomes dangerous to human

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(1) 3 M. H. C. R. (App.) 33, following *Cox* v. *Burbridge*, 13 C. B. (N. S.) 430.
(2) *Muhammad Sadiq*, 1 A. L. J. R. 605.
(3) *Ib.*
(4) *Lingapa*, (1892) B. U. C. 606.
(5) *Natha Reva* (1881) B. U. C. 163.
(6) *Ib.*

life, the orginal owner could not be convicted of this offence,[1] not even if its late owner claimed to be its owner and opposed the proposal to shoot it.[2] In neither case was the bull in possession of the accused, and without possession there can be no criminal liability under this section.[3]

3031. Measure of Probable Danger.—Lastly, it is essential for a conviction under this section that the danger of death or of grievous hurt should be probable. It is not necessary that the hurt should be actually caused, but what is necessary is that the danger should be near enough to be probable. Such danger may be presumed in the case of animals of *feræ naturæ*, and in the case of vicious dogs or horses. In any other case, there must be something more than a mere possibility of danger. A danger present but averted is a probable danger within the meaning of this section.

Punishment for public nuisance in cases not otherwise provided for.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

3032. Analogous Law.—The case "not otherwise provided for" must be a case of a public nuisance as defined in section 268. If the act is merely rash or negligent it may be punishable under sections 336-338, but it is not then punishable under this section. In order to be so punishable, regard must be had to two things; (*a*) was the act a public nuisance; and (*b*) does it fall within the terms of any special section. If it is one and not covered by any special provision, it is then punishable under this section.

3033. Procedure and Practice.—This offence is non-cognizable and summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily. The imprisonment to which the accused is liable under this section in default of payment of fine should be only simple and not rigorous.[4] In a trial under this section, the mere statement by the accused that he is guilty is not sufficient to sustain a conviction. It should be an admission of an act or acts, which constitute an offence, and it must, moreover, be recorded as nearly as possible in the words used by him, as is, indeed, required by section 243 of the Procedure Code.[5] Where the Criminal Courts ordered to remove a certain nuisance and the Civil Court issued an injunction to the complainant not to interfere with the alleged nuisance; the person ordered to remove it cannot be convicted for not removing it, since the Criminal Court is bound by the order of the Civil Court.[6]

3034. Proof.—The points requiring proof are those mentioned in s. 268, namely

(1) That there was some act or illegal omission.
(2) That it was done by the accused.
(3) That it caused any injury, danger or annoyance.
(4) That the said injury, etc., was a common to the public or to the people in general who reside or have property in the vicinity.

Or prove (1) and (2) and then—

(3) that it must necessarily cause injury, obstruction, danger or annoyance;
(4) that the injury, etc as in (3) should be likely to persons who may have occasion to use any public right.

3035. Miscellaneous Nuisances.—After mentioning severally the principal nuisances, this section though quite out of its place in the chapter, proceeds to prescribe a penalty for nuisances not specifically provided for. In its logical sequence, it should have been the last section in the chapter. But as it is, it does not exclude the nuisances to be mentioned hereafter.

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(1) *Shambu Dial*, (1904) P. R. No. 45, following *Bandhu*, 8 A. 51.
(2) *Fatta*, (1889) P. R. No. 32.
(3) *Fatta*, (1889) P. R. No. 32; *Shambu Dial*, (1904) P. R. No. 45.
(4) S. 67 *Lakbappe Kore*. 5 B. H. C. R. 45; *Malaobigadu*, (1882) I Weir 239, *contra* in *Yellamandu*, 5 M. 157.
(5) *Adihika*. I. C. P. L. R. 25.
(6) *Amar Singh*, (1917) P. W. R. 34.

3036. It may be sometimes a question whether an offence, though a nuisance, comes within the exact terms of any special section. For instance, the encroachment of a public highway by building over it is an infringement of the right of the public *quod* the part built over. As such, it is a public nuisance. But it may not then be punishable under any special section of the Code. Section 283 punishes such an encroachment when it *causes* danger, etc., to the public. In the absence of evidence of such actual injury, the offence would only be punishable under this section.[1] Such a case may arise where the accused constructs a projection, however small, over a public road,[2] allows dirty water from his house to run into a public street,[3] or there is any act or omission causing injury, obstruction or annoyance stated in section 268. So the noise in a public street by crying newspapers may become a nuisance, if it was likely to annoy the inhabitants generally, though only one person was in fact annoyed.[4] But as Lord Selbrone said: "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree."[5] Thc practice of music at night is *per se* open to no objection, but it may become objectionable if it is done on purpose, or is continued beyond working hours, or has the effect of causing annoyance to the neighbourhood generally.[6] So the blowing of a great trumpet at night,[7] blowing whistles, knocking on trays on boards, hammering, shrieking or shouting or indeed, making any great noise musical or unmusical so as to disturb the neighbourhood may be restrained as a nuisance. There are similarly other cases which would only be punishable under this section, for there is no other special section applicable. These cases will be found all set out under section 268.

3037. Nuisance under Local Law.—The generality of this section may sometimes bring its provisions into conflict with a special or local law providing against a nuisance. Thus, under the Bombay Motor Vehicles Act,[8] rash or negligent driving of a motorcar is visited with a penalty to which may be added the suspension or withdrawal of the licence. A question came up be fore the Bombay High Court, whether a person guilty of rash driving within the meaning of the local Act could also be convicted for a public nuisance under this section, or section 279 of the Code. In the opinion of Sir L. Jenkins, C. J., there was nothing illegal in such a double conviction, and he passed without comment the remark that in similar cases the ordinary practice is to charge the accused both under the special Act, as well as under the Code.[9] but though a double charge is not necessarily illegal,[10] and it is added to pass a heavier punishment than would be admissible under the local Act, still it does not justify the passing of a single day's imprisonment when imprisonment is not obligatory, since it would unnecessarily leave the stigma of imprisonment on the accused.[11]

3038. It has been already stated that a corporation may as much be guilty of a public nuisance as a private individual. Where, however, a corporation like the Municipality, is indicted for the offence, the proper persons to be indicted are the Municipal Corporation as a corporate body and not only their office-bearer, such as the Chairman.[12]

3039. No Nuisance.—It is, of course, essential for a conviction under this section that the act complained of must amount to a public nuisance as defined in section 268. It must, moreover, be a nuisance for which the accused is criminally accountable. Where, therefore, some persons diverted the water of a stream into the land of the accused, with the result that a certain path was obstructed and the accused was charged with and convicted under this section, the Court naturally

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(1) *Virappa Chetti*, 20 M. 433. *Umesh Chandra Kar*, 14 C. 656.
(2) *Nisar Mohamed*, 6 L. 203.
(3) *Lakbappa Kore*, 5 B. H. C. R 45.
(4) *Innes* v. *Newman*, (1894) 2 Q. B. 292.
(5) *Gount* v. *Fynney*, L. R 8 Ch. 12. *Happoo Mai*, 22 A, L. J. 662.
(6) *Christie* v. *Davey*, (1893) 1 Ch. 316.
(7) *Smith*, 2 Stone, 704.
(8) Bom. Act II of 1904.
(9) *Bayne*, 8 Bom. L.R. 414 (416, 418, 419)
(10) *Bayne*, 8 Bom L. R. 414 (419) *Onooram*, 9 W. R, 70.
(11) *Bayne*, 8 Bom. L. R. 414 (419).
(12) *Chairman of Municipal Council, Ellore*, (1893) 1 Weir 243.

set aside the conviction, presumably on the ground that the nuisance, if any, could not be attributed to any act or illegal omission on the part of the accused.[1] It is not a public nuisance for action under this section to skin a carcass[2] or to place a cot temporarily on the road in the bazaar, when it caused no obstruction to any one in particular.[3]

Master Not Liable.

3040. This section limits the liability to the actual nuisance-feasor. It does not extend it to his employer or master, though a joint owner may be liable.[4] The proprietors and manager of a mill were convicted of this offence on the ground that the working of their mill was a nuisance. It appeared that the proprietors were not residents in the locality, and there was no allegation of any abetment by them. It was held that only the users of the mill were liable but not the masters and employers.[5]

Continuance of nuisance after injunction to discontinue.

291. Whoever repeats or continues a public nuisance having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

[*Public servant*—s. 21.]

3041. Analogous Law.—This section provides an enhanced penalty for (*a*) repeating, and (*b*) continuing a public nuisance after receiving injunction to abate it. The injunction here referred to must have been issued by a public servant having lawful authority to issue it. Such authority will be found in sections 142 and 143 of the Procedure Code. It may also be issued by the Civil Court, in a suit pending before it.[6] A person disobeying an injunction may be, moreover, punished for contempt in addition to his being convicted under this section.

3042. Procedure and Practice.—This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable, by a Presidency Magistrate or a Magistrate of the first or second class, and summarily.

3043. In order to support a conviction under this section, there must be evidence of a previous injunction against committing the *same nuisance*, or there must be evidence of the *continuance* of the nuisance after injunction to stop it. In either case, it is necessary that the order of the Magistrate forbidding the continuance of the nuisance, or evidence of notice of such a character as to make plain the precise terms of the order and notice, be recorded in the case. Strict proof of all the circumstances constituting the offence, especially where the offence is one which is not *malum in se*, should be required as the basis of a conviction.[7]

3044. Provision for Enhanced Penalty.—The provisions of section 75 applicable to offences comprised in Chapter XII or XVII and providing for enhanced punishment do not of course apply to an offence under this Chapter. But it is one in which some provision was necessary for contumacious repetition or continuance of the public nuisance. This section accordingly provides that in case of (*i*) repetition, or (*ii*) continuance after lawful injunction the offender may be sentenced to the punishment here provided. A person repeating a nuisance after a previous substantial conviction under a specific section of this chapter could not be punished under this section, though in that case the Court may award the enhanced sentence admissible under the section under which the second or subsequent conviction is had. The provisions of this section are only applicable

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(1) *Vellai Gownden*, 2 I. C. (M.) 424.
(2) *Beni*, 12 A. L. J. 349, 25 I. C. 352
(3) *Kamla Prasad*, 10 A. L. J. 362, Dissented from in *Rama Krishna*, (1935) A. 746.
(4) *Molaiappa Gowndan*, (1928) M. 1235.
(5) *Bibhuti Bhusan*, 46 C. 515.
(6) S. 94 (*c*), C. P. C. (Act V of 1908).
(7) *Gunya*, (1886) B. U. C. 295.

to cases where a nuisance is repeated or continued after injunction.[1] Such injunction may be addressed to the accused under section 142 or 143 of the Procedure Code. Under section 142 of that Code, the Magistrate is empowered to issue an injunction pending an inquiry, under section 143 he may issue an injunction "not to repeat or continue" a public nuisance, and under s. 144 the injunction may be issued in urgent cases of nuisance. The Civil Procedure Code[2] further empowers the Civil Court to issue a temporary injunction "to restrain the defendant from committing the breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right." The same rule provides that in case of disobedience, or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.[3] This, however, is only a penalty for contempt, in addition to which the accused may be prosecuted under section 291 for the repetition or continuance of the nuisance.

3045. Now in order to justify a conviction under the section, the section requires that the repetition or continuance must be after a person has been enjoined by a public servant against its repetition or continuance. Such injunction must then have been addressed to the accused individually. It must be shown that he had on some previous occasion committed the particular nuisance, and had been enjoined not to repeat or continue it, but had nevertheless repeated or continued it.[4] A general proclamation issued by the Magistrate to the public at large, without naming the accused, though it may purport to have been issued under section 144 of the Procedure Code, is not such an injunction, the disobedience of which is punishable under this section.[5]

3046. This raises the next question, referred to in the section, namely, that there must not only have been a previous injunction, but that the injunction must be a legal injunction. The fact that an injunction was issued by a Magistrate purporting to act under the Procedure Code, does not make the injunction legal. It may be unquestioned or unquestionable in appeal or revision, but that alone does not make it an injunction issued by one who had lawful authority to issue it. So Jackson, J., remarked "when the Code of Criminal Procedure authorizes the making of orders by executive authorities with the view of preventing a breach of the peace, or for similar purposes, it has always been held, and is now enacted in the existing Code, that the property of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not."[6] The Court enquiring into an offence under this section is not then precluded by the order passed by another Magistrate from canvassing its legality, though it is precluded from questioning its propriety: *Prima facie* such order would be presumed to be legal, unless its illegality is apparent, and in any case it may be shown.

[292. Whoever—

Sale etc of obscene books, etc.

(*a*) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

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(1) *Jokhu*, 8 A. 99.
(2) S. 95, Ord. XXXIX, r. 2, C. P. C. (Act V of 1908).
(3) Ord. XXXIX, r. 2 (3) (Act V of 1908).
(4) *Jokhu*, 8 A. 99; *Mohesh Chunder*, 20 W. R. 55, such an order would, if passed under the Criminal Procedure Code, be, in Form XX of Sch. V.
(5) *Ib*.
(6) *Surjannarain Dass*, 6 C. 88.

(*b*) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(*d*) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(*e*) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

***Exception.*—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculpture, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]**[1]

3047. Analogous Law.—Both this and the next section were added in accordance with the resolution passed by the International Convention for the suppression and circulation of, and traffic in, obscene publications, signed at Geneva on behalf of the Governor-General in Council, on the 12th day of September, 1923. The Select Committee, in their report, dated 10th February, 1925, intended to exclude religious, artistic and scientific writings. etc., but they did not think it necessary to enlarge the exception, which they left to be supplemented by "a substantial body of case law" which, they added, made it clear " that *bona fide* religious, artistic and scientific writings, etc., are not obscene within the meaning of the Indian Penal Code." The two sections must, then, be understood as supplemented by case law on the subject. The Exception, as drafted by the Select Committee, was somewhat enlarged by the Legislative Assembly which added the words, "any book, pamphlet, writing, drawing, or painting kept or used *bona fide* for religious purposes or" to the original exception as enacted in the Act of 1860, which the Select Committee had reproduced in the draft.

3048. Procedure and Practice.—This offence is cognizable, and warrant must issue in the first instance. It is bailable but not compoundable and is triable by a Presidency Magistrate or a Magistrate of the first or second class. It is provided by s. 521 of the Code of Criminal Procedure that, on a conviction under this section, the Court may order the destruction of all copies of the thing in respect of which the conviction was had.[2]

3049. Proof.—The points requiring proof are :—

(1) That the thing in question was obscene, and
(2) That he used it in any of the ways enumerated. If the accused relies on the exception he must plead and prove it.

3050. Charge.—A charge under this section or section 294 of the Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene ; and the Magistrate, in convicting, should, in his decision, state distinctly what were the particular representations and words which he found on the evidence, had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such

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(1) This section was substituted for the original S. 292 by S. 2 of the Obscene Publications Act, 1925 (VIII of 1925).
(2) S 521 (1), Cr. P. C.

specific decision has been given, the High Court would be justified in trying the case *de novo* transferring it on its own file, or dismiss it on the ground that there was no finding on which the conviction could be sustained.[1]

3051. The charge should run thus :—

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of accused*) as follows :—

"That on or about the——day of——at——you sold (*or* distributed or imported *or* printed for sale *or* hire, *or* wilfully exhibited to public view *or* attempted to sell, etc., *or* offered to sell, etc. Exhibit——which is an obscene book, in that it contains the following obscene passages or words, namely——and you thereby committed an offence under section 292 of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge."

3052. Sale of Obscene Things.—The section does not, indeed it could not, punish all obscenity or immorality. It can only attack obscenity which is destructive of the morals of society. It, therefore, punishes only the sale, distribution, importation, or printing for sale or hire, or public exhibition of obscene things. Any attempt to publish, sell, etc., and an offer to do so are likewise punishable. There must be thus two things proved under the section, namely that (*i*) the matter must be obscene, and (*ii*) the accused must have sold, distributed, imported, printed or exhibited it or attempted or offered to do so.

What are Obscene things.

3053. In the first place, then, the section is confined to an obscene print or figure. It does not refer to obscenity or immorality in general, but it does refer to obscenity when it is made the subject of visual representation. The term "obscene" is not defined in the Code, but the correct test of obscenity is, whether the tendency of the matter charged as obscene is to deprave and corrupt the minds of those who are open to such immoral influences, and into whose hands the publication of the sort may fall.[2] Any publication which engenders lust or incites sensuality or depraves or corrupts those whose minds are susceptible to such immoral influences is obscene.[3] A religious book is necessarily excluded from this category, though it may contain passages of doubtful decency.[4] And an allowance must be made for the primitive directness of expression, which though coarse is not obscene.[5]

3054. In this connection, it is well to remember that a passage may not be obscene in its place in a religious book, but may become so by being published in a journal sold to the general public. If it has the tendency to excite in the minds of readers impure thoughts, then, its publication in its new form would be obscene, though, considered as a part of the whole, it may be innocuous. So, where the accused, the editor of a newspaper, published therein extracts from a religious book pointing out the various sexual acts prohibited during the fast of Ramzan, with the intention of ensuring strict observance of the fast, he was convicted on the ground that the section looked not so much to the intention as to the effect, and since the tendency of the writing was to arouse sensual thoughts, it became punishable under this section.[6] The exhibition of a female nude figure as beauty unadorned is thus within the rule, but a verbal description of such figure is not, though it may be under the provisions of S. 294. Anything which appeals to the lower passions or senses of man or woman is obscene.

3055. So, it is a nuisance to expose the private parts of an individual in a public place and in the sight of divers persons.[7] But the mere exposure of one's person is not indictable unless it was done to public view. The fact that a man exposed his private parts to a woman in a public place, where no one was in sight

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(1) *Semble* in *Upendronath Dass*, 1 C. 356 ; *Mi Min Si*, (1884) S. J. L. B. 262, to the same effect ; *Rowed*, 3 Q. B. 180 ; *Orchard*, 3 Cox. 248 ; *Bradlaugh*, 3 Q. B. D. 607.

(2) *Per* Cockburn C. J ; *Hicklin*, L. R. 3, B. 360 (371).

(3) *Kailash Chandea*, 139 I. C. (C.) 461.

(4) *Khirode Chunder Roy*, 39 C. 377 ; *Markondeyulu*, 22 M. L. J. 169, 37 I. C. 521.

(5) *Vishnu Krishna Pusanik*, 15 Bom. L. R. 30 , 19 I. C. 504.

(6) *Ghulum Hossain*, (1917) P. R. No. 5.

(7) *Thaliman*, 33 L. J. M. C. 58.

was held to be insufficient to support an indictment.[1] So the commission of fornication in open day on a common place, witnessed only by one other person was held to be insufficient to sustain the charge.[2] In all such cases, the accused may more appropriately be convicted of doing an obscene act under S. 294.

Intention and Motive.

3056. In the case of exhibition of obscene figures, exhibition of nudity in public is obscenity as it is an incentive to sensuality. In the case of print, the question naturally depends upon other considerations. It may be a scientific treatise intended to illustrate and expound the anatomy of human body. It could not then be condemned as obscene. But why? Because, the section is intended to check the spread of immorality and not the dissemination of science. But in order to see whether the book is a scientific treatise or only an obscene book in the guise of science, the scope and object of the work must be looked at. Was it intended to be an exposition of the science, or was it an exposition of indecency in the guise of science? For this purpose, the Court will have to examine the whole work, and if it contains details given irrespective of the ultimate purpose of the work as are calculated to inflame the passions and corrupt the morals of the readers, the book will be pronounced to be obscene, whatever may be its ostensible purpose and object. Indeed, in such cases the true object and intention of the writer is wholly immaterial.[3] As Cockburn, C.J., observed: "When a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quod* the intention and *quod* the act, it does not lie in the mouth of the man, who does it, to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that; you must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal."[4]

3057. These observations were made in a leading case in which the facts were these. The accused was found in possession of a certain pamphlet called "The confessional unmasked, showing the depravity of the Romish preisthood, the inequity of the confessional, and the question put to females in confession." He used to sell copies of the pamphlets at cost price to whoever asked for them. He sold it to expose what he deemed to be the errors of the church of Rome, and particularly the immorality of the confessional. The pamphlet itself contained extracts taken from the writings of theologians on the doctrine and discipline of the Romish church and particularly on the practice of the auricular confession. On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. It also contained preface and notes condemnatory of the tenets and principles of the writers. About half of it related to controversial questions, but the latter half of it was grossly obscene, as relating to impure and filthy acts, words and ideas. The question was, whether the pamphlet, written with the object stated, was to be regarded as obscene, and the Court held that the intention and object of the writer in such cases was immaterial, if the effect of the writing was immoral and obscene:[5] Cockburn, C. J. justified his decision on the ground that, if there is the infraction of law, the intention to break the law must be inferred.[6] But this is introducing a legal fiction to justify a rule which is otherwise perfectly justifiable.

(1) *Webb*, 1 Den. C. C. 338.
(2) *Elliot*, 1 L. & C. 103.
(3) *Hari Singh*, 28 A. 100.
(4) *Hicklin*, L. R. 3 Q. B. 360 (370) followed in *Brannan*, L. R. 7 C. P. 261; *Indarman*, 3 A. 837; *Parashram*, 20 B. 193; *Vishnu*, 15 Bom. L. R. 307, 19 I. C. 504; *Sarat Chandra*, 32 C. 247; *Markandeyulu*, 22 M. L. J. 169, 37 I. C. 521; *Thakar Datt*, (1917) P. R. No. 25, 37 I. C. 478.
(5) *Hicklin*, L. R. 3 Q. B. 360, *per* Blackburn, J., *Arguendo*, 367, *per* Cockburn, C. J., 371, 372; followed in *Stee* v. *Brannan*, L. R 7 C. P. 261; *Indarman*, 3 A. 837 (843); *Hari Sin*, 28 A. 100 *Parashram*, 20 B. 193; *Vishnu*, 15 Bom. L. R. 307; *Sarat Chandra Ghose*, 32 C. 247; *Khirode Chander Roy*, 39 C. 377; *Markandeyulu*, 5 L. W. (Mad.) 237 37 P. C. 521; *Ghulam Husain*, (1917) P. R. (Cr.) 5; *Thakar Datt*, 37 I. C. (Pun.) 478; *Kailash Chandra*, 139 I. C. (C.) 461.
(6) *Hicklin*, L. R. 3 Q. B. 360 (370).

The true reason appears to be that, in cases affecting public nuisances, the question of intention is always immaterial (§§ 2836-2837). The offences are treated as offences on account of the effect which they produce upon society, and not on account of the criminal intention of the offender. However, whatever the reason, the rule is clear, and it has been followed in several Indian cases.[1]

3058. In the two Allahabad cases, the accused had written books of a controversial character, intended to uphold Hinduism by denouncing the religion of Islam. They were intended to be replies to certain attacks made by Mahomedan writers upon the practices of Hinduism. In both, an attempt was made to show by an argument *tu quoque*, that Mahomedan religion abounded in as many immoral practices as were associated with the Hindu trinity. The pamphlets were, in short, not intended to be immoral, but they were held to be immoral. And the Court held that the writers had thereby sufficiently brought themselves within the penal visitation of this section.[2] It was urged for the accused that the pamplets did not stand alone, but that there were others who had similarly written, but had escaped prosecution. But it was held to afford no justification for the publication of the pamphlets, though the act should have probably been considered in mitigation of the sentence.

3059. In another case, a vernacular book, written in verse called *Vidhi Natagam*, was retailed at one anna a copy. It described the amorous intrigues of a married woman, referred to her sexual organ, and its general tendency was to excite a libidinous desire in the reader. The publisher was convicted of this offence.[3] In another case, the publisher of a religious book described the acts prohibited during the fast of Ramzan, including sexual intercourse of various kinds which were set out in indecent details. It was held that the publisher had rendered himself liable for this offence.[4] But where the accused published a newspaper called the *Tibi Akhbar*, which was only sold to registered subscribers, and though it contained passages resting on the border of obscenity, yet due regard being had to the character and obscurity of the publication and its dubious passages, the High Court was not prepared to reverse the acquittal.[5]

3060. The question whether a picture or a print is obscene or not is a question of fact and not of law,[6] the test applicable in each case being the same. The publication of a book written with the object of advocating checks to conception, and giving the explanations of the checks, the prices at which and the places where they could be procured is now no longer regarded as obscene and immoral,[7] though at one time Charles Bradlaugh and Annie Besant were convicted for publishing such a work,[8] but the question as to the immoral character of the work was never tried on appeal, the verdict having been quashed on the ground that the indictment was defective inasmuch as it failed to set out the offending passages.

3061. So it has been held, that, if the proceedings of a trial contain indecent details, their publication would be indictable, whatever may have been the motive of the publisher. As Bayley, J., said: "We are bound, for the purpose of justice; to hear evidence in the course of judicial proceedings, the publication of which at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider this subject was in the case of some trials for adultery. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound in a Court

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(1) *Indarman*, 3 A. 837; followed in *Markandeyulu*, 5 M. L. W. 237, 37 I. C. 521; *Hari Singh*, 28 A. 100; *Parashram*. 20 B. 193.

(2) *Indarman*, 3 A. 837; *Hari Singh*, 28 A. 100.

(3) *Markandeyulu*, 37 I. C. 521.

(4) *Ghulam Husain*, (1917) P. R. No. 5, 39 I. C. 473.

(5) *Thakar Datt*, (1917) P. R 25; I. C. 478.

(6) *Parashram*, 20 B. 193.

(7) *Framji D. Taraporewalla*, (1892) B.U.C. 620. To the same effect, *Jagat Narain Lal*, 110 I. C. (Pat.) 805.

(8) *Bradlaugh*, 2 Q. B. D. 569; O. A. 3 Q. B. D. 607.

of justice to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce. I am satisfied that, whenever that point has been under the consideration of this Court, it has always been viewed, and must invariably be viewed in the same way."[1] So, the publication of what purported to be the proceedings of a judicial trial of a person for selling the pamphlet called "Confessional unmasked" in which the said pamphlet was reprinted was held to constitute an indictable obscenity; it being held that the fact that it was a republication of the trial and was so intended to be, did not make it privileged.[2] In this case, however, some emphasis was laid on the fact, that, though the obscene passages were not read at the trial, they were reprinted in the so-called proceedings, which was, in fact, an attempt to circulate the pamphlet in the guise of a report of proceedings. But the decision turned on the broad question of the right of a person to publish judicial proceedings, though it contained obscene and immoral matter.

3062. Exceptional Cases.—But, there are well-known exceptions to the section. Indeed, without exceptions, the section would be unworkable. The section only excepts religious prints and sculptures, but, it is evident, that there are others which no one would think of condemning as immoral. Such are the works of art which adorn the National Galleries, which were the pride of ancient Greece and Rome. Such paintings and sculptures are treasured possessions of a nation, and have an honoured place in their show places. From one point of view they are obscene, but it is not from that point of view that they are to be judged. They may be debased to that purpose, as where photographs or other copies are made of them and sold to the public. The latter may be obscene, if they amount to incentives to sensuality or lead to the depravity of public morals, but the originals cannot be condemned on that account.

3063. Works of religious character are also exempt, but their exemption is based on the principle that they arouse feelings of veneration and reverence in the believers and cannot, therefore, be designated obscene. They are mostly allegorical or mythical figures long associated with religious sentiments and they cannot, therefore, have the debasing influence which it is the object of the section to repress. Such is the figure of the infant Christ, or the symbol of Siva or other deities of the Hindu pantheon. Such are the allegorical engravings to be found on many Hindu Temples and Cars.

3064. Publication Necessary.—Neither this section nor the next deals merely with possession of obscene things. Both under this as well as under the next section, their publication, or attempt or offer of publication or possession with that intention is essential The acts described in this section as acts of publication are (*i*) sale, (*ii*) distribution, (*iii*) importation, (*iv*) printing, the last two for only sale or hire, and (*v*) public exhibition; added to which there may be (*vi*) attempt at sale, (*vii*) attempt at distribution, or (*viii*) offer of sale, or (*ix*) offer of distribution. It is noteworthy that the section does not condemn importation or printing for *distribution*. The latter term is used, of course, to mean free circulation. A person who imports or prints obscene things for free distribution is scarcely distinguishable from one who imports or prints them for his own amusement. In such a case, criminality only begins with publication.

3065. In a similar case, arising in England, it has been held that it is the duty of the jury to decide whether the book was put out and published in such a way as to be lewd, lascivious, and manifestly to tend to corrupt the public morals. In considering this question, they were to take into their consideration the person to whom and the time and circumstances under which it was put forth. And for this purpose the titles and contents of other books found on the premises where the book in question was sold may be relevant as tending to show that the one in

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(1) *Carlile*, 3 B. & A. 167; *Creevey*, 1 M. & S. 273.

(2) *Steele* v. *Brannan*, L. R. 7 C. P. 261 (268).

question was sold with a view to corrupt the public morals.[1] Certain persons, carrying on business abroad, caused to be inserted in a newspaper in England advertisements of books and photographs, whereupon an officer of the police wrote to the advertisers for samples of the books and photographs as advertised, and received, in reply, through the post from abroad, the obscene books and photographs specified in the indictment. The editor was then prosecuted for selling and publishing the said obscene books and photographs and causing them to be sold and published by the advertisers. The jury were directed that if they were satisfied that the books and photographs so sent to the police were obscene, and that the defendant, at the time he inserted the advertisements in his newspapers, knew the general character of what he was advertising, and that by the advertisements he brought about the sale to the police, they ought to convict him. The defendants were convicted of abetment, and their conviction was upheld.[2]

3066. This raises the question, is the proprietor and printer of an obscene print liable, under this section, for the acts of his agent or servant? It has been held that he is not, if the management of the printing was in the hands of his agent, unless there is evidence that the work was executed with his authority, knowledge or consent.[3] (§§ 2836-2837).

Sale, etc., of obscene objects, to young person.

293. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.[4]

[***Possession***—s. 27.]

3067. Analogous Law.—(See § 3047). This section merely enhances the punishment where the obscene objects are sold etc., to persons under the age of twenty years. In the final draft of the International Conference which drafted the convention, it was stated that the conference generally was of opinion that the offence of offering, delivering, selling or distributing obscene objects must be held to have been aggravated when committed in respect of minors. The Council (of the League) considered that it would be preferable to leave each State free to fix the age under which a person should be considered to be a minor for the purposes of this provision.[5] The principle of this recommendation has been given effect to in this section.

3068. Procedure and Practice.—This offence is cognizable, but warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by the Presidency Magistrate, a Magistrate of the first or second class, and summarily. On a conviction under this section the Magistrate is empowered to order the destruction of all copies of the thing is respect of which the conviction was had.[6]

3069. Proof.—The points requiring proof are the same as under the last section, only that under this section further proof that the person given was aged below twenty years is necessary.

3070. Effect of Amendment.—The unamended s. 293 penalized persons for being in possession of an obscene article for sale, distribution or public exhibition. But under the amended section its possession for sale is no longer punishable, though sale is punishable under the last section. This section is an aggravation of the offence under the last section, the aggravating circumstance

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(1) *Thomson*, (1904) 64 J. P. 456.
(2) *De Marney*, (1907) 1 K. B. 388.
(3) *Muhammad Mohsin*, (1890) A. W. N. 175; *Uma Shankar*, (1889) P. R. No. 18; *Mumtaz Ali*, (1905) P. R. No. 35.
(4) This section was substituted for the original section 293 by s. 2 of the Obscene Publications Act, 1925 (VIII of 1925).
(5) Statement of Objects and Reasons *see Gazette* of India 1924, part V, p. 126.
(6) S. 521, Cr. P. C.

being the sale to a person under twenty years of age. Even if a person were to lend gratuitously such object to another, it would amount to circulation penalized in this section.

294. Whoever, to the annoyance of others—

Obscene Acts and Songs.

(*a*) does any obscene act in any public place, or

(*b*) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

3071. Analogous Law.—As originally enacted this section stood thus:—

Obscene songs.

"294. Whoever sings, recites or utters in or near any public places any obscene song, ballad, or words to the annoyance of others shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both,"

3071-A. The present section was substituted by the amending Act of 1895,[1] to meet a case of indecency common in the Madras Presidency and which was noticed in an unreported case of that High Court. The section, as it now stands, brings the law in line with the corresponding rule in England.[2]

3072. Procedure and Practice.—This offence is cognizable, and warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or Magistrate of the first or second class and summarily. A conviction under this section for uttering obscene abuse in a public place may amount to a conviction for an offence involving a breach of the peace within the meaning of section 106 of the Procedure Code.[3]

3073. Proof.—The points requiring proof are:—

(1) That the accused—
  (*a*) either did some act ; or
  (*b*) sang, recited or uttered any song, ballad or words in or near a place ;
(2) That the act was done in a public place, or the song, etc., was sung in or near a public place ;
(3) That it was obscene ;
(4) That it caused annoyance to others.

3074. Charge.—The charge should follow the language of the form given under s. 292 (§ 3051). It should specify the obscene act or song upon which the prosecution is founded. And its omission to specify in evidence was held in a Madras case to be a mere irregularity not vitiating the trial,[4] but, in view of the remarks of the Lord Chief Justice,[5] this view can be scarcely maintained.

3075. Obscene Acts and Songs.—In order to make an obscene act or song punishable under this section, three things are essential; (*i*) The act must be done in public place, and the song must be sung in or near such place ; (*ii*) it must be an obscene act or song, and (*iii*) it must cause annoyance to others. In fact the causing of annoyance is the most essential ingredient of the offence, without which the act or song ceases to be a public nuisance.[6]

3076. The first essential of the offence is that it must be committed in or near a public place. If an act it must be done in a public place. The fact that it is done to the public view is not then an offence under this section. An indecent exposure of one's person in an omnibus,[7] a public urinal,[8] a public house,[9] or in a place where the public go, no matter if they have any right to go or not,[10] would be punishable under this

Obscene Songs.

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(1) Indian Criminal Law Amendment Act (III of 1895), s. 3.
(2) 19 Geo. II, c. 21; *Strickland* v *Hayes*, (1896) 1 Q. B. 290.
(3) *Mi Kun Ya*, (1904) U. B.R., (P. C.) 4.
(4) *Narasamma*, (1882) 1 Weir 251.
(5) *Bradlaugh*, 3 Q. B. D. 607.
(6) *Strickland* v. *Hayes*, (1896) 1 Q.B. 290.
(7) *Holmes*, 22 L. J. M. C. 122.
(8) *Harris*, 40 L. J. M. C. 67.
(9) *Bunyan*, 1 Cox. 74.
(10) *Wellard*, 14 Q. B. D. 63.

section. In England, indecent exposure of one's person to public view is indictable,[1] but such an offence, if committed from, say, one's terrace or balcony, would be here punishable under the more elastic provisions of s. 290.

3077. Sufficient has been said before as to what constitutes a public place (§ 1508). The term must be understood here as used in that sense. The words "near a public place" are, however, new and require a word of explanation. They are probably an echo of the English phrase "on any land adjacent thereto." Lindley, L. J., commenting on this phrase, remarked: "Such a phrase is too wide and is far beyond what is necessary for the good government of the country. Such a provision would cover the case of a man swearing in a passion in his own stableyard, or even, as I think, in his own house, and its enforcement would really be tyranny.[2] But such is, indeed, the effect of the words in the section. And all that can be hoped for is that such construction may be spread.

(2) Obscene Acts and Songs.

3078. As regards "obscene acts," the section is advisably clear. But there are such acts as indecent exposure of person, sexual intercourse, indulgence in unnatural offences[3] and the like. The last offence would, however, be here punishable under the graver section of the Code.[4]

3079. As regards obscene songs, everything depends upon the songs themselves. A love song is not necessarily obscene unless it suggests coarse and indecent associations. A *lavni* is not necessarily an obscene song. It may be, and often is, obscene. But, on the other hand, far from being obscene, it is also considered almost sacred by the Maratha people.[5] So a *gazal* signifies nothing. It may be sacred or profane. If the latter, it may be a mere love song or it may savour of obscenity. The question is a question of fact and it is for the prosecution to prove what the song was and what it signified.

(3) Must Annoy Others.

3080. Lastly, the mere fact that the song is obscene does not conclude the matter. In order to constitute an offence, it must cause annoyance to others. Indeed, without annoyance, the act would be no crime.[6] And there must be actual annoyance and not merely the probability of it. There must be some person to say that the act done, or the song sung had annoyed him.[7]

294-A. Whoever keeps any office or place for the purpose of drawing any lottery not authorized by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Keeping lottery office.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.

[*Government*—s. 17.]

3081. Analogous Law.—This section is new, and was inserted by the amending Act of 1870[8] which applies chapters IV, V and XXIII of the Code to

(1) *Webb*, 18 L. J. M. C. 39.

(2) *Strickland* v. *Hayes*, (1896) 1 Q. B. 290 (292), animadverted upon on a different point in *Burnett* v. *Berry*, (1896) 1 Q. B. 641 (643, 644).

(3) *Rowed*, 3 Q. B. 180.

(4) S. 377.

(5) *Ganu*, 4 B. H. C. R. 25.

(6) *Nyo Ke*, (1885) S. J. L. B. 332, *Ma Kye W*, (1891) S. J. L. B. 537. So it was held in *Strickland* v. *Hayes*, (1896) 1 Q. B. 290 (293) that a bye-law, which absolutely forbade the singing of obscene songs irrespective of the anncyance caused to others, would be too wide.

(7) *Innes* v. *Newman*, (1894) 1 Q. B. 293; *per* Wight, J.: "If the act complained of is of such a character as to be likely to annoy the inhabitants generally, it is not the less an offence under this bye-law, because only one inhabitant is in fact annoyed"

(8) Indian Penal Code Amendment Act (XXVII of 1870) s. 10.

offences under this section.[1] In England, as far back as 1697 all lotteries were at first declared to be public nuisances,[2] and all grants, patents and licenses for such lotteries, to be against law. But all the same the Government found it convenient to raise money by means of lotteries which were legalized by the several Lottery Acts passed for that purpose.[3]

3082. But in 1801 a Statute of George III[4] declared all games or lotteries called little-goes to be public nuisances and provision was made for their suppression, and later Acts[5] imposed many penalties upon persons publishing lotteries or selling tickets. These Acts, however, exempt Royal palace[6] from their operation ; as also association for the distribution of works of art and art unions.[7]

3083. Though there appears to have been no express legislation against lotteries in this country till the Act of 1844[8] which, for the first time, provided for the suppression of all lotteries not authorized by Government, still, the provisions of the English Statutes were held to apply to the Presidency towns, while their spirit pervaded the mofussil. This section is only a re-enactment of the Act of 1844 in the Code, which is thereby repealed.[9] The section, however, leaves unaffected any special or local laws on the subject.[10]

3084. Procedure and Practice.—This is one of the sections of the Code in which the Courts have no power to take cognizance of an offence except upon complaint made by order of or under authority from the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf.[11] The offence is therefore necessarily non-cognizable, but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate, and summarily.

3085. Proof.—The points requiring proof are :—

(1) That there was an office or place.
(2) That the accused kept it.
(3) That it was kept for the purpose of drawing lottery.
(4) That such lottery was not authorized by Government.

And for the second clause of the section, prove—

(1) That the accused published a proposal.
(2) That the said proposal related to pay any sum or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery.

3086. Principle.—Lottery and gambling are alike by nature and in result; they are both games of chance. But gambling is a term the application of which is restricted to a game played by and in the presence of the participants, while lottery is a term in which the presence of participants is both unnecessary and superfluous. In gambling, there may be the display of some skill, as in throwing the dice or the like.[12] In lottery, they merely buy a chance, the happening of

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(1) Indian Penal Code Amendment Act (XXVIII of 1870) s. 13.

(2) (1697-8) 10 and 11 Will. III, c. 17 ; other Statutes to the same effect are : 9 Ann. c. 6, s. 57 ; 8 Geo. I, c. 2, s. 36 ; 12 Geo. II, c. 28 ; 42 Geo. III, c. 119 ; 4 Geo. IV, c. 60, s. 60.

(3) 9 Anne, c. 6, under which a million and a half sterling was raised by lottery for the service of the year 1711, and which at the same time (s. 57) suppressed all lotteries.

(4) 42 Geo. III, c. 119.

(5) (1823) 4 Geo. IV, c. 60, s. 41 ; (1836) 6 and 7 Will. IV c. 66 ; (1845) 8 and 9 Vict., c. 74. Various Acts were passed from time to time to prohibit various games which were invented to take the place of those declared to be illegal. Thus 13 Geo. II, c. 19 prohibited the games of passage and other games with dice except backgammon ; 18 Geo. II, c. 34 declared " roly-poly " and other games with cards and dice illegal ; so 42, Geo. II, c. 119, prohibited the games called "little-goes."

(6) (1738-9) 12 Geo. II, c. 28, s. 10.

(7) (1846) 9 & 10 Vict., c. 48.

(8) Act V of 1844.

(9) Second Sch., Act XXVII of 1870.

(10) Act XXVII of 1870, s. 15

(11) S. 196, Cr. P. C.

(12) *Ashton*, 22 L. J. M. C. 1 ; *Pattin* v. *Bhymer*, 29 L. J. M. C. 189 ; *Parsons* v. *Alexander*, 24 L. J. Q. B. 277 ; *Bleo* v. *Harston*, 3 Q. B. D. 454 ; *Dyson* v. *Mason*, 22 Q. B. D. 351.

which is wholly beyond their control. The mischief of gambling affects only the actual players. As such, it is comparatively limited. That done by lottery is widespread.

3087. Law reprobates both gambling as well as lottery, because they both promote the circulation of money by chance. And such circulation is both unjust and unequal, because its course is solely determined by chance. Law reprehends gambling and lottery not only because the course of money which is the fruit of labour is determined by chance, but also because they encourage the squandering of wealth and thus lead to incalculable public misery. They are, moreover, opposed to honest labour and thrift upon which the happiness of society depends. These remarks, however, apply only to a lottery in its best form. But it is not the usual form of lottery. In England, the keepers of lotteries are classed as rogues and vagabonds[1] and they are, in fact, so. Lotteries are mostly intended to inveigle people into forced purchase of worthless things or to part with their money with no return, and, of course, much to the advantage of the lottery-keeper. As such, lottery is a fraud on the public, and it is none the less so because it leads the public to pay for a game in which there is only one certainty—namely, that the lottery-keeper will win the biggest prize.

3088. This section penalizes this species of gambling on account of its widespread mischief. It penalizes gambling but in a different way and subject to the rule that it leaves men free to gamble away their money so long as it does not become a public vice. When it does so become, it treats them both alike. So far as this section is concerned, it is intended to suppress lotteries unauthorized by Government, and it intends to suppress them (*a*) by prohibiting the keeping of offices or places for drawing them, and (*b*) by prohibiting the publication of any advertisement relating to them.[2] It is needless to add that the authorization of a lottery by government does not legalize it; it merely exempts the person authorized from punishment under this section. For all other purposes, it is still an illegal transaction, subject to s. 30 and other provisions of the Indian Contract Act.

3089. Meaning of Words.—"*Whoever keeps any office for the purpose of drawing any lottery*": It is the place *for drawing a lottery* and not for planning it that is punishable here.[3] Drawing is here used in its physical sense.[4] "*Not authorized by Government*" means unless authorized by Government, the burden of proving which is on the accused. The authorization must be express and cannot be implied by the levy of incometax or the like.[5] "*Or deliver any goods*": The word "goods" has been held to include even immoveable property; *e.g.*, a ginning factory.[6]

3090. What is a Lottery.—As ordinarily understood, a lottery is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the persons concerned, is made wholly dependent upon the drawing or casting of lots.[7] It is the staking of money upon a contingency or an uncertain event, which is to be rendered certain by a chance or lot. The fact that it involves a certain degree of skill does not make it any the less a lottery, if the obtaining of a prize is determined more by chance than by skill.[8] The term is undoubtedly used here in its lexicographical sense as importing a distribution of prizes by lots or chance.[9] This section discriminates between a lottery

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(1) 42 Geo. III, c. 119, s. 2; 5 Geo. IV, c. 83, s. 1.

(2) *Mancherji Kavasji*, 10 B. 97.

(3) *Madan Gopal*, (1910) P. R. No. 17, 6 I. C. 620.

(4) *Mukandi Lal*, (1917) P. R. No. 35, 41 I. C. 144. *Harder*, (1934) S. 149.

(5) *Ramanujam*, 1 Weir 452; *Cooke*, 7 Bur. L. T. 187; 23 I. C. 195.

(6) *Pedda Malla Reddi*, 50 M. 479.

(7) *Per* Scotland, C. J., and Freere, J., in *Kamakshi* v. *Appavu*, 1 M. H. C. R. 448 (449). *Munisami*, 57 M. 923; *Raj* (*A. D.*), 10 R. 232.

(8) *Peers* v. *Caldwell*, (1916) 1 K. B. 371.

(9) *Per* Hawkins, J., in *Taylor* v. *Smetten*, 11 Q. B. D. 207, followed *per* Sterling, J., in *Barclay* v. *Pearson*, (1893) 2 Ch. 154 (164).

authorised by Government, and one not so authorised. It leaves the former unaffected, and only prohibits the latter (*a*) by prohibiting the maintenance of a lottery office, and (*b*) by prohibiting the publication of advertisements concerning it. It does not condemn lottery itself as it were by a frontal attack, nor does it penalize those who take part in it. As regards the lotteries exempted, little need be said beyond that they must be authorized by Government, which term here means the Imperial or Local Government of British India.[1] A lottery authorized by a foreign Government, British or Native, is therefore an unauthorized lottery, and it would be punishable under thissection.[2]

3091. The section then extends to prohibiting the maintenance of lottery offices and publishing advertisements concerning all unauthorized lotteries whether they be British or foreign and wherever held, if they are not authorized by the Government of British India as defined in section 17. The Government authorizes certain lotteries, if they are for an object of public charity or benevolence, as for instance, the maintenance and support of orphanages, the Hospitals and the like. In such cases the act of authorization is an executive act, the propriety of which it is not for the Municipal Courts to canvass .[3] Such lotteries may then be dismissed from consideration.

3092. Unauthorized Lotteries.—The only lotteries that call for notice here' are then lotteries unauthorized by the Government of British India. The question depends upon the accurate conception of the meaning of the term " lottery." As remarked before in its legal and popular sense it means a distribution of prizes by lots or chance (§ 3091). But, though this definition looks simple enough, it is not of much use in practice. For it raises the question, are all drawings by lots, lotteries? and are all distributions by chance, the same? That it is not so, will be shown presently. Of lotteries pure and simple, this much may, however, be predicated, that they are transactions in which there is no scope for the exercise of skill, the result of which is determined purely by chance. The presence or absence of skill is then one certain test of its legality. The most barefaced example of a lottery is the following. A horse was about to run, when 155 persons subscribed £1 each upon the terms that the names of the horses should be placed on separate cards in one box, and the names of the subscribers on separate cards in another box, and two disinterested persons should then draw these cards by chance, one from each box after the other, and that the person whose name was drawn next after the name of the winning horse should be entitled to £100, out of the fund. The transaction was held to be a lottery.[4]

3093. So where a publican arranged at his beer house a sweep-stake on a coming horse race, to which sixty-one persons contributed 6*d*. each, the condition being that out of the total amount of entries the publican was to award three prizes of 15*s*., 10*s*., 5*s*. respectively on the result of the race, provided that the person who won the prizes should purchase from him a certain quantity of beer to be consumed on the premises. The winners were ascertained by a drawing at the beer house and the publican distributed the promised prizes deducting the prize of the beer stipulated to be consumed on his premises. The sweep-stake was held to be a lottery.[5]

3094. These were evidently cases in which there could be no display of skill. They were undisguised cases, of lotteries, in which the result was determined by pure blind chance. But such cases are not the only ones met with in practice. For, there are those in which there is some display of skill, but in which the result is determined not by the skill used but by chance which no skill could control. In other words, the mere exercise of skill does not convert a lottery into a fair game if it did not influence the result. Such was the case in which tickets were drawn

(1) S. 17.
(2) *Mancherji Kavasji*, 10 B. 97.
(3) This subject was amply discussed in the previous edition of this work—*see* 1 Penal Law (4th Ed.) §§ 633-678.
(4) *Allport* v. *Nutt*, 14 L. J. C. P. 272; *Gotty* v. *Field*, 15 L. J. Q. B. 408.
(5) *Hardwicke* v. *Lane*, (1904) 1 K. B. 204 *Rabindra Nath Dhar*, 143 I. C. (C.) 113.

by subscribers of a shilling, which entitled them, at all events to what was professed to be a shilling's worth of goods, and also to the chance of certain bonuses of goods of greater value than the shilling.[1] In a similar case the appellant sold packets of tea each containing a pound of tea at 2*s*. 6*d*. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. It was contended for the appellant and admitted by the respondent that the tea was good and itself worth the money paid for it, and that what the purchaser had got was his money's worth with a coupon entitling him to a present.

3095. In such cases, the question whether the packets contained coupons entitling the purchaser to a prize or the prize themselves, is immaterial. For so long as there was an uncertainty as to what they contained there was a chance, and if the purchaser took something which was a chance it constitutes a lottery. This was the view taken, in a case in which every subscriber paid Rs. 10-8 and obtained a negotiable bond for Rs. 10. On sale of 2,000 tickets, the drawings were to commence and continue at stated intervals till everyone got a prize or had had his money refunded. The scheme was held to be a lottery because all the chances were in fact paid for in the mass by the general body of subscribers.[2] So where one Hunt who kept a shop of confectionery sold penny pockets of American caramel several of which contained a half-penny in addition to a fair penny worth of sweets. These prizes were not advertised, but all the same Hunt was held guilty of keeping a lottery.[3] In such cases the fact that the seller gives a fair money's worth in addition to a chance is immaterial, for whatever the vendor may lose on one transaction he recoups himself in the end, and it goes without saying that whatever may be his protestations, the prizes are paid for by the customers and leave the seller better off than he would be without them. Such is, indeed the object of newspaper lotteries intended to increase the circulation, in which the purchaser of the newspaper receives his money's worth in addition to the chance of prize. Such newspaper lotteries are infinitely varied in their nature and character. They are mostly ingenious devices to evade the law, but their essential ingredients are the same. And they are condemned because, apart from their motive and object, they are regarded as contrary to public policy.

3096. The fact that the lottery-keeper did not directly win by the contest does not make it any the less a lottery, if it is otherwise so. This was clearly brought out in the case of a paper called *Pearson's Weekly*, the proprietor of which announced in one of its issues a competition in which the winner had to guess the right word which the proprietors had previously selected and preserved in a sealed envelope. Sterling, J. held that the competition amounted to lottery on the following grounds: (*i*) because there were a great number of possible words equally appropriate, so that it could not be said that there was the most appropriate word upon which any skill might be devoted for selection; (*ii*) consequently, success did not depend upon the selection of the most appropriate word; (*iii*) no clue was given for the selection of the word; (*iv*) the word-selection was done so arbitrarily; and (*v*) the distribution of the entrance fee was by chance. For these reasons the competition was condemned as a lottery,[4] and the Court held that though it could not administer such a fund, it was open to the competitors to recover back their money, by suit before the defendant distributed it.[5]

3097. In another case, the programme of an entertainment promised that the proprietor would at its conclusion " distribute amongst the audience, a shower of gold and silver treasure on a scale utterly without parallel, besides a shower of smaller presents, all of which would be impartially divided amongst the audience and

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(1) *Harris*, 10 Cox. 352.
(2) *Madan Gopal*, (1910) P. R. No. 17, 6 I. C. 620, *Raj* (A. D.) 10. R. 232.
(3) *Hunt* v. *Williams*, (1888) 52 J. P. 821; followed in *Vazirally*, 53 B. 57.
(4) *Barclay* v. *Pearson*, (1893) 2 Ch. 155 (164, 165).
(5) *Ib*., pp. 166-169.

given away." The seats of the audience were numbered and on conclusion of the entertainment, the proprietor distributed a number of articles to occupants of certain numbers chosen at random. It was held to be a lottery.[1] The same view was taken in another case in which the proprietors of a London evening half-penny paper called the *Sun* originated a competition for the configuration of certain spots appearing in its issues from time to time, the result being judged by comparing the competing configurations with a configuration arbitrarily made by the proprietors of the paper on a certain date, and *facsimiles* of which were to receive the promised prizes.[2] In such a case, skill may have been displayed in the configurations, but it was of no avail in winning the prize. The proprietors of another paper distributed free medals, which were numbered, and a number selected arbitrarily carried a prize which was announced in the paper. The medals were distributed to all-comers and no conditions were attached to them. The object of the scheme was to advertise the paper and increase its circulation. It was held to be a lottery.[3]

3098. In another case the owner of an automatic machine kept it in a shop for the purpose of persons resorting to the shop playing with it in the following manner. The player placed a half-penny in a slot which set the mechanism in motion and loosened a ball which the player was to catch in a receptacle, which required skill to so manipulate. If he succeeded, the machine automatically ejected a cheque, which could be exchanged in the shop for two-penny worth of sweets. The game afforded some scope for the exercise of skill, but on the average the players, who were mainly boys were successful in winning a cheque only once in every eight attempts. The Magistrate had found it to amount to a lottery. And on appeal Ridley and Avory, JJ., (Lush, J. dissenting) held that the Magistrate was within his right to find it so, it being a question of fact whether the promised reward was won by chance or by skill.[4]

3099. Lottery Distinguished from Wager.—Lottery and wager in their acute forms are both vices of the same kind. But wagering has to be distinguished from lottery, as the latter has to be distinguished from gambling, because neither wager nor gambling is an offence under the Code. In England certain classes of wagers have been from time to time declared by Statute to be illegal.[5] But in India as well as in England wagering contracts are only voidable, but not illegal.[6] A wager is the staking of money upon an uncertain event. If there be no uncertainty there cannot be a wager.[7] As such, wager is more akin to gambling than to a lottery. A wager is bad because money is therein staked upon a contingency as to which parties are in a way able to make a forecast. A lottery is worse because its result is based upon a contingency about which no calculation is possible. A wager gives rise to mutual rights and obligations. It is in fact a perfectly formed contract but it is unenforceable because " it is tainted with an uncertainty which gives it the character of the gambling contract. Lottery is denounced for the same reason, but its *modus operandi* is different. It is in fact the same game differently played."

3100. No Lottery.—It has been said before (§ 2472) that the cardinal principle underlying lotteries is the distribution of prizes by lot or chance. Such distribution may, however, take a form which may remove the taint which attaches to lotteries. In a lottery only a few benefit while the many who subscribe are the losers. When it is so, the transaction is undoubtedly a lottery. But if suppose an arrangement is made by which all in turn get a return of the amount of their contribution, it could not then be denounced as a lottery. Where, for instance, twenty persons agreed to subscribe Rs. 200 each by monthly instalments of

(1) Where Benefit Mutual.

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(1) *Morris* v. *Blackman*, (1864) 2 H. & C. 912.

(2) *Hall* v. *MacWilliam*, (1901) 20 Cox 33.

(3) *Willis* v *Young*, (1907) 1 K. B. 448; followed in *Madan Gopal*, (1910) P. R. No. 17, 6 I. C. 620

(4) *Peers* v. *Caldwell*, (1916) 1 K. B. 371.

(5) 16 Car.; c. 7; 9 Anne. c. 14; 5 and 6 Will. IV, c. 41; 8 and 9 Vict., c. 109, s. 18.

(6) S. 23, Indian Contract Act. (IX of 1872); 8 and 9 Vict.; c. 109. s. 18.

(7) *Hampden* v. *Walsh*, 1 Q. B. D. 189.

Rs. 10, on condition that each in his turn as determined by lot should take the whole of the subscriptions for a month, the agreement could not be held to be a lottery, for it is no more than a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions nor to loan of the fund is made a matter of risk or speculation. Being unattended with the risk, speculation and uncertainty which make lotteries void, such a transaction has been held to constitute a good contract,[1] unaffected by the provisions of this section.[2] The business of life, accident, marine and fire insurance companies and of building societies is conducted on this principle. And ships are underwritten in accordance with the same rule.[3]

3101. So in the case of the mutual society, a registered company, the rules laid down were these :—Members contributed a certain sum to the funds of the society upon which they become entitled to receive an advance out of its funds and to certain other benefits under the rules of its constitution. An advance was made according to the number of certificates held by him. A certificate was a document given to members upon entering the society, and certificate-holders were entitled to elect for the drawing of an advance. It was alse a rule that advances could be made in two ways, the first and every fourth one thereafter, by drawing free of any premium or interest, while those intermediate to those of the members who offered the highest premium therefor. All advances were repayable in quarterly instalments in twenty years. As such, the defendant Wallingford took an advance but which he refused to pay up. He was sued by the society and he pleaded *inter alia* that the transaction was a lottery, because its advances were made by drawings, but it was held that such a society was entirely wide and far apart from the Statute condemning lotteries.[4]

3102. Similar view was taken of a club fund in which a number of subscribers say 500, contributed one rupee per head each month, at the end of which there was a drawing by lot, the subscriber who drew the ticket was given Rs. 50 and we could withdraw from the club. The process was repeated for 49 months, and at the end of the 50th month each of the remaining 450 members were given Rs. 50 each, the shareholders divided the profit and the fund was closed.[5] Where the ingredients of this offence are present, the mere fact that the lottery was annexed to a business conducted for the benefit of public does not make it anytheless a lottery. For instance, a lottery may be organized for the benefit of a hospital, or any object of public charity, but that would not exempt the organizers from the penalty of this section, unless they receive authority from the Government as required by the section.[6]

(2) Where Result Judged by Skill.

3103. Similarly, transactions the result of which is determined by skill and not by chance are also exempt from the rule. Indeed, it is on account of this rule that lottery-keepers anxious to veil their lotteries from the condemnation of law, require from their subscribers some display of skill. So it was, that when the Law Courts pronounced against the legality of the missing word competition, the promoters lighted upon another scheme of the missing line competition, which was called the limerick competition of jingling rhymes, in the composition of which some skill was presumed to be necessary. But the objections which existed to the missing word competition equally applied to the limerick competition, and it was likewise condemned. But newspaper enterprise will never cry beaten, and on the wake of these competitions there have arisen a host of others in which the object which is

(1) *Kamakshi* v. *Appavu*, 1 M. H. C. R. 448 (450); followed in *Muthu Vijaya* v. *Thandavaraya*, 22 M. 214.

(2) *Muthu Vijaya* v. *Thandavaraya*, 22 M. 213; following *Kamakshi* v. *Appavu*, 1 M. H. C. R. 448.

(3) *Per* Lord Hatherley in *Wallingford* v. *Mutual Society*, 5 App. Cas. 685 (701); followed in *Shanmuga* v. *Kumarswamy*, 48 M. 661.

(4) *Per* Lord Hatherley in *Wallingford* v. *Mutual Society*, 5 App. Cas. 685 (701, 702); *O'Comer* v. *Bradshaw*, 20 L. J. Ex. 26.

(5) *Shanmuga* v. *Kumarswamy*, 8 M. 661.

(6) *Universal Mutual Aid and Poor, Houses Association Ltd.*, v. *A. D. Thopa Naidu*, 56 M. 26; *Udumalpeth Nidhi Ltd.*, 57 M. 844.

of course the same, but which is masked with crafty devices to evade the Statute by introducing into the competition the element of skill.

3104. Such was the case of the newspaper called *Turf Life* which issued a free coupon offering £100 for placing the first four horses in a coming horse race. The coupon issued was free but two shillings were payable in respect of the competition. The defendant, who was a news agent and received the moneys paid on account of the competition, was prosecuted under the Lottery Act ; but Pollock, B., held that the transaction did not amount to betting[1] and in holding so he relied upon the following remarks of Day, J., made in a similar case : "Clearly it is not a bet at all. Any person who gets hold of one of these pieces of paper becomes entitled, according to the terms of this arrangement to get a prize of a large sum of money in the event of his succeeding in guessing the names of the winners of the six particular races ; it is really not a bet ; it is a scheme—a device—for the purpose, no doubt, of furthering the business which the respondent carries on, enabling him to sell more largely this Handicap Book of Racing Record with which these tickets or coupons are issued. In my judgment it is certainly not a bet"[2] The same view was taken in another case in which the defendant published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week, competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer. It was held that as the competition was one, the result of which did not wholly depend upon chance, it was not a lottery.[3] But where though the prediction of the price of opium on a certain day did enter into the calculation of the prize it had no real value in determining the prizes, the transaction was held to be a lottery.[4]

(iii) No Drawing.

3105. Though a scheme may amount to lottery still a person cannot be convicted under this section, unless there is a drawing of a ticket or a number in any such lottery. As already stated, the term lottery is used in a physical sense of extracting the lucky number, (§ 3089) by some process, whether of ballot or a box, and it is this lottery which the law penalizes. So where a trader, anxious to sell away his goods, enclosed a number of five-rupee notes in some packets of cigarettes, similar blank papers being enclosed in the rest, so that a purchaser of a packet had no means of knowing whether his packet contained a note, the court held the scheme a lottery, but as there was no drawing within the meaning of this section, the accused was acquitted.[5]

Paragraph 2.

3106. Publication of Lottery.—This second paragraph punishes the publisher of any proposal to pay any sum, or to deliver any goods, or to do or forbear anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number of figure in any such lottery. The word publication means making a thing available to the public or any section of the public. It does not matter in what way it is done, *e. g.*, delivery of a ticket-book of a lottery to another person, for the sale of tickets in such publication.[6] The "any such" lottery of course means the lottery not authorized by Government as is referred to in the first paragraph.[7] And as the lottery there referred to includes any lottery unauthorized by the British Indian Government, it follows that the publication of a proposal

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(1) *Stoddart* v. *Sagar*, (1895) 2 Q. B. 474 (480) ; followed in *Hal* v. *Cox*, (1899) 1 Q. B. 198 (200).

(2) *Caminada* v. *Hailton*, 60 L. J. (M. C.) 116 ; followed *per* Pollock. B., in *Stoddart* v. *Sagar*, (1895) 2 Q. B. 474 (480).

(3) *Hall* v. *Cox*, (1899) 1 Q. B. 198.

(4) *Mukandi Lal*, (1917) P. R. No. 35, 41 I. C. 144.

(5) *Vazirally* 53 B. 57, following *Mukundi Lal*, 41 I. C. (L.) 144, and *Madan Gopal*, 6 I. C. (L) 620.

(6) *Diwanchand Jolly*, (1930) L. 81.

(7) *Mancherji Kavasji*, 10 B. 97.

of a lottery, though authorized by the British Government of that Company, *e. g.*, a lottery on Derby Sweep[1] or on the Melbourne Cup Race is illegal and punishable under this section.[2] The section holds the publisher responsible, on the mere fact of publication. It says nothing of intention or knowledge. But as has been seen before (§ 2774) the presence of *mens rea* is not a necessary pre-requisite of an offence under this chapter, and the same would probably be the view taken of an offence under the section. The publisher is bound to see that the lottery to which he gives advertisement is authorized, and if he is careless or negligent he could not afterwards be heard to say that he could have learnt the truth if he had enquired, but he did not enquire, and should therefore be exonerated. Of course, the case would be different if an advertisement crept into a newspaper inadvertently, and the publisher expunged it as soon as he became aware of it. In this connexion it may also be noted that the printer and publisher stand in a position of further liability in consequence of the provisions of the Printing Presses and Newspapers Act, 1867[3] under section 4 of which no person can keep in his possession any press for the printing of books or papers without subscribing a declaration stating that he has a press for printing at a certain place to be therein specified. A similar declaration is required from the printer of a periodical containing public news or comments on public news.[4] Under section 8 the declarant may at any time file another declaration stating that he has ceased to be the printer or publisher or both, of the periodical. The effect of these declarations is thus then stated :—

"7. In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, shall be held (unless the contrary be proved) to be sufficient evidence as against the person whose name shall be subscribed to such declaration, that the said person was printer or publisher, or printer and publisher (according as the words of the said declaration may be) of every portion or every periodical work whereof the title shall correspond with the title of the periodical work mentioned in the declaration."

3107. The effect of this declaration is to make the printer or publisher responsible for everything appearing in the periodical.[5] And it *prima facie* has been held in Bombay that if *A* sends an advertisement *B* so that both *A* and *B* would be deemed to "publish" the advertisement so that both may be convicted for its publication.[6] This is enough to fix responsibility upon the accused. The next question is: Did he publish a proposal (*i*) to pay any sum, (*ii*) or to deliver any goods, or (*iii*) or do or forbear doing anything for the benefit of any person, on any event of contingency relative or applicable to the drawing of any ticket, lot, number or figure in any unauthorized lottery? The delivery or payment need not be promised by the publisher. His liability depends simply upon publication. If he publishes news that *A* shall pay to *B* a sum of money as his prize drawn in a lottery he is liable, though he may have done nothing more. And the proposal to pay need not be *in præsenti*, for it is equally within the mischief of the rule to publish an advertisement, containing the offer of a prize to be drawn for on a future day and subject to certain conditions.

3108. An announcement appeared in a London half-penny evening newspaper called the *Sun* offering prizes for configuration of certain spots appearing in its certain issues. It was stated that the competition should close on a certain day when an announcement would be made of the exact configuration of certain spots which were to be the winning spots, and those who sent configurations corresponding to the winning spots were to receive certain prizes. The winning spots were arbitrarily selected by the proprietors of the newspapers, and the winning of the prizes, therefore, wholly depended upon chance. The scheme

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(1) *Chiman Lal*, 27 Bom. L. R. 333, (1925) B. 243.
(2) *Mancherji Kavasji*, 10 B. 97.
(3) Act XXV of 1867.
(4) *Ib.*, s. 5.
(5) *Phanedra Nath Mitter*, 35 C. 945.
(6) *Mancherji Kavasji*, 10 B. 97, following *per* Lord Kenyon in *King* v. *Smith*, 4 T. R. 414.

was, therefore, held to be a lottery, and its publication was held to constitute a publication of a proposal and scheme for a lottery.[1] In another case, the accused kept a restaurant in which he exhibited placards headed "Great Eastern Money Club," "White Race Club for the Radcliffe Cup," etc., for which he sold tickets. He delivered prizes to those whose numbers were drawn for prizes, but there was no evidence to connect him with any drawing by lottery or otherwise for the prizes. But the facts were held to be sufficient to support his conviction for keeping a lottery.[2]

3109. Persons Liable.—Two classes of persons are liable for this offence (*i*) the keeper of a lottery office, and (*ii*) its publisher (§§ 3091-3108). The office or place, keeping of which is punishable under the first paragraph of this section, is a place or office where the actual drawing of the lottery takes place. Keeping a small office for doing preliminary business and correspondence and not intended and fit for the drawing purpose is not indictable under this part of the section.[3] It is not, however, necessary that the office or place should be used exclusively for drawing a lottery,[4] or that any lottery be actually drawn.[5] A person may "keep" an office though he may not be its sole occupant. In certain premises tenanted by a social club, lottery was drawn monthly and the members of the committee were charged under this section. It was held that they were liable, as they exercised full control over the affairs of the Club, and that they could not shift their responsibility on to the general body of members or to the club as an abstract entity.[6]

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(1) *Hall* v. *MacWilliam*, (1901) 20 Cox. 33.
(2) *James Crawshaw*, (1860) 8 Cox. 375.
(3) *Madan Gopal*, (1910) P. R. No. 17.
(4) *Jenks* v. *Turpin*, 13 Q. B. D. 505; *Cooke*, 7 Bur. L. T. 187, 23 I C. 195..
(5) *Ramaswami*, 44 M. L. J. 505, 59 1. C. 272.
(6) *Jenkis* v. *Turpin*, 13 Q. B. D. 505; *Cooke*, 7 Bur. L. T. 187, 23 I. C. 195; *Barrett* v. *Flynn*, (1916) 2 Jr. R. 1.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

3110. Topical Introduction.—The Romans were religious cynics and tolerated all religions and left alone those professed by races brought under their subjection. This policy has been adopted by all rulers who profess religious neutrality but, at the same time, insist that followers of rival religions shall not make religious beliefs of others a target for their hostility. This chapter has been enacted to subserve that object.[1]

Injuring or defiling place of worship, with intent to insult the religion of any class.

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

3111. Analogous Law.—The section makes criminality depend upon intention. In its general purpose it follows the English Law under which quarrelling, chiding or brawling in churches or churchyards have always been esteemed very heinous offences as being very great indignities to the Divine Majesty to whose worship and service such places are immediately dedicated.[2] Order in them is now enforced by several Statutes passed for the purpose,[3] but it will serve no useful purpose to refer to them here in detail as they are mostly Statutes passed with the object of preventing disturbance in churches,[4] disturbing, dissenting, congregation,[5] obstructing or assaulting a clergyman or other minister in the discharge of his duties,[6] breaking church windows,[7] or quarrelling, chiding or brawling,[8] smiting or laying violent hands,[9] in a consecrated place.

3112. The cases decided in England have also strict reference to the interpretation of these Statutes, and they will, therefore, be only referred to whenever they elucidate or illustrate a similar point arising under this chapter. They are otherwise inapplicable.

3113. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is bailable but non-compoundable and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

3114. Proof.—The points requiring proof are :—

(1) That the accused destroyed, damaged or defiled a place or an object.
(2) That the place or the object was held sacred.
(3) That it was held sacred by some class of persons.
(4) That he did as in (1) with—
  (*a*) the intention of insulting the religion of any class of persons mentioned in (3); or
  (*b*) with the knowledge that any class of persons is likely to consider such destruction, etc., as an insult to their religion.

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(1) Note, J. appended to this section, printed in 1, Penal Law (4th Ed.)at p. 1457, ss. 2922-2923.
(2) 1 Hawk, P. C., c. 63, s. 23.
(3) 5 & 6 Edw. VI, c. 4; 9 Geo. IV. c. 31.
(4) 23 & 24 Vict. c. 32, s. 2.
(5) 1 Will. & M, c. 18, s. 18.
(6) 24 & 25 Vict., c. 100, s. 36.
(7) 2 Chit. Cr. L. 23.
(8) 5 & 6 Edw. VI, c. 4.
(9) *Ib.*, s. 2 ; Geo. IV, c. 31.

3115. Charge.—The charge should run thus:—

"I (*name and office of Magistrate, etc.,*), hereby charge you (*name of accused*) as follows:—

"That on or about the——day of——at——you destroyed (*or* damaged *or* defiled) a place of worship, namely——(*or* an object namely——) held sacred by a class of persons, namely——(*mention the class*) with the intention of thereby insulting the religion of that class of persons, [*or* with the knowledge that any class of persons, namely—was likely to consider the said destruction (*or* damage *or* defilement) as an insult to their religion] and thereby committed an offence under s. 295 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3116. Principle.—This section is framed to punish the intentional "wounding the religious feelings" of a class of persons by desecrating their place or object of worship. The professed religious neutrality of the Government makes it only necessary that it should not be the censor of its subjects' religious views, and it is a principle in consonance with the highest political expediency that the head of the State professing a religion different from its subjects should exercise the utmost religious toleration. Any other policy will be the sure precursor of civil war and perennial bloodshed, as the past history of India amply bears witness to.

3117. Meaning of Words.—"*Defiles any place of worship*": The word "defiles" does not only mean anything which will make the object of worship unclean as a material object, but it extends to acts done in relation to the object of worship which would render such object ritually defiled, *e.g.*, entering a Hindu Temple with boots on.[1] "*Or any object held sacred*": does the word "object" include an animate object, such as, a Mahant, for instance? The Courts are divided on the subject (§ 2126). But the word would seem to be restricted to inanimate objects, such as idols or the like. "*With the intention of thereby insulting*": An insult taken but not intended does not then suffice to constitute the crime. "*Any class of persons*": This phrase means any group of persons of one persuasion. The "class" may be composed of only a limited number, but it must not be composed only of one or two persons.

3118. Desecrating Religion.—This section punishes a person who intentionally insults a religion by destroying, damaging or defiling any place of worship or any object held sacred by any class of persons. The first thing necessary is intention. An insult given, but not intended, does not suffice to render a person liable, unless it was given with the knowledge of the likelihood of a class of persons taking the act as an insult. The insult must be by destruction, damage or defilement, and it must be to a place or an object of worship.

3119. In the first place, then, there must be the intention to insult, or at least the knowledge of the likelihood of the act being taken as an insult. Such intention or knowledge must in the first place be judged by the act itself. It may then be explained by the other acts and contemporaneous or other circumstances, words uttered or gesture assumed, threat given or the determination expressed—in short, by anything by which it is permissible to infer a man's knowledge or intention. The accused, certain Hindus, were in a case charged at the instance of certain Mahomedans under this section for dismantling their mosque. It appeared that the mosque which was a very small building was in charge of no one in particular, and had fallen into ruins. The accused Narain Das whose house adjoined it removed its material with the help of one or two Mahomedans, with what object it was not established. Broadhurst, J., held that the facts did not warrant a conviction under this section.[2] In another case the accused a Hindu had inserted the rafters of his roof, for convenience in the walls of a mosque. It was held that

(1) Intention to Insult.

(1) *Per* Muttusami Ayyar, J., in *Sivakoti Swami*, (1885) 1 Weir 253; contra, *Nga Po San*, (1894) 1 U. B. R. 199.

(2) *Narain Das*, (1883) A. W. N. 39.

though it might have damaged the mosque the accused must be acquitted of that intention.[1]

3120. In another case the accused, who were low caste servants of a Hindu worshipper were convicted of having defiled a temple in which they put up. It was held that being themselves Hindus they feel at least as much reverence and fear of the idol of the temple as any other Hindus, and as they had put up there for convenience having accompanied their mistress who had visited the idol in fulfilment of a vow there was nothing in their conduct to indicate any desire or intention inconsistent with her own object upon which they could be convicted.[2] As intention of knowledge is a part of the definition of the offence, it is on the prosecution to establish it by clear and cogent evidence. The fact that a certain act not pleasing to a sect is done by a person, does not entitle it to take up cudgels against the actor, unless it is apparent or proved that his act was done on purpose to insult it or had in fact that effect, and the accused could have foreseen it.

3121. So were Ratna, a Hindu, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan Fakir held in veneration by some of his co-religionists and the act was done in secret and at night, the Court held this section inapplicable, having regard to the secrecy and the time though the accused was convicted under s. 297 for trespassing into a place of sepulchre.[3] In another case the accused a gold-smith by caste, performed a ceremony called *abishekam* by pouring cocoanut oil over the *lingam* of Siva. It was held that the act of the accused would amount to an offence under this section, if the idol could not be touched by any one except the priests, and if the object of the accused in performing the ritual was to ridicule openly the established custom.[4]

3122. The intentional act must be directed to the destruction, damage or defilement of "a place of worship or any object held sacred by any class of the community." The common examples of such places of worship, are the churches, temples, kyaungs,[5] mosque and synagogues. Indeed, any place set apart or consecrated for the worship of deity becomes a place of worship, whatever may be the place or the deity worshipped. The Hindus consecrate such places by placing a stone painted with ochre to usually mark the spot. The Mahomedans fly a green flag from places such as tombs, darghas and the like which they esteem as objects of veneration. In all countries burial grounds, cremation grounds and the church-yard are esteemed as objects of veneration. They are therefore, sacred objects within the meaning of the section. The Hindus regard the water of certain rivers such as the Ganges and the Nerbudda as sacred. There are doubtless many local streams which similarly exact from them their tribute of sanctity. But in all such cases it is for the prosecution to prove that the object defiled was a place of worship or a sacred object. In one case the accused having had a quarrel with a relative, threw a basket containing cooked meal, such as fish, fowl, rice and the like into a well. He was convicted under this section for desecrating the well. But there was no evidence that the well was held in esteem as a sacred object, in the absence of which the accused's conviction was naturally quashed.[6]

(2) The Place or Object must be Sacred.

3123. The question whether a thing is a place of worship, is a question of fact. If it is in fact so considered by a class of persons—it will be so treated, whatever may be its nature or character. It may be a steep hill, or an uncouth rock, a flamboyant peepul tree or a crawling vermin. If a class of persons are found to hold it in esteem as an object of veneration, it is a sacred object the desecration of which is punished by this section.

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(1) *Soban Ram*, 3 L. L. J. 247, 67 I. C. 586.
(2) *Zingoo*, 7 C. P. L. R. 45.
(3) *Ratna Mudali*, 10 M. 126.
(4) *Shivakoti Swami*, (1885) 1 Weir 253.
(5) (1894) U. B. R. 198.
(6) *Waman Lakshman*, (1898) B. U. C. 979; *Gunpatya*, 5 C. P. L. R. 20.

What is a Sacred Object.

3124. The term "a place of worship" is then clear and ought to present no difficulty in its construction. But what is a sacred object. It is clear that such an object may, but need not be worshipped. An idol of a Hindu god is a sacred object and it is worshipped. The Mahomedan esteems the Koran as sacred, but he does not worship it. There is, again, a difference between objects which are sacred, and those that are merely venerated though they are not sacred. So Brandt, J., observed: "There is a distinction, not arbitrary, between objects which are objects of respect and even veneration, and objects which are held sacred; as an example of the former, I may refer to a place of sepulchre (not actually consecrated as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity, or where an idol or altar is kept; and such distinction appears to have been kept in view by the Legislature, for, while section 295 deals with the latter class of objects and places, section 237 deals more specially with trespasses on places of sepulchre and places set apart for the performance of funeral rites and as depositaries for the remains of the dead."[1]

3125. For instance, a tomb of a Mahomedan saint is an object of veneration. But it is not a sacred object, unless there is evidence to shew that it was consecrated, or that it had begun to be so treated by Mahomedans. The mere fact that they preferred to say their prayers there does not make it a sacred place, for Mahomedans do as a rule resort to gardens and enclosures where their ancestors or holy men have been buried for the purpose of saying their prayers; but that alone does not make the place sacred.[2] Formal consecration is, of course, not necessary to make a place sacred. The section is enacted to respect the feelings of the different communities, and it makes that the test for judging of the sacredness of an object. If it is regarded sacred by a class of men, no matter why and how, it is a sacred object for the purpose of this section.

Should the "Object" be Inanimate.

3126. But does the word "object" only apply to an inanimate object, or does it extend even to an animate object, such as a priest, a fakir, a cow or a monkey? According to the view taken in Calcutta[3] and Allahabad,[4] the word is intended to be applied only to inanimate objects *ejusdem generis* with a place of worship. The contrary was at one time held by the Chief Court of the Punjab,[5] but it is a view which has nothing in the section to commend it. In the first place, an animate object, such as a cow, is designated an animal in section 47 of the Code, and it must be presumed that this section would have used that word, if it had been intended to apply it to animate objects. In the second place, the words "destroys, damages or defiles" would be wholly inapplicable to an animal. They are strictly speaking only applicable to an inanimate object, such as an idol, or the like. Thirdly, the collocation of the words leaves no doubt that the word "object" has been used *ejusdem generis* with "any place of worship." Lastly, no one speaks of an animal as an object, and the contrary view, therefore, places a constrained construction upon the word at variance from its normal meaning. It might be urged that the extended sense was intended by the authors who wrote—"We have provided a punishment of great severity[6] for the intentional destroying or defiling of places of worship, or of objects held sacred by any class of persons. No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult, attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have, therefore, empowered the Courts, in cases of this description,

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(1) *Ratna Mudali*, 10 M. 126 (127, 128).
(2) *Ib.*, p. 128.
(3) *Romesh Chunder Sanyal* v. *Hiru Mundal*, 17 C. 852.
(4) *Imam Ali*, 10 A. 150, F. B.
(5) *Hakim*, (1884) P. R. No. 27; *Bahadur*, (1888) P. R. No. 34: overruled in *Ali Muhammad*, (1918) P. R. 10 F. B., 44 I. C. 330.
(6) The framers had provided the sentence of seven years' rigorous imprisonment.

to pass a very severe sentence on the offender."[1] But as Norris, J., pointed out "what caused the tumult in Benares was not the slaughter of the cow, but its slaughter in a sacred place."[2] The cases of this description must then refer to desecration of sacred places and they do not support the contention for inclusion of animate objects. The view taken in the Punjab is, therefore, clearly untenable, while that taken in Calcutta and Allahabad looks more natural and in conformity with the syntax. The question is an important one, because if the slaughter of a cow or a bull in view of the Hindus is not punishable under this section, it is not punishable also as a public nuisance,[3] and it may then be, that in that case it would not be punishable at all.

(3) The Place or Object must be Sacred to a Class.

3127. Thirdly, the place or object must be sacred to a class of persons. This phrase naturally excludes the case of a family *Thakur*. It only applies to objects held sacred by a community. The facts that the community worship a certain god, does not make all idols of that god, whether used or disused, sacred. The very thing defiled must be proved to be held sacred by a "class of persons." That phrase means a sect or group of persons belonging to one religious persuasion. For instance, the Hindus, Mahomedans, Christians, Parsees and the Jews are all persons each forming a class by themselves. But the term is not restricted in its use to such well established religions. Any conglomeration of men agreed on a certain belief will be treated as a class apart for this purpose. Any religious sect, however few in number may be its followers, is a distinct class for this purpose, and their religious places are objects under the protection of this section.

(4) "Destroys, damages or defiles."

3128. Lastly, the act of desecration intended and committed must be of the nature stated in the section. It must be by destroying, damaging or defiling such a place of worship or a sacred object. The words "destroys" and "damages" evidently refer to and have been held only to refer to inanimate objects (§ 3126). But they have been understood in the Punjab to include also the killing and maiming of sacred animals such as a cow or a bull.[4] A similar uncertainty has gathered round the meaning of the word "defiles." It has been, on the one hand, held to mean unclean as a material object *ejusdem generis* with "destroys and damages"[5] and on the other, it has been held not to be so restricted in meaning, but to extend also the acts done in relation to the object of worship which would render such object ritually impure.[6] That the word is in common parlance used in both these senses is undoubted. And there is no reason to restrict its use to the narrow sense rather than the other sense in which its use is probably more appropriate.

3129. Class v. Class.—This section equally applies whether the offence is committed by a person professing one religion against those belonging to a different persuasion, or is committed against those who belong to the same religion. Indeed, a Hindu heretic has no more justification to be an iconoclast than a Mahomedan or a Christian, for the effect upon the orthodox community is in each case the same; *a fortiori*, the section applies to those belonging to different sects, as for instance, Shiahs and Sunnis amongst Mahomedans and Vaishnavas and Sarojis amongst the Hindus.[7]

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(1) Note J. It may be added that this section remains exactly as it was originally drafted as clause 275.

(2) *Romesh Chunder Sanyal* v. *Hiru Mundul*, 17 C. 852 (859, 860).

(3) *Byramji Dalji*, 12 B. 437; *Zakhuddin*, 10 A. 44.

(4) *Hakim*, (1884) P. R. No. 27; *Bahadur*, (1888) P. R. No. 34.

(5) *Per* Parker, J., in *Bheema Goundan*, (1891) 1 Weir 256; *per* Burgess, J. C., in *Nga Po San*, (1886) 1 U. B. R. 199.

(6) *Per* Muttusami Ayyar, J., in *Sivakoti Swami*, (1885) 1 Weir 253, followed in *Bheema Goundan*, (1891) 1 Weir, 256. To the same effect *Rutna Mudali*, 10 M. 126; *Kuttichami*, 41 M. 930; *Atmaram*, 76 I. C. (N) 299.

(7) *Per* Mahmood, J., in *Imam Ali*, 10 A 150, F. B.; *Sivakoti Swami*, (1885) 1 Weir 253.

295-A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[1]

Deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs.

3130. Analogous Law.—This section was added in consequence of the abortive prosecution of one Rajpal who had published a pamphlet called the *Rangila Rasul* or the "Amorous Prophet," in which he described the incontinence of the Prophet Mahomed. Rajpal was convicted under s. 153-A, but the Lahore High Court quashed his conviction, holding that an attack of the personal character of the founder of a religion could not expose the accused to the penalty for an offence directed against class hostility.[2] The Mahomedans set up a violent agitation to remove the defect in law resulting in the addition of this section.

3131. Procedure and Practice.—No Court shall take cognizance of this offence except on the complaint or authority of the Governor-General in Council, or the Local Government, or some officer empowered by the Governor-General in Council in this behalf.[3] Warrant should issue in the first instance. The offence is non-bailable and non-compoundable; it is triable by the Court of Sessions or Presidency Magistrate. The Local Government may search for, seize and hold, forfeit any publication offending against the section.[4]

3132. Proof.—The points requiring proof are :—

(1) That the accused insulted or attempted to insult the religion or the religious beliefs of a class of His Majesty's subjects ;
(2) That he did so deliberately, and
(3) Maliciously, and
(4) With intent to outrage the religious feelings of any class, etc.

3133. Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

"That on or about the——day of——at——you——insulted or attempted to insult the religion of——or the religious beliefs of——in the following words (spoken, or written by you) namely——and that you used those words with deliberate and malicious intention of outraging the religious feelings of——a class of His Majesty's subjects, to wit——and you thereby committed an offence, punishable under s. 295-A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3134. Principle.—The Penal Code punishes defamations of various kinds—that of the State being punishable under s. 124-A, of a class under s. 153-A, of a person under s. 500, and of religion under this section. Under English Law, religious libels are technically punishable because England is professedly a Protestant country and its King the Defender of that Faith ; but in practice they are never taken notice of unless they endanger the public peace. In India where the Government is, as regards religion, professedly neutral, there can be no law of blasphemy as such, and it is apprehended that all that the section is intended to safeguard against is such deliberate and maliciously intentional outrage on the religious feeling of the people as is likely to endanger the public peace. This is insured by the initiative for prosecution being reserved to Government.

3135. Meaning of Words.—"*Deliberate and malicious intention*" : An act may be deliberate without being malicious and it may be malicious without being deliberate ; since it may be reckless without being intentional. What is required to constitute the offence is the presence of both. In other words, it is only a cold,

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(1) Added by Act XXV of 1927, which came into force on the 22nd September 1927.

(2) *Rajpal*, (1924) L. 590 ; *contra* in *Devi Sharan*, (1927) P.L.R. 497; *Kali Charan Sharma*, (1927) A. 649.

(3) S. 196, Criminal Prccedure Code, as amended by s. 3 of Act XXV of 1927.

(4) S. 99-A. Criminal Procedure Code, as amended by s. 3 of Act XXV of 1927.

calculated and malicious lampoon on one's religion that exposes one to the penalty of this section. "*Outraging the religious feeling*": It will not suffice if the intention was merely to insult the religion without outraging the religious feeling of a community. Even the outraging of the religious feeling of some members of a class would not suffice : since what the offence contemplates is that the feelings of "the class" as a body should be outraged. It is a question of fact to be decided with due advertance to the facts of each case.

3136. Insult to Religion.—This section does not penalize a mere insult to religion : what it does penalize is an insult which is both deliberate and maliciously aimed at wounding the religious susceptibilities of its followers. The underlying motive is, of course, the preservation of the public peace. As such, it is seldom that an offender would not equally contravene the provisions of ss. 153-A, 295 or some other section of the Code.

Disturbing religious assembly.

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[***Voluntarily***—s. 39.]

3137. Analogous Law.—This section closely corresponds with the provision made in English Law by the Statute (1 Mary, Sess. 2, c. 3, s. 2), against disturbances during the time of divine service. It was, however, explained that, in order to be punishable, the disturbance must be caused 'voluntarily.' It was added, that as the missionaries would resent the intrusion of Hindus and Mahomedans to impugn their faith, so would the latter by the intrusion of the missionaries. And in either case the resentment would not be any the less because the intruder had come to argue with them with calmness and moderation.[1]

3138. This section only applies to disturbance caused to a religious assembly. A similar disturbance caused to a *funeral* party is punishable under the next section,

3139. Procedure and Practice.— This section is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the Presidency Magistrate or a Magistrate of the first or second class.

3140. Proof.—The points requiring proof are:—

(1) That there was an assembly.
(2) That it was engaged in the performance of religious worship or ceremonies.
(3) That it was lawfully so engaged.
(4) That the accused caused the disturbance to the assembly when so engaged.
(5) That he did so voluntarily.

3141. Charge.—The charge should run thus :—

"I (*name and office of Magistrate, etc*) hereby charge you (*name of the accused*) as follows:—

"That or about the——day of——at——you——voluntarily caused disturbance by (*specify the act*) to an assembly, to wit——who were lawfully engaged in the performance of religious worship (or religious ceremornies) and you thereby committed an offence under section 296 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3142. Disturbance of Religious Assembly.—This section only punishes a disturbance (*i*) *voluntarily* caused to an (*ii*) assembly *engaged* in religious worship or religious ceremonies, which must be (*iii*) lawful, that is to say, it must be doing what it has a right to do.

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(1) 2nd Rep., s. 260.

3143. In the first place, then, what is a disturbance? It is evidently used here for the phrase "molest, let, disturb, vex or trouble, or by any other unlawful ways or means disquiet or misuse any assembly.[1] The word does not imply that the worship or ceremony should be actually stopped or interrupted, or prevented from being carried on.[2] All it means is that the peace or quiet of the assembly should not be interfered with, whether by discordant sound, noise or otherwise. And in order to constitute this offence, such disturbance must be caused voluntarily intention to insult the assembly, or knowledge that it will feel insulted is not necessary, beyond such intention and knowledge as is implied by use of the word "voluntarily." A person can scarcely be said to do an act voluntarily unless he knew that the result caused was likely.[3] Consequently, no one can be said to disturb a religious assembly voluntarily unless at least there were circumstances from which it would be justifiable to infer that he at the same time knew that his act was likely to cause the disturbance. But probably, something more than a mere knowledge of the disturbance is required to complete the act as done "voluntarily."

(1) Disturbance must be Voluntary.

3144. It was so held in the case of jointprayers offered by the four sub-sects of Mahomedans namely, Shafai, Malik, Hanafi, founded by the orthodox Imams, of whom the first three close their prayer with a word *Amin*, spoken aloud, while the Hanafis say that word in a whisper. It was held that the mere fact that the loud exclamation of one disturbed the other gave the dissentients no right to restrain the other.[4] Indeed, any other view would have the effect of placing the minority absolutely at the mercy of the majority. At the same time, it goes without saying that if in such a case the word is uttered not *bona fide* in the honest exercise of conscience, but *mala fide* for the purpose of disturbing others engaged in their devotions, the case would be widely different.[5]

3145. And the same rule apply to worshippers in a Hindu temple. All worshippers have an equal right to recite *mantras*, and the fact that the recitation of one is overheard by and causes disturbance to the others cannot deprive the former of his communal right to a joint worship. The rule, however, would be different if the temple was a private one in which the priests had the exclusive right of chanting *mantras*. But apart from such privilege, which must be asserted and proved by those who rely upon it, no worshipper, whether a Hindu or a Mahomedan, can arrogate to himself the right of controlling the mode of performance of prayers by the others. And any disturbance the latter may cause would not then be "voluntary" within the meaning of this section. The case of denominational Christian churches is, of course, different. There is no one but the officiating ministers who has the right to preach or pray, and the audience must presumably conform to the rituals of the church they elect to attend. But the fact that a disturbance is caused does not necessarily make the accused liable for it, for in order to fasten upon him the liability imposed by this section, it should be a disturbance in every case caused voluntarily which according to the English Statute[6] mean "willingly and of purpose, maliciously, contemptuously or by any other unlawful ways or means."

3146. The plaintiff in a case presented a notice to the Parish clerk, and desired him to read it. After consulting the minister the clerk refused to do so. Thereupon the plaintiff, while the minister was walking from the communion table to the vestry-room and whilst no part of the service was going on, stood up

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(1) Mary, Sess. 2. c. 3, 2.
(2) *Selvarajulu Naicker*, (1889) 1, Weir 259; *Krishnachari*, (1889) 1 Weir 259.
(3) S. 39 *Ill.*; See *per* Banerjee, *J.*, in *Jaipal Gir* v. *Dharamapala*, 23 C. 60.
(4) *Ataullah* v. *Azimullah*, 12 A. 494 (502 506),; F.B.; *Janu* v. *Ahmudullah*, 13 A. 419, F. B.; *Vijiaraghva Chariar*, 26 M. 554, F. B.
(5) *Ramzan*, 7 A. 461, F. B., explained *per* Straight, J., in *Ataullah* v. *Azimullah*, 12 A. 494 (503), F. B.; *per* Mahmud, J., in *Janu* v. *Ahmadullah*, 13 A. 419 (422) F. B.
(6), Cited in 1 Penal Law (4th Ed.) p. 1467

in his pew and read aloud a notice that a vestry would be held to choose church wardens, for which he was ordered into custody, whereupon Abbot, C. J., said: "Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mary, Sess. 2. c. 3, warranted his detention in order that he might be taken before a justice."[1] But in another case, where in a contest for situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was held to be a diturbance of a dissenting congregation, although the Statute prohibiting disturbance was intended primarily to apply to persons who opposed a form of worship inconsistent with their own.[2]

3147. It is, of course, not necessary for the purpose of this section, that the accused should have had an active intention to disturb religious worship. It is sufficient, if knowing they were likely to disturb it by that music or otherwise, they took the risk and did actually cause disturbance. For instance, while every one has the right of marching in procession along a public way, no one has the right to insist that he shall play music while passing a mosque at stated hours devoted to prayers if it has really the effect of disturbing the assembly. Where, therefore, the District Magistrate had ordered that during certain fixed hours no Hindu shall lead a procession playing music in front of a mosque, but nevertheless the accused did play music during those hours, in convicting them under this section, the Court held that the accused had in fact disturbed the assembly in their prayers and their act was voluntary as they had acted in spite of a previous warning.[3] (§ 3150).

No Right in Public Places.

3148. Again, the right to security from molestation, during the performance of a religious service, depends upon the right to meet and worship in a quiet place being exclusively vested in the assembly. They have not the same right when they engage in worship in an unquiet place open to all the public, such as a thoroughfare.[4] As regards the right to non-disturbance in a public place, the right, if any, approaches merely to this, that a person may use a public place for which it was originally intended, and no one has a right to divert it to other uses. A public street cannot be converted into a hall nor a public park into a meeting room. The one is intended as a public highway, the other as a ground for public recreation, and no one resorting to it for the purpose of prayer can enforce the discipline of his creed upon those who may be using it for its legitimate purpose. Indeed, as will be prsently shewn, such a user may be unlawful, so that a disturbance even though voluntary would not be subject to the penal visitation of the section.

3149. It is, however, open to any body of men to obtain permission of the authorities in whom is vested the right to control public traffic, to march in procession with fllags flying and music playing, and any disturbance of it would then become unlawful entailing the penalty prescribed by this section.[5] Such was the case of certain Lodhas who had obtained permission to carry flags through a certain street to their temple as a part of their religious ritual. The accused attacked them and he was convicted of this offence, as the Court held him to have disturbed an assembly while lawfully engaged in the performance of religious worship.[6] A body of men disturbing such procession may be guilty of rioting.[7]

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(1) *Williams* v. *Glenister*. 2. B. and C. 699.

(2) *Hube*, 5 T. R. 542. The abstract in 2 R. R. 669 isincomplete.

(3) *Public Prosecutor* v. *Sunku*, 7 M. L. T. 430, 6 I. C. 744; *Muthialu* v. *Baupan*, 2 M. 140; *Sundram*, 6 M. 203.

(4) *Vijiaraghava Chariar*, 26 M. 554, F. B.; *Dhalu Ram*, (1909) P. R. No. 33, 2 I. C. 981.

(5) *Manzur Hosan* v. *Mhd. Zamon*, 47 A 151 P. C.

(6) *Masit*, 34 A. 78; *Vijayaroghava*, 26 M. 554, F. B.; *Kandasawmy*, v. *Subraya*, 32 M. 478; *Mannada* v, *Nallayc*, 32 M. 527; *Sengodon*, 15 I. C. (M) 806.

(7) *Sengodan*, 15 I. C. (M.) 806.

3150. The right to immunity from voluntary disturbance only exists during the actual performance of religious worship or ceremonies by an assembly. There must be, firstly, an assembly and that assembly must be engaged in the performance of worship or ceremonies. An assembly is the meeting together of men for some common purpose. A religious assembly is then the collection of men for worship. It is then equivalent to the congregation in Christian churches. The right to non-disturbance here given does not then belong to an individual or two. It is a right which followers of a religion possess and enjoy collectively. A couple of men would, however, be sufficient to constitute an assembly. Nor is it necessary that they should have met together for a common worship. A number of persons assembling in a mosque to say their prayers form an assembly, though they do not all say prayers in common, or indeed, in the same form, or at the same time. So if two persons meet, one to worship and another to pray, they would both form an assembly, whatever may be the form of their devotion. Such persons can only demand non-interference whilst they are *engaged* in the performance of their worship or ceremony. If they are disturbed before or after, they may have a right to complain, but not under this section.

(2) Right during Engagement of Assembly in Worship.

3151. So it has been held that the Mahomedans cannot generally restrain followers of other religions from leading noisy processions at all times past their mosques, though they can restrain them during their prayers (§ 3143-3146). The right is, indeed, not a right which places one religion above another. It is a right which ensures non-disturbance during the performance of religious observances. As such, it is strictly limited only to the period during which the observance actually lasts. It is sometimes urged by religious fanatics that their worship and ceremonies go on day and night and that they have, therefore, an absolute right to non-disturbance. But law cannot uphold such factious pretensions. It is enacted to give people a reasonable chance of performing their devotions in quiet and peace. If they use them as a lever for restricting or humiliating their rivals, the performance of their worship ceases to be *bona fide* and itself requires to be restrained to give an equal right to others who may otherwise turn the tables upon them.

3152. This leads to the third point, which is important, namely that in order to entitle an assembly to protection against disturbance, it must be *legally* engaged in the performance of worship or ceremonies. An assembly held, say, in a public street or thoroughfare and causing obstruction to the traffic cannot be held to be "legally" engaged in worship. The word implies that the assembly must have met in a place to which they have a right, and they must be doing what they have a right to do. No particular class or sect of people has a right to appropriate a public way even temporarily so as to cause obstruction, inconvenience or annoyance to the passers-by. A religious procession, like the rest of the public, has no doubt the right to pass by the king's highway. But there is no peculiar right known to the law as a right of procession. But though the law accords to members of a procession no recognition in their collective capacity, yet the fact that number of persons use a highway together for some common purpose, does not detract in any way from such use being lawful; but as the circumstances attending processions may, in consequence of their being inconsistent with the paramount idea of passage, be of such a character as to render its use by the processionist otherwise than lawful, and as carrying on worship on a highway is of that character, it cannot be said, any number of persons, however orderly, posses the right to perform a worship unmolested by others.[1]

(3) Assembly must be "Legally" Engaged.

3153. The right to non-molestation then depends upon the legality of the right of worship in the assembly. If that right is challenged by another, and the

(1) *Vijayaraghava Chariar*, 26 M. 554, F. B.

worship is held to test its legality or in defiance of the opposition, persons who challenge or oppose the worship could not be condemned to the penalty under this section, if their action was *bona fide* and in the assertion of their right. This was the *ratio decidendi* of the Mahabodhi temple case in which one Dharampal, a Buddhist from Ceylon, failing to get possession of a Buddhist temple at Gaya, which had been since long in possession of the Shaivite Mahants, took with him an artistic image of Buddha, obtained from Japan, and entered the temple with a view to enshrine it in the upper storey of the temple, whereupon, the Mahants, aided by some Mahomedans turned him out, upon which Dharampal launched a prosecution against the Mahant's men whom the Court acquitted, holding that the complainants were not engaged in a religious ceremony, since their object was to establish their right to the temple.[1]

3154. No Disturbance.—The disturbance punishable here is that occasioned by direct action. Where, therefore, the accused spread false rumours which caused a procession to come to an end, it was held to be no disturbance.[2]

Trespassing on burial places, etc.

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any person assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[*Criminal trespass*—s. 441.]

3155. Analogous Law.—As originally drafted, this section only applied to sepulchre, but its scope was extended in accordance with the recommendation of the law commissioners, who said: "It seems to us that the word 'sepulchre', the proper meaning of which is burial or interment, is not sufficiently comprehensive to express what is intended in this place; for it is clear that what is contemplated is any place in which are performed the last offices of the dead, of what nature soever they may be, or in which the remains of the dead are deposited. Instead of a 'place of sepulchre' we would propose 'any place set apart for the performance of funeral rites, or a depository for the remains of the dead,'"[3] and this was done.

3156. Procedure and Practice.—This offence is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class.

3157. Proof.—The points requiring proof are:—

(1) That the accused—
  (*a*) committed trespass, or offered any indignity to a human corpse; or
  (*b*) disturbed persons assembled for funeral ceremonies.
(2) That the place trespassed upon was a place of worship or of burial or cremation.
(3) That he did so with any of the following—
  (*i*) intention to—
    (*a*) wound the feelings of any person; or,
    (*b*) to insult the religion of any person;
  (*ii*) or knowledge—
    (*a*) that the feelings of any person are likely to be thereby wounded, or
    (*b*) that the religion of any person is likely to be thereby insulted.

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(1) *Jaypal Gir* v. *Dharmapala*, 23 C. 60. C. 197.
(2) *Mhd. Hussain*, 17 A. L. J 820, 51 I. (3) 2nd Rep., s. 261.

3158. Charge.—The charge would run thus :—

"I (*name and office of Magistrate, etc.*,) hereby charge you (*name of the accused*) as follows :—

That on or about the——day of——at——you——committed trespass in——a place of worship [(*or* which is a place of sepulchre *or* a place set apart for the performance of funeral rites *or* which is used as a depository for the remains of the dead), offered an indignity ——by——(*specify the act*) to the corpse of——(*or* caused disturbance to persons, to wit—— assembled for the performance of funeral ceremonies)] with the intention of wounding the feelings of——[(*name the persons whose feelings are wounded*) *or* of insulting the religion of ——*or* with the knowledge that the feelings of——are likely to be wounded *or* that the religion of——is likely to be insulted] and you thereby committed an offence under s. 297 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

3159. Principle.—Places reserved for the cremation or burial of the dead are universally regarded with veneration as places sacred to the memory of the dead. They are regarded specially sacred by followers of religions in which belief in the transmigration of the soul is a recognized doctrine. A trespass upon such places is regarded as a sacrilege not lightly to be condoned. With them the performance of the funeral obsequies in accordance with the orthodox formula, is a matter of strict religious injunction, the slightest disturbance of which might imperil the repose of the disembodied spirit of the departed. With others the feeling of respect is due to sympathy, and the refinement which dictates respect to the dead on account of their having entered the great unknown.

3160. Meaning of Words.—"*Commits any trespass*" : The trespass may be a civil trespass, a mere encroachment or an unauthorized entry without amounting to criminal trespass as defined in section 441.[1]

3161. Sacrilegious Acts.—This section is supplementary to section 295 and more or less extends the same principle to places which, though not sacred, are treated almost so. In either case the criminality of the act depends upon intention or knowledge.

3162. That intention or knowledge must relate to insulting the religion or hurting the feelings of any person by the commission of an act. So far the requirements of this section are the same as those of section 295. In both cases criminality depends upon criminal consciousness. If, therefore, the act was done in assertion of a right, or through ignorance of the custom and usage of people, negligence or inadvertence, it would not be criminal, whatever offence it may cause to those feelings aggrieved thereby. So where the accused, who was a member of a committee appointed by the community to collect subscriptions to defray the cost of erecting a wall round the cemetery, stopped a corpse at its gate and demanded a fee before permitting its admittance, which elicited some discussion and caused some delay in consequence of which the corpse had to be placed on the ground which was an indignity to it. It was, however, ultimately admitted without fee, it was held that the act of the accused did not amount to an indignity so as to be punishable under this section.[2]

Intention or Knowledge Required.

3163. The same view was taken in another case in which there was a *bona fide* dispute as to the right to use a burial place, arising out of a question between the parties as to the complainant's omission in making a certain customary payment, in consequence of which there was a delay in digging the grave, and which dispute had begun before the arrival of the corpse.[3] In another case the complainant, the accused and another were co-owners of a vacant plot which both parties had converted into a burial ground for their dead. The accused afterwards opened

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(1) *Subhan*, 18 A. 395 ; *Ram Prasad*, 33 A. 773; *Jhulam Sani*, 40 C. 548 ; *Mustoffa* v. *Moti Lal*, 2 I. C. (B.) 825; *Umar Din*, (1915) P. R. No. 23, 30 I. C. 731 ; *Mustan*, 1 R. 690; *Abdul Kader* v. *Abdul Kasim*, 137 I. C. (C.)872.

(2) *Hajee Mahomed Ghouse Sahib*, (1903) 1 Weir 287.

(3) *Burnan Shah*, (1887) P. R. No. 26.

a saw pit on this plot in defiance of remonstrances addressed to him by the complainant, for which he dug up land within a few yards of the spot at which some relatives of the complainant had been buried. The accused was convicted of trespass into a place of sepulchre. But the High Court quashed the conviction on the ground that the accused had not actually disturbed a grave nor was it shown that any specific portion of the plot had been set apart as a place of sepulchre.[1] In this case it is evident that if the accused had dug up the grave, his conviction would have been upheld notwithstanding that he lay claim to the property. Indeed, the fact that the land belongs to a person was held to be no reason for desecrating the graves thereon.[2]

3164. This was the view hesitatingly expressed by Knox, J., in a case in which the owner of a certain land with graves thereon had let it to the accused with the express purpose that the graveyard should be ploughed up and converted into agricultural land. The ploughing up by the accused was then for the present purpose tantamount to the ploughing up of the land by the owner himself. His act had disturbed the graves and the only question then was whether his act amounted to "trespass" as that term is used in this section. Knox, J., said, "the point is not free from difficulty; and although I have taken time to consider my judgment, and to consult reports, I can find no case in point, nor have I been referred to any. At the same time I am not prepared to construe the word 'trespass'[3] in the present section as it is defined in the case of criminal trespass under the Penal Code. In a section of this kind I see no reason for restricting the original meaning of the word, which covered any injury or offence done, and to couple it with entry upon property. The act of the petitioners was an act of injury to the place of sepulchre, and it was an act which they must have known would have been likely to wound the feelings of others."[4] In this view the owner of land may 'trespass' upon his own property, for no one has the right to botanize upon his mother's grave.

3165. The entry of a low caste *mahar* into a temple would be such a trespass, for the accused could have known that his intrusion would wound the religious susceptibilities of the higher caste Hindus.[5] In this case the accused was reported to have entered the temple with a woman with whom he was stated to have had sexual intercourse. But it was not proved. In another case the accused had entered the enclosure surrounding the tomb of a Mahomedan fakir at 9 o'clock at night with the same object which was proved. It was held that the act was punishable under this section.[6]

3166. The question whether a certain act will insult the religion or wound the feelings of a certain person is a question of fact the determination of which depends upon the proved circumstances of each case. It is not necessary, however, under this section as it is under s. 295, that the insult or hurt should be to the religion or feelings of any class of persons. For it is sufficient if the act offends even a single individual—and that individual need not necessarily be a relative or friend of the deceased. Nor need the act have been done in manifestation of hostility towards another. Indeed it may have been done in reckless disregard of another's feelings and still the offence may be committed if there was the knowledge that the act would be resented.

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(1) *Khaja Mahomed Hamid Khan*, 3 M. 178.

(2) *Subhan*, 18 A. 395.

(3) From Lat, *transgressio*, transgression; originally any transgression of law less than *felony*; treason, felony or misprison of either Shep, Plead (9th Ed.) in 37, 154, cited in Wharton Lexicon, *sub nons* "trespass."

(4) *Subhan*, 18 A. 395.

(5) *Bhagga*, (1880) B. U. C. 148.

(6) *Rutna Mudali*, 10 M. 126; *Nga Po San*, (1894) U. B. R. 199; *Gaja*, 5 C. P. L. R. 32; *Moqsud Hussain*, 45 A. 52.

3167. Besides the requisite intention or knowledge, the act of the accused must be either (*a*) trespass in any place of sepulchre or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or (*b*) offer of any indignity to any human corpse, or (*c*) it must cause disturbance to persons assembled for the performance of funeral ceremonies. A sepulchre is a burial place. It would also include a crematorium or cremation ground. It would not, however, include any place not specially reserved for the purpose. For instance, where the corpses are thrown into a river or the sea, the river and the sea do not become places of sepulchre. The place set apart for the performance of funeral rites is usually the place of cremation or interment. But it might as well be any other place sanctioned by the religion or usage of a community. But it must be a place exclusively or, at least mainly, dedicated for the purpose.[1] Such dedication may be by grant, usage or prescription.

(2) Acts Condemned.

3168. A charnel-vault and a graveyard are places set apart to be depositories of the remains of the dead. Such a place need not be public, but may as well be private, as for example the family burial place. Nor need it be in use,[2] provided it is a known or recognized sepulchre, and is not merely a place where there have been only a few isolated and secret cases of burial in the course of many years.[3] In either case no one has the right to dig open a grave if it will result in an insult to any one's religion or wound any one's feelings. If there is no such possibility it is only left to the good feeling of the person digging up a grave, for law cannot then touch him. Such would be the case if one dig open and destroy an old forgotten grave or tomb or a forsaken graveyard. But in doing so the feelings of the people must not be lacerated. They may not be interested in the grave or graveyard and still they may be hurt by its destruction. But the wounding of feelings must be more than sentimental which is easy to acquire if it costs nothing. Such feelings are not intended to be respected, and what the section aims at is avoidance of that ebullition of hostile feeling which might result in bloodshed if it is not otherwise safeguarded.

3169. The section punishes acts of three kinds (*i*) trespass upon the repose of the dead (§§ 3161-3167), (*ii*) indignity to a human corpse (§ 3170), and (*iii*) disturbance in a funeral ceremony (§ 3171).

3170. The first question has been sufficiently discussed (§§ 3161-3167). The second requires but a passing thought. It is needless to add that the indignity here spoken of may be by word or deed: it must be something in the nature of an insult. It may consist of the doing of an act which the members of the community to which the deceased belonged regard as such. The burial of a high caste Hindu, amongst whom cremation is the recognized mode of disposal, would be such an indignity. The conveyance of a corpse in a conservancy cart, its interruption on the way, or other similar acts afford other instances. Of course, the dissection of a body for *post mortem* examination, if necessary and justifiable under the circumstance, would be excepted from the rule. But its dissection without any reasonable justification and with the object of insulting the relations or extorting money from them, would certainly be an indignity within the comprehension of this clause. The accused, who had purchased a share in a grove, was having it demarcated by digging a trench, in the course of which he had dug up certain graves in spite of the remonstrances of the relations of the persons there buried. He pleaded justification, but the Court held it to be a clear case of desecration punishable under this section.[4] The case could not have been differently decided even if he had been the sole owner of the land.[5]

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(1) *Mustaffa* v. *Moti Lal*, 2 I. C. (B.) 825.

(2) *Jhulam Sain*, 40 C. 548.

(3) *Mustaffa* v. *Moti Lal*, 2 I. C. (B.) 825; *Jhulam Sain*, 40 C. 548.

(4) *Ram Prasad*, 33 A. 773.

(5) *Umar Din*, (1915) P. R. No. 23, 30 I.C. 731; *Subban*, 18 A. 395, distinguishing *Khaja Mahomed*, 3 M. 178 on the ground that there was no proof of the place being used as a sepulchre or of the disturbance of any grave.

3171. The disturbance of persons assembled for the performance of funeral ceremonies follows the same rule. The funeral ceremony here spoken of does not mean a symbolical religious ceremony, such as the Moharram procession, so that its stoppage could not be punished under this section.[1] But the performance of the obsequial rites is within the term.[2]

Uttering words, etc., with deliberate intent to wound religious feelings.

298. Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

3172. Analogous Law.—This section is an improvement upon the English Law which tolerates no schismatic doctrines the preaching of which is deemed a blasphemy and as such the preacher is indictable at common law, as are also "all impostors in religion, such as falsely pretend extraordinary missions from God, or terrify or abuse the people with false denunciation of judgment. In like manner, all malicious revilings in public derogation and contempt of the established religion are punishable at common law, inasmuch as they tend to a breach of the peace."[3] And so at one time to write against Christianity was held to be an offence at common law,[4] and so it is an indictable offence to write a blasphemous libel concerning the Old Testament.[5] So in a case in which the accused has stood indicted for blasphemy for having called Jesus Christ an impostor, a murderer in principle, a fanatic, a juryman inquired whether a work denying the divinity of Christ was a libel, to which Abbot, C. J., stated that a work speaking of Jesus Christ in the language used by the accused was a libel, and he was found guilty.[6]

3173. But in recent times this rule has been much relaxed, and Lord Coleridge, C. J., went so far as to hold that the law is, and always has been, that if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. But the Statute law against blasphemous libels remains as it was originally enacted. So under a Statute passed in 1547[7] persons reviling the sacrament of the Lord's Supper are punishable by imprisonment. The same offence was subsequently extended to libels uttered in derogation of the book of Common Prayer[8] and the following general provision was made in 1697 to supplement the earlier Statutes and Common Law.[9]

3174. As stated before, this statute is merely cumulative and does not affect the Common law.[10] As regards this country the Legislature were exercised about the policy to be sanctioned for this country, but at last the policy adopted was in favour of absolute religious neutrality and freedom of religious discussion. The implied toleration of preaching conflicting doctrines is, in this country, an advancement upon the existing English Law, the spirit though not the letter of which is intended to be reflected in this section. For, though that system is intolerant of any heretical teaching (§ 3172) still, the course of modern decision has been to regard the offence as consisting more in the contempt and ridicule cast upon the established religion than in the mere denial of its cardinal doctrines. Even if so, the section goes much further in its toleration of religious

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(1) *Ghasita* v. *Kalka*, (1885) A. W. N. 49.
(2) *Subramania* v. *Venkata*, 6 M. 254 (257).
(3) 1 East. P. C. 3.
(4) *Woolston*, 2 Str. 834; *Foote*, 15 Cox. 231.
(5) *Hetherington*, 5 Jur. 529.
(6) *Waddington*, 1 B. & C. 26.
(7) 1 Edw. 6, c. 1.
(8) 14 Car 2, c. 4, s. 20.
(9) 9 & 10 Will. III, c. 32, s. 1; quoted in 1 Penal Law (4th Ed.) § 2979; so much of this Statute as relates to denying the doctrine of Trinity was repealed by 53 Geo. III, c. 160; *Carlisle*, 3 B. & Ald. 161; *Wadington*, 1 B. & C. 26.
(10) *Carlisle*, 3 B & Ald. 161; *Wadington*, 1 B. & C. 26.

criticism, for it is not penal under the Code which it would be under English Law, to pile ridicule and contumelious abuse upon one's religion, so long as it is impersonal and is not " deliberately intended " to wound the feelings of some one in particular. The difference between the Code and the English Law is then this—the former is respecter of no religion and is indifferent to irreverent blasphemy of any religion so long as it is not uttered *in the presence* of any person, and with the deliberate intention of insulting him; the latter is by the very constitution (§§ 3172-3174) pledged to support the established Protestant Church, and it therefore punishes all irreverence in the abstract apart from any intention to insult individuals. English Law can, therefore, be of no assistance in interpreting the Indian rule.

3175. Procedure and Practice.—This offence is non-cognizable and summons should issue in the first instance. It is both bailable as well as compoundable, and is triable by a Presidency Magistrate or a Magistrate of the first or second class. It will be noticed that unlike the other offences in this and the preceding chapters, which being offences either against the State or against the public are non-compoundable, this offence which is in the nature of an insult offered to a person, is compoundable, because it is regarded as a personal offence.

3176. Proof.—The points requiring proof under this section are :—

(1) That the accused uttered any word or made any sound or gesture or placed any object.
(2) That he did so intentionally.
(3) That that intention was deliberate.
(4) That the deliberate intention was to wound the religious feelings of some person.
(5) That he did wound his feelings.

3177. Charge.—The charge should run thus :—

" I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

" That on or about the——day of——at——you uttered the words——(*mention them*) in the hearing of——(*name the person offended*) (*or* made a sound to wit——in the hearing of——*or* made a gesture in the sight of——*or* placed an object, to wit——in the sight of——) with the deliberate intention of wounding the religious feelings of the said person, and thereby committed an offence under s. 298 of the Indian Penal Code and within my cognizance.

" And I hereby direct that you be tried on the said charge."

3178. Principle.—The authors of the Code say: "In framing this clause we had two objects in view : We wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture, or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause."[1]

3179. Meaning of Words.—"*With deliberate intention*" means premeditated intention as opposed to intention formed on the spur of the moment. "*Wounding the feelings of any person,*" that is, giving offence to any person. "*Makes any sound etc*": This phrase recognizes that a religious insult may be as much conveyed by speech, sound, gesture or a visible representation. This collocation of words occurs in ss. 124-A and 499 to which the offence here described is allied.

3180. Insulting Religion.—This section punishes an insult to one religion if it is given with the deliberate intention of wounding one's feelings by speech, articulate or inarticulate. The object of the section is the same as has dictated the policy of sections 124-A, 153-A and 500. Of all these sections, this

(1) Note J.

section is probably one in which there is the least room for the play of reason, for as has been truly said: *Nulla discordia major quam quoe a religione fit.*[1] Men may be argued out of their cherished views on almost any other subject, but on the one subject of religion they are generally obdurate, and the fact that one cannot reason another out of his faith, makes it all the more necessary that one should not try to do by heaping insults what cannot be achieved by the exercise of reason.

3181. This section requires that in order to amount to an offence, it must be (*i*) that an insult to one's religion deliberately intended, and (*ii*) that it was given in the presence or hearing of some one, (*iii*) whose feelings were thereby wounded.

(1) Deliberate Intention.

3182. In the first place, then, there can be no offence without "deliberate intention." These words have been nowhere defined in the Code. But they were explained by the Law Commissioners who said: "The intention to wound must be *deliberate* that is, not conceived on the sudden, in the course of discussion, but premeditated; it must appear not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument, consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him. In other places in the Code a party is held to be guilty if he causes a certain effect the causing of which is an offence, intending to cause that effect, or *knowing that his act was likely to cause it.* Here there is a marked difference. Although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound the feelings of his auditors, yet if it were apparent that he uttered them on the spur of the occasion, in good faith, simply to further his argument—that he did not take advantage of the occasion to utter them in pursuance of a deliberate purpose to offend—he would not, we think, be liable to conviction under this section. If, however, a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer."[2]

3183. The commissioners conceded that there would be a difficulty in drawing the line, and that different men would be apt to take very different views of what ought to be considered as evidencing a deliberate intention of "wounding the religious feelings." But they added: "When a man in the course of an argument uses insulting words to another it is impossible to suppose that he does so without the intention of insulting him—it is not to be believed that he uses them in good faith simply for the purpose of convincing or persuading the person with whom he is arguing. In such a case the intention is to be inferred from the character of the words. Again, when words, not positively insulting in themselves, are used in a manner clearly evidencing a deliberate intention to insult the religious feelings of another, the case will fall within the clause. But it will not be an offence when any person arguing with another on the subject of his religion says, what is likely to wound his religious feelings in good faith, simply for the purpose of convincing the person with whom he is arguing of "what he believes to be the truth.[3]

3184. Deliberation may, however, be inferred not only from the nature of the words and the manner of using them, but also from the previous manifestation of intention towards a person or his religion.[4] Such was the case of the accused Rahman who defiantly carried the flesh of a cow sacrificed by him on *Bakrid* in an

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(1) "No animosities are more bitter than those which arise from religion."

(2) 2nd Rep., s. 252, Reprint, p. 412; *Boutler*, (1908) 72 J. P. 188; following *Ramsey*, 1 C. & E. 126.

(3) 2nd Report, s. 253.

(4) S. 14, Indian Evidence Act (I of 1872).

uncovered state round the village. He did so because his Hindu fellow-villagers had previously endeavoured to induce the zemindar to prevent the slaughter of the cow. The exposure of the cow's flesh was, therefore, naturally held to be deliberately intended to wound the feelings of the Hindus.[1] In this case there was both knowledge as well as intention, and that intention was, having regard to the previous difference, deliberate. But there can be no crime where there is merely knowledge without intention, much less a deliberate intention.[2] For instance, such intention could not be presumed from the mere fact that the accused, who were Mahomedans, were driving the cows intended for sacrifice to a slaughter-house along a thoroughfare where there were some Hindu shops, to whom the sight was naturally revolting,[3] or that the accused in another case, who were Hindus, had killed goats by strangulation and not by cutting their throats, and thereby wounded the susceptibilities of the Mahomedans.[4] Persistency in uttering words in spite of protest, would be deliberate. So the interpolation of a forbidden chant in an authorized ritual, was held to amount to this offence.[5] Of course, if the accused had chanted the hymn because he considered it to be authorized by his religion, the case would have been different. For then he would have the knowledge and not the intention of offending others. Moreover, the intention here required is not only to insult some one but to insult him through his religion. Any other insult may be punishable under ss. 153-A, 500 or 504; but in that case the necessary ingredients appropriate to those sections must be present and proved.

3185. In an Allahabad case,[6] two persons were convicted by the Magistrate under section 426 on the following facts: They were both members of a *Mallah* caste, and had been invited to a caste-dinner. They arrived when several of their caste men had taken seats and the food was being served. The accused, for reasons not reported, demanded the persons seated to get up and move elsewhere. They declined and thereupon the accused flung a shoe at them and thus made the food they were about to eat ritually impure, so that the guests had all to get up and leave unfed. The Magistrate thought that the act of the accused fell within this section, but on revision Blair, J., quashed the conviction under s. 426, and on the suggestion being made to alter it to one under this section, he held that the shoe was thrown down to prevent the diners from eating. It was not intended to insult their religion, and the insult, if any intended, was merely incidental. The same view was taken in Bombay, in which the accused having attended a caste dinner, wanted the caste people to re-admit an outcasted woman to their caste and feast, adding that if they feasted without the woman, their act would be like eating of cow's flesh. Upon this all the diners rose up leaving their food untouched and the accused being prosecuted was convicted under this section, but his conviction was quashed by Jardine and Telang, JJ., who held the objurgation to be merely a rough appeal to the religious feelings of the caste people there assembled, and it may be added, his intention was to secure re-admission of the woman into the caste, and not to insult the religion of his fellow-castemen to whom, in fact, he had addressed his appeal.[7]

3186. Again, the section is applicable only to an act which has the effect of wounding the *religious* feelings of the person. It has no reference to an act which involves some social penalties as occasioned by the forfeiture of caste. The accused gave birth to an illegitimate child, whereupon she went to the house of a person whom she alleged to be its father, and threw upon him the cloth which she had been wearing at the time of her confinement. She was prosecuted under this section by the complainant who alleged the act to have entailed deprivation of his caste. The accused stated the act to be a common occurrence with the people of her caste in similar circumstances. It was held that the section was

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(1) *Rahman*, (1893) A. W. N. 144.
(2) *Narasimha* v. *Shri Krishna*, 2 M. L. J. R. 236.
(3) *Habibullah*, (1890) P. R. No. 4..
(4) *Kirpa Singh*, (1912) P. W. R. No. 26; 16 I. C. 169.
(5) *Habibullah*, (1890) P. R. No. 4.
(6) *Moti Lal*, 24 A. 155.
(7) *Dagadi*, (1892) B. U. C. 592.

never intended to extend to injuries to caste as distinct from religion and that the accused could not be, therefore, convicted under this section.[1] In this connection it is well to state, that as originally drafted, this chapter headed "of offences relating to religion and caste," and it contained sections relating to injuries to caste but these were afterwards deliberately omitted. The chapter as enacted has, therefore, no application to acts involving social degradation as distinct from religious insult, and the fact that amongst Hindus one is inseparably connected with the other does not make these provisions any the more applicable to one as distinct from the other.

(2) Insult must be Personal.

3187. Secondly, the insult must be personal, that is to say, it must be addressed to or intended for some one present when it was given. It is not necessary that such a person should have been an acquaintance of the accused, or that he should be on terms of enmity with him. A theological theorist may give his own rendering of the Sermon on the Mount to a coterie of Hindus, by reviling their gods and expatiating on their infamous deeds, especially, say at a fair or bathing-ghat where he knows that religious fervour makes people particularly sensitive to such reflections. Even if such allusions are necessary to adorn his discourse, he has to pay regard to the time and temper of his audience and see that he does not unnecessarily irritate men with forced religious polemics at times of religious feasts and festivals. He is probably as tenacious of his views as the heathens whom he seeks to convert to his faith. If, therefore, the latter object to his references, but still the former persists, they may well seek the protection of this section against such a reviler of their faith.

(3) Words must Wound Feelings.

3188. But, of course, in such cases, it is not sufficient that the words used were offensive; they must offend and offend some one by their religious allusion. Such would, for instance, be the case, if the discourse was a mere pretext to rail and abuse another person's religion, without any argument which an impartial arbiter could reasonably believe to have been addressed to him in good faith, merely for the purpose of convinc ng him of the truth. But the question whether the words used were such as were likely to wound the feelings of a person, would not depend upon the mere feelings of that person, for the Court will have to consider whether they were such as deserved to be considered as insulting, and whether they were uttered with the deliberate intention of insulting.[2] And it may be added, for this purpose, the Court will have to consider the time and occasion of the offending speech, its necessity and whether it was courted by the other party or had been forced upon it. The past and present relations between the contending parties and their attitude towards each other at the time the offending words were uttered, are all matters of paramount importance in arriving at the conclusion whether the words or act were such as were likely to wound the religious feelings of a person in the situation of the accused. And in this connection it would not, perhaps, be amiss to repeat that in religious controversy more than in anything else, moderation of speech and thought is all the more required where there are in the State, communities each one of which professes a different religion which makes its followers naturally bigoted and intolerant. In such cases there is no *odium* like the *odium theologicum*.

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(1) *Tukaram*, v. *Zeli*, 6 C. P. L. R. 7.

(2) 2nd Rep., s. 252, Reprint, p. 412.